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THE LAWYERS REPORTS ANNOTATED

BOOK XLIX

ALL CURRENT CASES OF GENERAL VALUE AND
IMPORTANCE, WITH FULL ANNOTATION.

BURDETT A. RICH, EDITOR, AND
HENRY P. FARNHAM, ASST.

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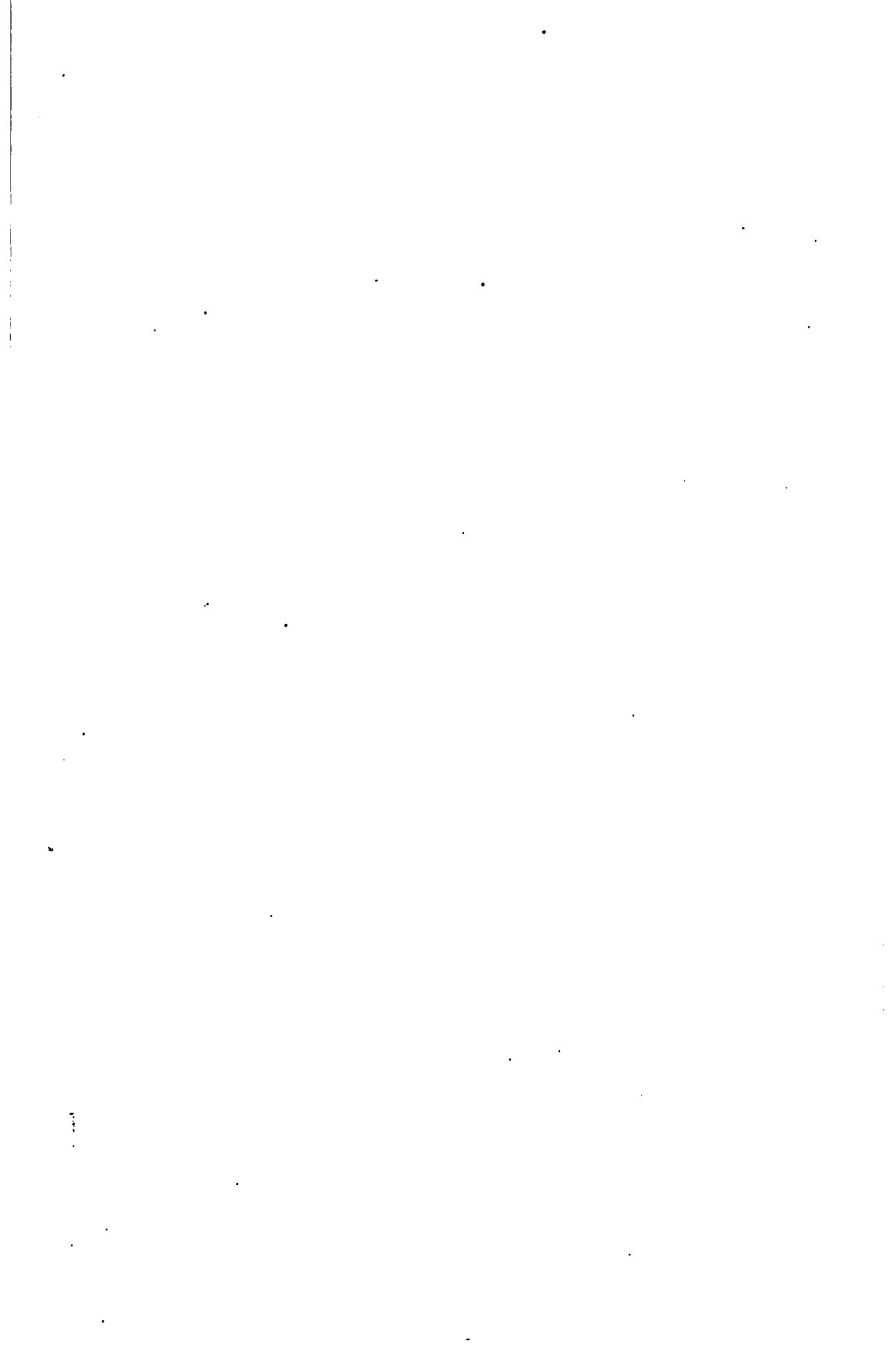
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LAWYERS' REPORTS

ANNOTATED.

CALIFORNIA SUPREME COURT.

Albert LIMBERG, *Resp't.*,

GLENWOOD LUMBER COMPANY, *Appt.*

(127 Cal. 598.)

1. A teamster of experience will, as matter of law, assume the risk attendant on the use of short lines if he proceeds to perform his work with such appliances, although he has complained to his employer of their insufficiency, where the latter made no promise to remedy the defects, and nine months have elapsed since the last complaint.

2. A teamster of experience cannot

claim that he was unaware of the danger attendant on using a wagon without a seat, to avoid the conclusion that he assumed the risk by voluntarily doing so without protest.

3. Evidence that the shortness of lines was remedied after injury to the teamster because thereof is not admissible in an action to recover for the injury.

4. Expert evidence as to what appliances are safe and what are unsafe is not admissible in an action by a teamster to recover from his employer for injuries caused by short lines and absence of a wagon seat.

(February 21, 1900.)

NOTE.—Contributory negligence in entering or remaining in an employment.

1. When the servant's action is barred.

a. Introductory.

b. Servant's knowledge as an element of the defense, generally.

c. Contributory negligence held to be a question for jury where servant's knowledge of defects only is shown.

d. Contributory negligence inferred from servant's knowledge both of defects and resulting dangers.

e. Contributory negligence inferred from servant's knowledge of defects alone.

f. The rationale of the principle.

g. Knowledge of danger held to be not necessarily a bar to the action.

h. Missouri doctrine as to the effect of the servant's continuance of work with knowledge.

i. Failure of servant to report defect.

j. Duty of the servant to quit the employment when he ascertains that he is exposed to an abnormal danger.

II. Relation between the defenses of assumption of risks and contributory negligence.

a. Introductory.

b. Logical independence of the two defenses.

c. Assumption of risk a conclusive defense irrespective of whether servant exercised due care.

d. Contributory negligence in respect to risks assumed.

e. Defenses confused owing to inaccuracies of terminology.

f. Doctrinal confusion between the defenses.

g. Concluding remarks.

1. When the servant's action is barred.

a. Introductory.

b. Assumption of an assumption of the risk

caused by the master's breaches of duty is based, as we have seen, upon the theory of an implied contract. But it is obvious that, under the general principles of the law of negligence, evidence of the servant's continued exposure of himself to a known peril also raises a question which is independent of the conventional relations of the parties, *viz.*, whether he was acting with reasonable prudence in encountering that peril. Side by side, therefore, with the series of cases in which the defense raised is an assumption of the risk, we find another series in which the theory upon which the master seeks to escape liability is that the servant contributed to his own injury by his negligence in entering or remaining in an employment which involved abnormal dangers. The rulings upon this aspect of the servant's conduct are much less consistent and harmonious than those in which his knowledge of the risk is dealt with as evidence of its acceptance by him, and the difficulties of formulating a body of clear and well-defined principles are greatly aggravated by the extraordinary confusion, both verbal and doctrinal, between the two defenses. (See II. b, *infra*).

b. Servant's knowledge as an element of the defense, generally.

There is no dispute with regard to the evidential significance of the servant's knowledge, when considered under its negative aspects. As, in cases where the defense raised is an assumption of the risk, it is well settled that the master cannot escape liability on the ground of the servant's contributory negligence unless the elements of danger are shown to have been known, either actually or constructively, to the servant.

No one can be charged with negligence in failing to avoid danger of which he knows nothing. *Kearns v. Chicago, M. & St. P. R. Co.* (1885) 66 Iowa, 599, 24 N. W. 231.

Negligence can only be affirmed in respect of situations and conditions known to the party to whom it is imputed. *Brown v. Louisville &*

APPEAL by defendant from a judgment of the Superior Court for Santa Clara County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant in furnishing plaintiff unsafe appliances with which to carry on his work. *Reversed.*

The facts are stated in the opinion.

Mr. D. W. Burchard for appellant.

Mr. J. C. Black for respondent.

Garoutte, J., delivered the opinion of the court:

Defendant appeals from a judgment and order denying a motion for a new trial. The action is one for damages for personal injuries, and arises upon the following state of facts, as testified to by the plaintiff and his witnesses. Plaintiff was a teamster of ex-

perience, forty-one years of age. He was hired by defendant to haul lumber with a wagon and four horses. He continued in this employment for a period of eleven months. Then, while traveling upon the public road with his loaded wagon, he fell therefrom beneath the wheels, and the loss of a leg was the result. He asserts negligence upon the part of the defendant in this, that the appliances furnished him with which to do the work were defective. These defective appliances consisted of a wagon having no seat, and also of a pair of lines, that were too short. It may be conceded that, if either of these defects had not existed, the accident would not have happened. A short time after the hiring of plaintiff he complained to defendant at two different times that the lines were too short, but never made any complaint as to the lack of a seat

N. R. Co. (1895) 111 Ala. 275, 19 So. 1001; s. p. Higgins v. Williams (1896) 114 Cal. 176, 45 Pac. 1041.

As to the general principle that knowledge is an essential element of negligence, see also *note to Walkowski v. Penokee & Gogebic Consol. Mines (Mich.)* 41 L. R. A. 33.

Among the elements of liability in these cases, there are, in the first place, the abnormal material conditions which create the danger.

In the following cases the action was sustained: *Gulf, C. & S. F. R. Co. v. Donnelly* (1888) 70 Tex. 371, 8 S. W. 52 (railway track had suddenly, and without plaintiff's knowledge, become worse owing to the recent passage of a train-hand-car derailed); *St. Louis & S. F. R. Co. v. McClain* (1891) 80 Tex. 85, 15 S. W. 789 (fireman was ignorant of defective wheel on his engine); *Stackman v. Chicago & N. W. R. Co.* (1891) 80 Wis. 428, 50 N. W. 404 (owing to want of time for examination, and being obliged by the roughness of the ground to look down to see where to step, a servant was caught between a car which he was pushing and a bank); *Norman v. Wabash R. Co.* (1894) 22 U. S. App. 505, 62 Fed. Rep. 727, 10 C. C. A. 617 (plaintiff injured through kneeling on a floor, not known to be defective); *Gisson v. Schwabacher* (1893) 99 Cal. 419, 34 Pac. 104 (location of unprotected machinery not known to servant).

An instruction to the effect that the employer has a right to expect that the servant will adopt the less hazardous course is misleading and erroneous, where the evidence is that the servant did not know there was any hazard in the course he actually took. *Hawkins v. Johnson* (1886) 105 Ind. 29, 55 Am. Rep. 169, 4 N. E. 172 (revolving shaft had been repaired without the plaintiff's knowledge so that he could not drive under it without injury).

If the accident was due to two or more physical conditions, the defense of contributory negligence fails, unless the servant was aware of all of them. *Waldhler v. Hannibal & St. J. R. Co.* (1885) 87 Mo. 37 (switchman knew that point of frog was loose, but did not know that the plate was broken until his foot struck it); *New Jersey & N. Y. R. Co. v. Young* (1892) 1 U. S. App. 96, 49 Fed. Rep. 723, 1 C. C. A. 428 (fireman knew that the air-brake was defective, but not that the defect was so great as to render it impossible to stop the train within the distance at which a danger signal can be seen); *Cleveland, C. C. & St. L. R. Co. v. Brown* (1893) 18 U. S. App. 10, 56 Fed. Rep. 804, 6 C. C. A. 142 (workman did not know 49 L. R. A.

that his cutting of a supporting post would cause a structure to fall).

In *Fort Worth & D. City R. Co. v. Wilson* (1893) 3 Tex. Civ. App. 587, 24 S. W. 686, it was held that a charge that if the deceased knew of the storm that washed away the defendant's track, the plaintiff could not recover, was properly refused, since the fact that the deceased might have had notice of the rain would not charge him with contributory negligence, unless he also had notice of the condition of the track which rain rendered dangerous.

In *Illinois Steel Co. v. Schymanowski* (1896) 162 Ill. 459, 44 N. E. 876, the court, after remarking that the servant usually "assumes" the risks of the service as increased by a known defect, states that this rule is subject to the qualification that "the servant is not chargeable with contributory negligence" if he knows that defects exist, but does not know, actually or constructively, that risks exist. See *infra*. But as the actual ruling was that the plaintiff's knowledge of the insufficiency of the lights furnished for work on a dark and stormy night did not indicate that he knew of the unsafe condition of the pile of ore and of the risk in working near it, it is plain that the decision might better have been put on the ground that the material conditions creating the danger were not fully known to him.

The second element of liability is, the possibility of injury which is incurred by remaining in the employment. *Wuotilla v. Duluth Lumber Co.* (1887) 37 Minn. 153, 33 N. W. 551; *Taylor v. Carew Mfg. Co.* (1885) 140 Mass. 150, 3 N. E. 21; *Slms v. Lindsay* (1896) 122 N. C. 678, 30 S. E. 19; *Bjorman v. Fort Bragg Redwood Co.* (1894) 104 Cal. 626, 38 Pac. 451; *Clarke v. Holmes* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405, per Byles, J. (discovered machinery); *Davidson v. Correll* (1890) 31 N. Y. S. R. 982, 10 N. Y. Supp. 521 (employee injured by the falling of a platform or structure on which he was required to work, has a right to show his ignorance of the effects arising from the manner adopted in bracing the structure) *Reversed in* (1892) 132 N. Y. 228, 30 N. E. 573, but not on this point.

A finding that the servant was in the exercise of due care impliedly negatives his knowledge of the danger. *Chicago & E. I. R. Co. v. Hines* (1890) 132 Ill. 161, 23 N. E. 1021.

But the books disclose a wide difference of opinion as to the proper legal effect which, in view of the respective functions of judge and jury in drawing conclusions of fact, shall be ascribed to evidence showing that the servant

upon the wagon. Defendant made no promise to remedy the defective lines, but remained silent when the complaints were made. From the foregoing state of facts it is insisted by defendant that the motion for nonsuit should have been granted, and it is also claimed that the evidence does not support the verdict and judgment. The contention, in substance, is but a single one, and the sufficiency of the evidence is the question before the court. Testing the facts of this case by the law, we cannot see how plaintiff is entitled to recover. It may be conceded that defendant was negligent in not furnishing plaintiff with proper appliances to do the work. Such concession being made, then the question presented is not strictly one of contributory negligence upon the part of the plaintiff, but, rather, did plaintiff assume the risk of working with these defective ap-

pliances? If there had been an express contract between the master and servant that the work should be done without a seat to the wagon, and with these identical lines, clearly that agreement would have barred a recovery in this action. This being so, do not the facts indicate an implied contract to the same effect? While the servant only assumes the dangers and risks necessarily incident to the work to be performed, he may, by contract, either express or implied, also assume the risk of working with defective appliances. Indeed, many cases go further, and sustain the proposition that, where the servant proceeds at the outset to perform his work with defective appliances, having knowledge of the defect, then an implied contract arises to the effect that he assumes the risk; especially so if he is aware of the danger surrounding him by reason of the defect.

actually possessed a knowledge of one or the other of these elements.

c. Contributory negligence held to be a question for jury, where servant's knowledge of defects only is shown.

An obvious corollary to the rule laid down in the preceding section is that the servant is not prevented from recovering by evidence merely of his knowledge of the material conditions, inasmuch as such evidence still leaves the existence of the other essential element of his culpability to be established.

The mere fact that a servant has knowledge of defects in plans or methods of construction may not charge him with contributory negligence or assumption of risk. The question is, Did he know, or by the exercise of ordinary common sense and prudence could he have known, that, in addition to these defects, the risks existed? *Snedden v. Libera* (1896) 65 Minn. 337, 68 N. W. 36.

It is error to grant a nonsuit where, although it is admitted that he knew of the defect, he denied (and the evidence is consistent with the inference) that he had any actual knowledge that the appliance was dangerous. *Pitts v. Florida C. & P. R. Co.* (1896) 98 Ga. 655, 27 S. E. 189 (space allowed to exist between engine and tender, rendering apron liable to fly up—fireman injured); *Colbert v. Rankin* (1887) 72 Cal. 197, 13 Pac. 491 (plaintiff entitled to instruction that he was not guilty of contributory negligence unless he knew, or might have known, that by reason of the defect the employment involved danger).

That an instruction disregarding the element of danger as distinguished from the knowledge of the defect is properly refused, see *Lawless v. Connecticut River R. Co.* (1883) 136 Mass. 1. See also *Lasure v. Graniteville Mfg. Co.* (1882) 18 S. C. 275 (charge to effect that continuance with knowledge of defective conditions bars the action, held erroneous); *Galveston, H. & S. A. R. Co. v. Parrish* (1897; Tex. Civ. App.) 40 S. W. 191 (same point).

The practical deduction drawn by many courts from this general principle is that, when the specific evidence submitted only goes to the extent of establishing the servant's knowledge of the defect, the question of his contributory negligence cannot be withdrawn from the jury. *Goggin v. D. M. Osborne & Co.* (1896) 115 Cal. 437, 47 Pac. 248; *Eureka Co. v. Bass* (1886) 81 Ala. 200, 60 Am. Rep. 152, 8 So. 216; *Le Clair v. First Div. of St. Paul & P. R. Co.* (1873) 20 Minn. 9, 11; *Norfolk & W. R.* 49 L. R. A.

Co. v. Ward (1894) 90 Va. 687, 24 L. R. A. 717, 19 S. E. 849; *Louisville & N. R. Co. v. Kelly* (1894) 24 U. S. App. 103, 63 Fed. Rep. 407, 11 C. C. A. 260 (negligence question for jury where knowledge of conditions only is indisputable—deadwoods out of repair, holes in track, or incompetency of fireman—brakeman injured while coupling); *Parker v. South Carolina & G. R. Co.* (1896) 48 S. C. 364, 26 S. E. 660 (derailment caused by defective engine and track); *Fordyce v. Edwards* (1895) 60 Ark. 438, 30 S. W. 758 (engine derailed by collision with a horse in consequence of its pilot being too high); *Laning v. New York C. R. Co.* (1872) 49 N. Y. 521, 10 Am. Rep. 417 (plaintiff knew of incompetency of foreman. Here the master's agent had told the plaintiff that, if the foreman did not do better, he would have to discharge him—a statement amounting to a conditional promise; but the ruling does not seem to turn upon this circumstance entirely); *Mehan v. Syracuse, B. & N. Y. R. Co.* (1878) 73 N. Y. 585 (nonsuit properly denied, where engineer was injured by a derailment, he knowing merely that the track was somewhat out of repair); *Kain v. Smith* (1882) 89 N. Y. 375 (1881) 25 Hun. 146 (jigger used in loading cars seen to be defective); *Schwandner v. Birge* (1884) 33 Hun. 186 (plaintiff knew that the means of escape from fire prescribed by statute were not provided. Emphasis was laid here on the distinction between appliances used by the plaintiff himself and those in other parts of the establishment); *McMahon v. Port Henry Iron Ore Co.* (1881) 24 Hun. 48 (nonsuit erroneous where plaintiff knew that a blast had been negligently prepared); *Heavey v. Hudson River Water Power & Paper Co.* (1890) 57 Hun. 339, 10 N. Y. Supp. 585 (lad fifteen years of age continued to use, for the purpose of pushing a heavy pipe, a pole which, to his knowledge, had become spongy and soft at the end, the consequence being that it slipped, and he was precipitated into a vat of hot fluid; error to rule that plaintiff must have known pole to be unfit for use); *Fox v. Le Comte* (1896) 2 App. Div. 61, 37 N. Y. Supp. 316 (negligence of plaintiff question for jury where he denied that he knew that the clicking of a power press indicated danger, and this testimony was corroborated by other witnesses, who stated that they did not consider danger to be a necessary inference); *Hungerford v. Chicago, M. & St. P. R. Co.* (1889) 41 Minn. 444, 43 N. W. 324 (brakeman injured by the "gooseneck" of an engine, generally used for passenger trains, but in this case ordered to be coupled to a freight car,—circumstances

And to say that the servant assumes the risk is but another way of saying that he impliedly agrees to release the master from liability. In this case we lay aside any question as to the lack of a seat upon the wagon. If the wagon was defective in this regard, the plaintiff, an expert teamster, by using it for a period of eleven months without objection or protest of any kind, assumed all of the risks incident to the use of that kind of a wagon. We have found no case in the books involving anything like a similar state of facts which holds that plaintiff may recover damages for injuries received. We know of but a possible exception to the rule, and that would be a case where the servant, though aware of the defect, was not aware of the danger incident to it. That exception cannot be urged here. This defect of the wagon was of a character that the servant, as a rea-

sonably prudent man, must have been aware of the danger incidental to its use. He cannot be allowed to close his eyes to the danger, and thereafter say, "I did not know it was dangerous." As to the defective lines, additional principles of law are involved to those arising upon the defect of the wagon; for, as to the lines, the plaintiff made complaint to defendant on two different occasions regarding their defective character. Yet when we pause to consider that the last complaint was made more than nine months before the accident, and to consider the additional fact, pregnant with materiality here, that defendant remained silent under the complaint of the servant, and gave no promise to cure the defect, the case as to the two respective defects is not widely variant. Plaintiff knew of the defect, and must have known of the danger that surrounded him by

under which it would be extremely apt to cause injury to the person doing the coupling, if he were not familiar with the appliance): *Wuotilla v. Duluth Lumber Co.* (1887) 37 Minn. 153, 33 N. W. 551 (where the court, emphasizing the inequality in the positions of the master and servant, refused to set aside a verdict for the plaintiff, who, being only a common laborer, and not a machinist, was caught in a gearing near which, as was testified by several witnesses, it was quite possible for anyone, not acquainted with machinery, to work without anticipating any danger); *Wright v. Southern P. Co.* (1896) 14 Utah, 383, 46 Pac. 374 (switch engine operated without fireman to observe signals); *Missouri P. R. Co. v. Lehmburg* (1889) 75 Tex. 61, 12 S. W. 338 (charge directing verdict for defendant, if there were patent defects, held properly refused where the servant saw that a switch engine had a square tank, but did not know the danger of its use); *St. Louis & S. F. R. Co. v. McCain* (1891) 80 Tex. 85, 15 S. W. 789 (verdict for plaintiff will not be set aside because the record shows that plaintiff knew of the defective condition of the appliance); *Gulf, C. & S. F. R. Co. v. Shearer* (1892) 1 Tex. Civ. App. 343, 21 S. W. 133 (instruction that knowledge of defect, unballasted track, rendered servant chargeable with negligence is properly refused); *Graham v. Newburg Orrel Coal & Coke Co.* (1893) 38 W. Va. 273, 18 S. E. 564 (case for jury where miner was merely proved to have known that cross-cuts were closed, but denied that he knew the dangerous effect this would have upon the ventilation).

It seems to be the true doctrine that perhaps there may be instances in which the knowledge of the defects, possessed by the injured party, is so definite that he must be deemed, as a matter of law, to have taken the risk on himself of injury arising therefrom, but that, as a general rule, such knowledge is only a circumstance to be submitted to the jury from which they may infer negligence. *McMahon v. Port Henry Iron Ore Co.* (1881) 24 Hun, 48.

A finding by a judge, sitting as a jury, that a scaffold was manifestly defective, the ledge being too narrow, and the standard not tied, does not necessarily imply that the servant who used it was negligent. *Stuart v. Evans* (1883) 49 L. T. N. S. 138, 31 Week. Rep. 703 (see especially the opinion of Williams, J.).

An averment that a servant knew that a fellow servant was incompetent for a reasonable time before the injury caused by such fellow servant's negligence does not show that he is debarred from recovery on the ground of 40 L. R. A.

contributory negligence. *Hoey v. Dublin & B. Junction R. Co.* (1870) Ir. Rep. 5 C. L. 206.

It is one thing to be aware that machinery is defective, or in a particular condition, and another thing to know or appreciate the risks resulting therefrom. A man of ordinary intelligence and experience may know the actual condition of an instrument with which he is working and yet not know the nature or extent of the risks to which he is exposed. *Wuotilla v. Duluth Lumber Co.* (1887) 37 Minn. 153, 33 N. W. 551.

In *Graham v. Newburg Orrel Coal & Coke Co.* (1893) 38 W. Va. 273, 18 S. E. 584, where the injury was caused by an explosion of gas in a mine, the court reasoned thus: "The danger must be such as may reasonably be expected to entail accident and injury, not a remote probability or chance of accident. It must be such as a fairly prudent, cautious man ought to think likely to result in accident, and which he ought not to risk. Does the rule require the employee in all cases to stop work simply because he knows of defective machinery or condition? In this case could the plaintiff fairly expect that these openings would leave an insufficient supply of air? And did he know that there was gas present, in which case the openings would be a real danger, otherwise not? Was it rash, or even imprudent, to work? Was he so in thinking he might go on safely? Under the circumstances of this case, you cannot say that the situation was such as to impress him with a feeling of insecurity. To do so you must fix the rule unalterably that knowledge of any defect whatever, finally resulting in disaster, should have caused the employee to stop, and will forbid recovery. Would the interests of either employer or employee be subserved by such a rule? To know simply of a defect of machinery, or that the condition or surroundings of a working place are not just what they should be to guarantee safety, is not to be certainly or necessarily forewarned of danger. Does the employee from that knowledge in all instances assume all risks? I think not. The question is, Did he know, or ought he to have known by the use of ordinary common sense and prudence, as applied in the particular instance, that dangers were before him likely to flow from the defect or condition? Not simply that he knew the defect or condition existed. He need not in all cases quit work. He may run some risks provided they be such as a prudent, careful man would under the circumstances run."

The doctrine of the above cases has been embodied in Miss. Const. § 193, providing that

reason of it. Any reasonably prudent man must have been aware of it, and the defendant must be held to be a man of ordinary prudence; indeed, it appears that he was an experienced teamster. Here the master gave no intimation to the servant that he would remedy the defect, and allowed it to continue for nine months without taking a step towards remedying it. Under these circumstances, the servant, at the time of the accident, was not working in expectation that the defect would yet be remedied. After a lapse of nine silent months, he had no right to indulge in any such expectation. Many cases hold that when the master, after complaint, made promises to correct the defect, the servant may continue his employment for a reasonable time, relying upon the master's promise; but here we have no promise. We also have the lapse of a most unreason-

able time. The mere fact that the servant makes complaint of the defect gives him no right to rely for all future time upon the complaint made, and thus irrevocably fasten a liability upon the master. If the master had positively refused to correct the defect when the complaint was made to him, then certainly the servant would have been forced by the law to do either one of two things,—either assume the risk, and thus release the master from liability; or leave the master's employment. In this case the same conditions, substantially, arose when a reasonable time had gone by after the making of the complaint to the master, and nothing had been done, or even promised. After complaint made, and nine months had come and gone, the plaintiff had no right, as a reasonable man, to believe that the master would remedy these defective lines.

such knowledge shall not be a defense except as therein specified, where at the time the servant was injured he had reason to, and did, believe that the defect had been repaired. *Welsh v. Alabama & V. R. Co.* (1892) 70 Miss. 20, 11 So. 723; *Buckner v. Richmond & D. R. Co.* (1895) 72 Miss. 873, 18 So. 449. The latter case mentions that, in this state, the common-law rule was that contributory negligence was inferred from knowledge of defects merely.

Especially is the servant entitled to the benefit of this principle where the defective appliance had been safely used by himself or his fellow servants so frequently and so long that he might reasonably suppose that its use could be continued without danger. *Lyttle v. Chicago & W. M. R. Co.* (1890) 84 Mich. 289, 47 N. W. 571 (footboard, known to be defective, had been used by a switchman one hundred times a day for a week, without injury); *Hawley v. Northern C. R. Co.* (1880) 82 N. Y. 370 (engine run with cars attached over a defective road was overturned—other engine had frequently been run over the road in safety, in the same way that plaintiff was running his).

d. Contributory negligence inferred from servant's knowledge both of defects and resulting dangers.

By the great majority of the courts it is laid down that where it is established by specific evidence that the servant had knowledge, not only of the abnormal conditions created by a breach of duty on the master's part, but also fully appreciated the extraordinary risk resulting from these conditions, his subsequent continuance in the employment will render him chargeable, as matter of law, with contributory negligence. *Stuart v. Evans* (1883) 49 L. T. N. S. 138, 31 Week. Rep. 706, per Cave, J.; *The Serapis* (1892) 8 U. S. App. 49, 51 Fed. Rep. 91, 2 C. C. A. 102 (stevordore used an unsafe steam winch, with knowledge of the danger and risk) *Reversing* (1891) 49 Fed. Rep. 393, which applied the admiralty rule; *The Max Morris* (1890) 137 U. S. 1, *sub nom.* *The Max Morris v. Curry*, 34 L. ed. 586, 11 Sup. Ct. Rep. 29 (that contributory negligence does not wholly deprive the servant of his right to damages, point not touched upon by the majority of the court of appeals, but made the foundation of a dissent by Goff, J.); *Barkdoll v. Pennsylvania R. Co.* (1888) 21 W. N. C. 281, 13 Atl. 82 (brakeman killed in coupling broken car); *Tenanty v. Boston Mfg. Co.* (1898) 170 Mass. 323, 49 N. E. 654 (defective saw); *Mehan v. Syracuse, B. & N. Y. R. Co.* (1878) 73 49 L. R. A.

N. Y. 585 (defective track: conceded that engineer could not recover if he knew that it was so badly out of repair that it was dangerous to run over it); *Jones v. Roach* (1876) 9 Jones & S. 248; *Crutchfield v. Richmond & D. R. Co.* (1878) 78 N. C. 300 (held error to refuse to charge the jury, that "if they believed that plaintiff [a brakeman] knew, or had reasonable grounds for believing, that the engine used by defendant prior to the time of the injury complained of was not controllable by the engineer, and that the roadbed was in a dangerous condition, and the plaintiff was injured thereby, then the plaintiff was guilty of contributory negligence"); *Nelling v. Industrial Mfg. Co.* (1886) 78 Ga. 260 (court refused to set aside a verdict for the defendant considering the jury were not misled by an instruction which announced in substance that if the servant is aware of the dangerous character of a particular tool or instrument, or may, by the exercise of ordinary care, be apprised of it, and continues nevertheless to use it, he cannot have redress for any damage he sustains by its use); *Chicago & A. R. Co. v. Munroe* (1877) 85 Ill. 25 (switchman worked several years knowing that a drawbar was somewhat dangerous owing to want of a thimble in a bumper to keep the coupling link from running back); *St. Louis & S. E. R. Co. v. Britz* (1874) 72 Ill. 256 (defective brakes); *Glass v. Chicago, R. I. & P. R. Co.* (1893) 41 Ill. App. 87 (plaintiff injured by slipping on bolt-head projecting from footboard of engine which he was attempting to board); *Pollich v. Sellers* (1890) 42 La. Ann. 623, 7 So. 786 (held negligence to trust one's weight, at a height of 70 feet above the ground, supported by guys extending under the trusses of a building in process of demolition, such trusses being known to be in such a condition that they were liable to fall at any moment).

In *Darcey v. Farmers' Lumber Co.* (1894) 37 Wis. 245, 58 N. W. 382, the jury returned an affirmative answer to the following interrogatory: "Were the dangers and risks to the plaintiff, by reason of the uncovered condition of the saw, such as would be apparent to a person using ordinary care and observation, and having the knowledge and experience in saw-mills which the plaintiff then had?" They also found that there was no want of ordinary care on the part of the plaintiff which contributed to cause the injury sustained by him.

As the only ground on which contributory negligence was imputed to the plaintiff was, that he remained in the service with knowledge of the risk, the second finding was held to be equivalent to an affirmation that he did not so

The law of this question, as declared by text-books and decisions of courts, is in line with the foregoing views. Shearman & Redfield on Negligence—a work more friendly to servants than any other standard text-book—declares: “The latest and best authorities hold that the liability of the master for risks caused by his negligence, which did not exist when the servant accepted the employment, depends upon a ‘question of fact whether a servant who works on, appreciating the risk, assumes it voluntarily or endures it because he feels constrained to.’ If he voluntarily continues work with full notice of the risk, he assumes it; but not so if he acts under coercion.” There certainly is no question of coercion in this case. It is said in *Stephenson v. Duncan*, 73 Wis. 408, 41 N. W. 338: “But, if the plaintiff did continue his employment for an unreasonable

time after the defendant could have removed the defects, he would then be deemed to have waived his objections, and assumed the risk of operating the machinery in the unsafe and dangerous condition in which it was.” We find the following language in *Hough v. Texas & P. R. Co.* 100 U. S. 224, 25 L. ed. 617: “If the engineer, after discovering or recognizing the defective condition of the cowcatcher or pilot, had continued to use the engine, without giving notice thereof to the proper officers of the company, he would undoubtedly have been guilty of such contributory negligence as to bar a recovery, so far as such defect was found to have been the efficient cause of the death. He would be held in that case to have himself risked the dangers which might result from the use of the engine in such defective condition. But “there can be no doubt that, where the mas-

remain with that knowledge, and to be therefore inconsistent with the first one. *Eureka Co. v. Bass* (1886) 81 Ala. 200, 60 Am. Rep. 152, 8 So. 216 (defective fuse, known to be dangerous); *Pleasants v. Raleigh & A. Air Line R. Co.* (1886) 95 N. C. 195 (section master used dump car which he knew to be out of order and in a dangerous condition); *Reese v. Wheeling & E. G. R. Co.* (1896) 42 W. Va. 333, 26 S. E. 204 (laborer, in spite of the repeated warnings of his foreman, traveled on a truck in a construction train pushed ahead of the engine—derailment); *Ballou v. Chicago, M. & St. P. R. Co.* (1882) 54 Wis. 280, 41 Am. Rep. 31; *Brossman v. Lehigh Valley R. Co.* (1886) 113 Pa. 490, 57 Am. Rep. 479, 6 Atl. 226; *Bemis v. Roberts* (1891) 143 Pa. 1, 21 Atl. 998.

The courts of Illinois are firmly committed to the principle that, “if a person, knowing the hazards of his employment as the business is conducted, voluntarily continues therein, without any promise by the master to do any act to render the same less hazardous, the master will not be liable for any injury he may sustain therein, unless, indeed, it may be caused by the wilful act of the master.” *Stafford v. Chicago, B. & Q. R. Co.* (1885) 114 Ill. 244, 2 N. E. 185 (fellow servant known to be incompetent); *Pennsylvania Co. v. Lynch* (1878) 90 Ill. 333 (plaintiff knew of the unsafety of a platform which he was using to transfer freight from one car to another); *Chicago & A. R. Co. v. Munroe* (1877) 85 Ill. 25 (plaintiff testified that he knew the defective coupling was not very safe); *United States Rolling Stock Co. v. Wilder* (1886) 116 Ill. 100, 5 N. E. 92 (fellow servant known to be incompetent, so that plaintiff's position was extra hazardous); *Illinois Steel Co. v. Schymanowski* (1896) 162 Ill. 459, 44 N. E. 876 (speaks of defects augmenting the danger of the service); *Coal Run Coal Co. v. Jones* (1889) 127 Ill. 379, 8 N. E. 865, 20 N. E. 89 (gas in mine exploded—known to have been accumulating in dangerous quantities).

It is error to charge that a servant, although he has full knowledge of a dangerous defect, may recover if he uses ordinary care to avoid injury from such defect; at all events where he has not reported the defect, or objected to the maintenance of the dangerous condition, or received a promise that it will be remedied. *Chicago, R. I. & P. R. Co. v. Clark* (1882) 11 Ill. App. 104.

The knowledge which this doctrine contemplates is the complete appreciation which, as we have seen, must also be established before the master can protect himself by the defense that the risk was assumed.

The servant's continuance of work with a mere apprehension of possible danger is not such negligence as will bar his action. *Dumas v. Stone* (1893) 65 Vt. 442, 25 Atl. 1097 (mason injured by breaking of wire rope some of the strands of which had become rusty, and had been repaired after breakage); *Chicago, W. & V. Coal Co. v. Peterson* (1890) 39 Ill. App. 114 (request of miner for more props showed apprehension of danger); *Erslaw v. New Orleans & N. E. R. Co.* (1896) 49 La. Ann. 86, 21 So. 153 (brakeman killed by guy-wire of street-car company; presumption of servant's fault ought not to rest on vague surmises of the possibility of danger).

That an engineer knows that a road is so far out of repair that he incurs some danger in running his engine over it is not conclusive proof that he is negligent in continuing to use it. Unless the evidence is clear that he understood the danger to be imminent or very great, it is for the jury to say whether he acted with reasonable prudence and discretion in venturing to run his engine over the road. *Hawley v. Northern C. R. Co.* (1880) 82 N. Y. 370.

e. Contributory negligence inferred from servant's knowledge of defects alone.

On general principles, it is clear that, where there can be no reasonable doubt that a person in the servant's position, who knew of the defect in question, must also have understood the resulting risk, it may be ruled, as a matter of law, that, for the purpose of the defense, his information was complete.

That an appliance may be so grossly or clearly defective that the servant must have known of the risk to which it exposed him was laid down in *Sims v. Lindsay* (1898) 122 N. C. 678, 30 S. E. 19.

This is in accordance with the general principle laid down by Knowlton, J., in a dissenting opinion: “The danger may be so great and so obvious that, in any possible view of the evidence, the general judgment of common sense would at once condemn his conduct in continuing to work as careless.” *Davis v. Forbes* (1898) 171 Mass. 548, 47 L. R. A. 170, 51 N. E. 20.

It is only in a very clear case that the question whether the servant appreciated the danger as well as the defect can be withdrawn from the jury. *Louisville & N. R. Co. v. Kelly* (1894) 24 U. S. App. 103, 63 Fed. Rep. 407, 11 C. C. A. 260; *Kalm v. Smith* (1882) 89 N. Y. 375 (1881) 25 Hun. 146.

The essential question is whether knowledge

ter has expressly promised to repair a defect, the servant can recover for an injury caused thereby within such a period of time after the promise as it would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept,"—citing cases. It is said in *Morbach v. Home Min. Co.* 53 Kan. 740, 37 Pac. 125: "But if a servant continues in his work an unreasonable length of time after the master has agreed to remedy the defect complained of, or if the danger is imminent or obvious, he assumes the risks incident thereto. Generally, the question of reasonable time is one of fact for a jury; but where a servant has full knowledge of the danger of his employment, as in this case, after his first injury, and continues in the master's service while

he is conducting his business in a way which the servant knows is dangerous, the servant cannot continue to wait, and, after being injured, then claim damages. He should leave his dangerous employment within a reasonable time, on discovery of the master's method of doing business, when he finds that the master will not remedy the danger, or fulfil his promise in that respect." See also *Counsell v. Hall*, 145 Mass. 468, 14 N. E. 530; *Eureka Co. v. Bass*, 81 Ala. 200, 60 Am. Rep. 152, 8 So. 216; *Davis v. Graham*, 2 Colo. App. 210, 29 Pac. 1007. The only recent case in this state, to our knowledge, where this question has been at all involved, is *Martin v. California C. R. Co.* 94 Cal. 326, 29 Pac. 645. It was there held that the mere fact of a brakeman knowing that an appliance was defective and dangerous did not, as matter of law, bar a recovery based upon

of the defects necessarily, and in legal contemplation, carries with it knowledge of the risk or danger, or whether knowledge of the defects can possibly warrant any other conclusion than that the risk was understood. *Michael v. Stanley* (1892) 75 Md. 464, 23 Atl. 1094.

Whether or not notice of danger in the continued use of a defective appliance can be imputed to the servant will depend upon its character, and upon whether it was in so obviously a dangerous condition as to convey notice to a person of his intelligence of the danger which might result to him in consequence of his continuing to use it. *Pitts v. Florida C. & P. R. Co.* (1896) 98 Ga. 655, 27 S. E. 189.

If, in the jurisdiction where the action is brought, even a knowledge of the danger is not regarded as requiring a peremptory inference of contributory negligence, the opinion of the jury must still be taken on this point. But, under the theory that the servant's continuance of work with knowledge of the danger renders him chargeable, as matter of law, with contributory negligence, it is obvious that a court, which has deemed itself justified, under the evidence, in finding that a knowledge of the danger was a necessary implication from the knowledge of the defect, is also warranted in taking the next step in the deductive process without the intervention of the jury, and declaring the servant unable to maintain the action. It is in this manner that these decisions are to be explained, which, by holding that the suit was barred by a knowledge of the defect alone, seem to disregard the principle that a knowledge of the resulting danger must also be proved.

That the rule by which the continuance of work with knowledge of defects implies negligence is founded on the presumption that a servant understands the dangers arising from these defects, was expressly noted in *Galveston, H. & S. A. R. Co. v. Parrish* (1897; Tex. Civ. App.) 40 S. W. 191.

Essentially, therefore, the rulings cited below, in which the action was barred by a knowledge of the defect, are applications of the same theory as that embodied in the cases referred to in the preceding subdivision. Knowledge of the danger is not denied to be a necessary element of the defense. It is merely taken for granted that knowledge of the defect must have carried with it a knowledge of the concomitant danger. Viewed from this standpoint, the supposed conflict between the authorities which has troubled some judges so much entirely vanishes so far as it is a matter of theory, for no court, 49 L. R. A.

not even those of Missouri and of the states which have followed the Missouri decisions, has gone to the length of declaring that it is for the jury, under every conceivable state of the evidence, to say whether a knowledge of the danger shall be inferred. But it must be confessed that, on the facts, it is sometimes extremely difficult, if not impossible, to reconcile the following cases with those cited under I. d. *supra*. In many instances the circumstances are, for practical purposes, identical, and in at least one, *viz.*, where the defect under review was the unfitness of a fellow servant, absolutely identical. *Griffiths v. Gidlow* (1858) 3 Jurist. & N. 648, 27 L. J. Exch. N. S. 404 (defective hook caused the fall of a tub used for holsting water from a pit); *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 224, 25 L. ed. 617 (defective cow-catcher); *Reese v. Clark* (1892) 146 Pa. 465, 23 Atl. 246 (heavy iron plates which had been laid against a wall fell on plaintiff); *Marean v. New York, S. & W. R. Co.* (1895) 167 Pa. 220, 31 Atl. 562 (want of signal flag known to plaintiff, a car inspector); *Marsh v. Chickering* (1886) 101 N. Y. 396, 5 N. E. 56 (defective ladder); *Smith v. Memphis & L. R. Co.* (1883) 18 Fed. Rep. 304 (in charge to jury); *Dillon v. Union P. R. Co.* (1874) 3 Dill. 319, Fed. Cas. No. 3,916 (engineer injured owing to want of signal bell in cab of engine); *Smith v. Sibley Mfg. Co.* (1890) 85 Ga. 333, 11 S. E. 616 (plaintiff here alleged that he knew of the negligent propensities of the delinquent coservant); *Atlanta & C. Air Line R. Co. v. Ray* (1883) 70 Ga. 674 (employee who had to light stove knew that it was defective); *Porter v. Western N. C. R. Co.* (1887) 97 N. C. 66, 2 S. E. 581 (plaintiff held not to be entitled to recover where the jury had returned an affirmative answer to the question: Did the servant remain in the service with knowledge of the incompetency of the fellow servant whose negligence caused the injury); *Galveston, H. & S. A. R. Co. v. Eckols* (1894) 7 Tex. Civ. App. 429, 26 S. W. 1117 (plaintiff knew of coservant's unfitness); *Richmond & D. R. Co. v. Worley* (1893) 92 Ga. 84, 18 S. E. 361 (knowledge of fellow servant's unfitness appeared from plaintiff's own testimony); *Nelson v. Central R. & Bkg. Co.* (1891) 88 Ga. 225, 14 S. E. 210 (plaintiff nonsuited, where he himself testified that a brake-rod was broken); *McGhee v. Bell* (1897) 19 Ky. L. Rep. 267, 39 S. W. 823 (Reversing on rehearing (1897) 38 S. W. 702 (lever of hand-car was worm-eaten)); *Lawrence v. Hagemeyer & Co.* (1892) 93 Ky. 591, 20 S. W. 704 (defective saw); *Michael v. Stanley* (1892) 75 Md. 464, 23 Atl. 1094 (minor of

injuries received by reason of the defect. The element of time was not a material matter in that case, and was not considered; and continued user of the appliance, with knowledge of the defect and its dangerous character, was not shown, and the question not discussed. *Magee v. North Pacific Coast R. Co.* 78 Cal. 430, 21 Pac. 114, which was relied upon to support the conclusion declared in the *Martin Case*, is not opposed to the views here expressed.

The question here, then, resolves itself into this: At the conclusion of the introduction of evidence at the trial, was there a question of fact for the jury to pass upon as to whether or not plaintiff remained in the employ of defendant for an unreasonable time after his notification to defendant of the defective character of the lines? If that question ever may become a question of law by rea-

son of any particular state of facts, then it would seem that a question of law alone was presented here. There is absolutely no conflict in the evidence. Plaintiff continued his employment for nine months after a notification to defendant of the defect, without any intimation from his master that the defect would be repaired, during all of which time the defective appliance was constantly before his eyes, and also in his hands. We believe that this delay of nine months is a fact absolutely fatal to plaintiff's cause of action. We see no difference in a delay of nine months and a delay of nineteen months, and, as a matter of law, this court must say that plaintiff, continuing for this long period of time in the employment of his master, after his notification to the master of the defect, by implied agreement released the master from any liability resulting from in-

eighteen years injured by circular saw in which two teeth were wanting); *Erdman v. Illinois Steel Co.* (1897) 95 Wis. 6, 69 N. W. 993 (cracked saw); *Morris v. Gleason* (1879) 4 Ill. App. 395; *Chicago, R. I. & P. R. Co. v. Clark* (1882) 11 Ill. App. 104 (platform near track); *Chicago & T. R. Co. v. Simmons* (1882) 11 Ill. App. 147, Affirmed (1884) 110 Ill. 340 (danger that the upper portion of a bank may fall when the lower part is excavated held to be obvious); *Illinois C. R. Co. v. Jones* (1882) 11 Ill. App. 324 (defective coupling); *Wabaash, St. L. & P. R. Co. v. Thompson* (1884) 15 Ill. App. 117 (tumbling rod of pumping apparatus not boxed); *Chicago, B. & Q. R. Co. v. Montgomery* (1884) 15 Ill. App. 205 (peculiarly hazardous form of coupling); *Evans v. Chessmond* (1890) 38 Ill. App. 615 (rock in the roof of a drift of a mine in such a condition as to be liable to fall at any moment); *Peoria, D. & F. R. Co. v. Puckett* (1893) 52 Ill. App. 223 (brakeman injured by a hole in the track); *Illinois C. R. Co. v. Swisher* (1893) 53 Ill. App. 411 (fireman injured by a collision due to the want of a lamp on a rotary switch); *Legnard v. Lage* (1894) 57 Ill. App. 223 (plaintiff injured by the fall of a bank of earth, the condition of which was visible); *McQueen v. Central Branch U. P. R. Co.* (1883) 30 Kan. 689, 691, 1 Pac. 139 (plainly visible defects in wheels of hand car which plaintiff had an opportunity to observe); *Jackson v. Kansas City, L. & S. K. R. Co.* (1884) 31 Kan. 761, 3 Pac. 501 (plaintiff knew that step of engine was not fit for use); *Rush v. Missouri P. R. Co.* (1887) 36 Kan. 129, 12 Pac. 582 (unblocked guard rail); *Goltz v. Milwaukee L. S. & W. R. Co.* (1890) 76 Wis. 136, 44 N. W. 752 (iron hook plainly showed a flaw on the outside. Special finding that the defect could have been observed by the owner of the hook or parties that used it if they were exercising ordinary care in using or taking care of it, held conclusively to negative the right to recover); *Anderson v. C. N. Nelson Lumber Co.* (1896) 67 Minn. 79, 69 N. W. 630 (uncovered machinery); *King v. Ford River Lumber Co.* (1892) 93 Mich. 172, 53 N. W. 10 (same facts); *Schroeder v. Michigan Car Co.* (1885) 56 Mich. 132, 22 N. W. 220 (same facts); *Peterson v. Sherry Lumber Co.* (1895) 90 Wis. 83, 93, 62 N. W. 948 (same point); *Nadeau v. White River Lumber Co.* (1890) 76 Wis. 120, 43 N. W. 1135 (same facts); *Houston & T. C. R. Co. v. Myers* (1881) 55 Tex. 111 (*arguendo*); *Texas & P. R. Co. v. Bradford* (1886) 66 Tex. 732, 59 Am. Rep. 730, 2 S. W. 595 (no proper appliances furnished for curving rails).

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If the servant, acting as a prudent man would ordinarily act, would undertake to do the work with knowledge of the defect, this very test relieves the master from liability, for the obligations and duties of master and servant are correlative; each is held to that degree of care in reference to all matters affecting the safety of the servant while in the master's employment which men of ordinary prudence would or ought to exercise under the same circumstances. If the servant, with a knowledge of the defect, as a prudent man may undertake the work, can it be said that the master has not exercised that degree of care required of him? *Texas & P. R. Co. v. Bradford* (1886) 66 Tex. 732, 59 Am. Rep. 730, 2 S. W. 595.

McKelvey v. Chesapeake & O. R. Co. (1891) 35 W. Va. 500, 14 S. E. 261, construed in *Woodell v. West Virginia Improv. Co.* (1893) 38 W. Va. 23, 17 S. E. 386, as a ruling that an engineer's knowledge that some stay-bolts in a locomotive boiler were broken rendered him chargeable with negligence in going on working. But the actual decision was that his negligence is for the jury, where a promise to repair had been given.

In *Ford v. Fitchburg R. Co.* (1872) 110 Mass. 240, 14 Am. Rep. 598, the court sustained the refusal of the trial judge to charge the jury to the effect that the plaintiff could not recover if he knew, or had reasonable cause to believe, that the engine which exploded was defective, and approved the following instruction as given: "If the plaintiff ran the engine when it was not in good working order, knowing it to be such; and the particulars in which it was not in good working order were signs of a defective condition in the boiler, causing an explosion by which the plaintiff was injured; and a competent engineer ought to have known that such particulars were signs of such defective condition; and the plaintiff held himself out as such a competent engineer when he entered into the employment of the defendants as an engineer,—he cannot recover."

If we compare the language of the instructions thus rejected and adopted, it will be apparent that this Massachusetts case is not an authority for the unqualified proposition in support of which it is sometimes cited, viz., that to defeat the action of the servant it must be proved, not only that he knew of the defects from which the injury resulted, but that he must also have known of the danger.

This opinion we understand only to declare that knowledge of a defect which in the ordinary course of events, under the operation of well-known laws governing matter, may result

juries received in the use of the appliance; or, as some of the cases declare, plaintiff must be held to have been guilty of contributory negligence in continuing his employment for this long period of time with this defective appliance,—a defective appliance of which he well knew, and the danger of its use *ex necessitate* ever present to his mind. In the comparatively early case of *McGlynn v. Brodie*, 31 Cal. 379, this court said: "Where a party works with or in the vicinity of a piece of machinery insufficient for the purposes for which it is employed, or for any other reason unsafe, with a knowledge or means of knowledge of its condition, he takes the risk incident to the employment in which he is thus engaged, and cannot maintain an action for injuries sustained arising out of accidents resulting from such defective condition of the machinery. This is the prin-

ciple established by all the cases." In view of the decision in *Martin v. California C. R. Co.* 94 Cal. 326, 29 Pac. 645, the aforesaid doctrine may be considered modified, but the modification goes to a limited extent only, for the limitation only goes to the point that the servant, after beginning his employment with a defective appliance, may have the time and opportunity to call the attention of the master to the defect, and the master may have the time and opportunity, after the notification, to remedy the defect, before it be held that the servant has assumed the risk.

It was error for the court to admit evidence, under objection, to the effect that the defects were remedied after the accident. In *Sappenfield v. Main Street & A. P. R. Co.* 91 Cal. 62, 27 Pac. 590, the court said: "Such a rule puts an unfair interpretation

in injury, will cast upon the person who, with knowledge of such, continues to use the defective implement or machine, the risks incident to the business done with the defective implement or machine; but there is nothing in the opinion to indicate that the engineer must have had knowledge of the danger of an explosion otherwise than as he may have been affected with knowledge or notice, by the defect itself, that such an event might occur. *Texas & P. R. Co. v. Bradford* (1886) 66 Tex. 732, 735, 50 Am. Rep. 739, 2 S. W. 595.

Cases turning upon this principle, it should be observed, sometimes present the additional feature that there was independent culpability in failing to make an examination of the defective appliance. Senior v. Ward (1859) 1 El. & El. 885, 28 L. J. Q. B. N. S. 139, 5 Jur. N. S. 172, 7 Week. Rep. 261 (plaintiff's intestate and his collaborators had been warned to examine the rope of a hoisting cage before descending into a mine, and had not done so).

Or in failing to notice a defect which was obvious. *Bemisch v. Roberts* (1891) 143 Pa. 1, 21 Atl. 998 (holes in which the pins which confined the load on a buggy were so worn that the pins would not stay in, and the load fell off).

The phrase "knowledge of the risk," which is customarily employed in statement of this principle, is somewhat ambiguous in meaning. By one court it is interpreted as implying that the action is not barred by the servant's knowledge of a defect, unless the circumstances were such as "necessarily and inevitably to expose him to danger." *Snow v. Housatonic R. Co.* (1864) 8 Allen, 441, 85 Am. Dec. 720 (plaintiff's foot caught in a hole in a plank crossing). Compare *Waidner v. Hannibal & St. J. R. Co.* (1885) 87 Mo. 37, where the servant was allowed to maintain his action on the ground that the defect was not such as to render the place of work "necessarily dangerous."

But it is manifest that the rulings last cited cannot be brought within the purview of any such stringent principle. They rather proceed upon the theory suggested in other cases, that negligence is properly inferred wherever injury may "reasonably be apprehended." *Eureka Co. v. Bass* (1886) 81 Ala. 200, 60 Am. Rep. 152, 8 So. 216.

Whether continuing in the service, after discovering the defect, constitutes contributory negligence depends in a great measure upon its nature and extent. Unquestionably, when the danger is so apparent that injury appears to be inevitable, the employee is not justified in continuing in the service. No man is bound to 49 L. R. A.

subject himself to certain and inevitable injury, endangering life in rendering service to another. Continuance in service under such circumstances would be reckless, and, if death ensued, suicidal. But that the injury should appear to be unavoidable is not requisite. When injury is imminent—when the appearance of injury is of a degree greater than that which produces the impression that injury may result; when it leaves no room for reasonable doubt—continuing in the service after knowledge of the defect causing the injury, and its nature and extent, must be regarded as contributory negligence. *Highland Ave. & B. R. Co. v. Walters* (1890) 91 Ala. 442, 8 So. 357.

The probability or improbability of encountering the particular risk of which the servant had knowledge at the time when the injury was received may also, as it would seem, be taken into account. *Hoey v. Dublin & B. Junction R. Co.* (1870) Ir. Rep. 5 C. L. 206, where Justice Lawson, in denying the soundness of the doctrine which would make continuance in employment with knowledge of the incompetency of a fellow servant contributory negligence, laid stress upon the fact that although a locomotive engineer (the plaintiff) might know that there was one incompetent engineer in the service of the common employer he could not know that, when he was proceeding on the journey during which the injury was inflicted, he was to encounter that particular incompetent engineer.

In other words, whenever the servant sees, or ought to see, that the probable consequence of his remaining in an environment which the master's breach of duty has made more than usually dangerous will be some personal injury, the possibility of disaster is sufficiently serious to require him, as a prudent man, to discontinue work.

The effect of the principle in relation to practical litigation is, as has been remarked, practically to make it a matter of indifference, so far as the servant's rights are concerned, whether he relies on the defense of assumption of risks or contributory negligence. In either case the functions of the jury cease when it is determined that both the defects and the resulting risks were known to him. *The Serapis* (1891) 49 Fed. Rep. 393, 395.

1. The rationale of the principle.

The theory applied in the decisions cited in the last two subheads is that, whatever the period of service to which the servant's contract binds him, the master's failure to per-

on human conduct, and virtually holds out an inducement for continued negligence." See also *Hager v. Southern P. Co.* 98 Cal. 311, 33 Pac. 119; *Turner v. Hearst*, 115 Cal. 401, 47 Pac. 129. The materiality of this error under the circumstances need not be considered.

It was not proper to admit the testimony of expert witnesses as to what appliances were safe and what were unsafe. As illustrative of this branch of the case, the record discloses the following: "Q. Can you state to the jury whether or not it is more safe for a teamster to sit on a bare load of lumber without a seat, or whether it is more safe with a seat for him?" And again: "Q. Can you state whether or not short lines used to drive horses are as safe as long lines without knots?" These questions were objectionable for two reasons: First, it is not material to the case that the wagon would have been safer with a seat than without it; second, neither was it material to the case

that longer lines would have been safer than shorter ones. Defendant was not bound to furnish the safest appliances that could be had in the market. Again, the questions cover a subject-matter not calling for expert testimony under any circumstances. The jury was the best judge of the safety of the appliance used, and as to the safety of other appliances which might have been used no such question was before the court, and clearly it was not material. *Sappenfield v. Main Street & A. P. R. Co.* 91 Cal. 62, 27 Pac. 590; *Kauffman v. Maier*, 94 Cal. 281, 18 L. R. A. 124, 29 Pac. 481; *Redfield v. Oakland Consol. Street R. Co.* 112 Cal. 220, 43 Pac. 1117.

We find no merit in the contention that the bill of exceptions cannot be considered.

For the reasons stated, *the judgment and order are reversed*, and the cause remanded.

We concur: **Van Dyke, J.; Harrison, J.**

form his obligations entitles the servant to throw up his position if he see fit, and that, since he has this right, his conduct in remaining at work after he acquires knowledge of an abnormal hazard must amount, in the absence of some special countervailing circumstance, to that species of negligence which consists in the deliberate exposure of oneself to unnecessary perils. *Laning v. New York C. R. Co.* (1872) 49 N. Y. 521, 10 Am. Rep. 417; *Leary v. Boston & A. R. Co.* (1885) 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115; *Wheeler v. Berry* (1893) 95 Mich. 250, 54 N. W. 876; *Reese v. Clark* (1892) 146 Pa. 465, 23 Atl. 246; *Marean v. New York, S. & W. R. Co.* (1895) 167 Pa. 220, 31 Atl. 562; *Crutchfield v. Richmond & D. R. Co.* (1877) 76 N. C. 320.

The servant's freedom of action is, of course, more especially decisive where his employment is for no definite period of time. *Indianapolis, B. & W. R. Co. v. Flanagan* (1875) 77 Ill. 365 (brakeman employed by the trip).

See note to *O'Maley v. South Boston Gas-light Co.* 47 L. R. A. 161. *Volenti non fit injuria* as a defense to actions by injured servants.

This consideration seems to have been forgotten by Messrs. Shearman and Redfield when, in their treatise on Negligence (ed. 1888) § 215, they undertake to sustain the doctrine discussed in I. J. *infra*, by vouching in aid a supposed general principle that "a party to any other contract having mutual obligations is allowed to fully perform his part notwithstanding the failure of the other party to fulfil a condition precedent, without necessarily waiving his right to insist upon performance of such condition at a later period." (This passage was cited with approval in *Thorpe v. Missouri P. R. Co.* (1886) 89 Mo. 650, 58 Am. Rep. 120, 2 S. W. 3, but has been excised in the last edition of the treatise.)

The true rule, as it happens, is precisely the reverse of that here stated (see *Bishop, Contracts*, § 839, and a note by the present writer in 33 Am. St. Rep. pp. 791 *et seq.*); but in any event, the negligence of the servant must necessarily be the proximate cause of any injury which he receives after the master's breach of the contract gives him the right to consult his personal safety, and thus on general principles a bar to his action.

The situation which thus supervenes upon the servant's failing to exercise his option to 49 L. R. A.

leave the employment is that the master, in permitting his machinery to be more than ordinarily dangerous, is guilty of negligence; the servant by remaining with full knowledge of the resulting risks contributes to his own injury. *Swoboda v. Ward* (1879) 40 Mich. 420, quoting *Cooley, Torts*, pp. 551, 552.

While there is an implied contract between employer and employee that the former shall procure and keep suitable tools, implements, means, etc., with which to perform the labors required of the latter, and also that the latter shall be advised by the former of all the dangers incident to the service, of which the latter is not cognizant, yet the failure of the employer in that regard furnishes no excuse for the conduct of an employee who voluntarily incurs a known danger. He must himself use due care and caution to avoid injury. If he has full knowledge of all the perils of a particular service, he may decline to engage in it, or require that it shall first be made safe; but if he does thus enter it, he assumes the risk, and must bear the consequences. *Pennsylvania Co. v. Lynch* (1878) 90 Ill. 333.

It is for the plaintiff to show, not merely that the place was unsafe, and that he was injured thereby, but that he himself was in the exercise of due care. His evidence falls to show this, if it appears that, knowing and appreciating the danger arising therefrom, he voluntarily exposes himself thereto. Business is sometimes carried on in buildings or places obviously unsafe, and if, with a knowledge that a business is thus conducted, the workman engages in it, he takes the risks which he must know are incident thereto. *Taylor v. Carew Mfg. Co.* (1885) 140 Mass. 150, 3 N. E. 21.

The fact that a danger is known, or might be known by the exercise of the natural faculties, will preclude a recovery where it is immediate and of such a character as to impose upon one who undertakes to pass the danger a hazard that a prudent man would not incur. A man has no right to cast himself upon a known danger where the act subjects him to great peril. If there is a risk, apparent or known, that will result in injury, he must not encounter it. *Lake Shore & M. S. R. Co. v. Pinchin* (1887) 112 Ind. 502, 13 N. E. 677 (an action by a stranger).

The causal connection between the employer's negligence and the injury is broken at the time the danger becomes so plain that a per-

son of ordinary care would not assume the risk of continuing to work at the place of danger. Pollich v. Sellers (1890) 42 La. Ann. 623, 7 So. 786.

Is a man without fault who uses a dangerous and insufficient tool knowing it to be so? Can a man claim that he has been damaged by the fault of other employees who have furnished an insufficient tool when he has for months used that tool and knows that it is unsafe, and still runs the risk? An employee is not without fault,—that is, he is a contributor to his own hurt,—if, however negligent others may be, knowing that negligence, seeing the danger, he still chooses to expose himself to the danger. Western & A. R. Co. v. Bishop (1873) 50 Ga. 465.

As to whether the employee was negligent, his actions should be judged by the facts as they existed, within his knowledge, or within what he ought to have known, at the time he acted or failed to act; and the previous negligence of the employer, which was known to the employee, or ought to have been known by him, will not excuse him. In the case at bar the failure to furnish props at the working place of the plaintiff below was negligence on the part of the defendant below; but if plaintiff knew of this negligence, or ought to have known thereof, and remained in the room, knowing the roof to be dangerous, his injury was directly caused by his own negligence in remaining in a room known to be dangerous, and not by defendant's negligence in failing to furnish props. Pittsburgh & W. Coal Co. v. Estlevarnard (1895) 53 Ohio St. 43, 40 N. E. 725.

When the danger is not obvious or imminent, and both the employer and the employee, with full knowledge of the same, enter into the contract of employment, or continue the same, neither party is guilty of culpable negligence as towards the other; while if the danger is obvious and imminent, and it is encountered by the servant, then both parties are equally guilty of culpable negligence—that of the employee being culpable contributory negligence. In all cases the continuance on the part of the servant in the master's employment, with full knowledge of the danger, is either negligence or it is not negligence. If it is negligence, and injury results, then no recovery can be had, because of the culpable contributory negligence of the servant; but if it is not negligence on the part of the servant, then neither can it be negligence on the part of the master. What the servant may lawfully do without negligence, the master may lawfully hire him to do without negligence. The master cannot be found to take greater care of the servant than the servant does of himself. If the danger is such that an ordinarily prudent man could assume it without being guilty of negligence, then the same facts and the same reasoning which would show this would also show that there could not be any culpable negligence or any breach of duty on the part of another person for hiring him to assume it. There cannot be negligence on the part of the one, and not on the part of the other, where both are capable of understanding the danger, and both are fully informed as to all the facts. Rush v. Missouri P. R. Co. (1887) 36 Kan. 129, 12 Pac. 582.

If he were allowed to recover after voluntarily incurring a danger he would receive compensation for his own negligence. Illinois River Paper Co. v. Albert (1893) 49 Ill. App. 363.

The servant, however, is not debarred from recovering for injuries directly due to a spe-

cific wilful act of the master's vice principal, merely because he knew that similar acts had previously been committed by the same man. Gulf, C. & S. F. R. Co. v. Brentford (1891) 79 Tex. 619, 15 S. W. 561 (intoxicated superintendent by his shouts prevented the plaintiff from hearing properly his foreman's words of command by which the loading of a car was being regulated). The court said: "When the cause of the injury is the direct act of the master or his representative, it cannot be said that the servant's remaining in the employment is the proximate cause of the injury, even though the servant may have known that the master or his representative had frequently done the same, or similar acts, which imperiled his safety; for the act which in such case causes the injury is the wrongful act of the master or of his representative, the result of the exercise of the will of the one or the other, and hence the proximate cause of the effect from which the master ought not to be permitted to go free from liability on the ground that the servant knew he had, before the happening of the injury, done acts such as that from which the injury resulted, but still remained in his service."

g. Knowledge of danger held to be not necessarily a bar to the action.

There is also considerable authority for the view that, even where the case involves none of those special considerations,—such as effect of positive orders, assurances of safety, etc.,—which, as noted elsewhere, may tend to rebut the inference of contributory negligence, a court is not warranted in drawing that inference from proof of the mere fact that the servant remained in the employment with an appreciation of the risks resulting from the master's breach of duty. Weblin v. Ballard (1886) L. R. 17 Q. B. Div. 122, 55 L. J. Q. B. N. S. 395, 54 L. T. N. S. 532, 34 Week. Rep. 455, 50 J. P. 597, per Smith, J.; Sledge v. Gayoso Hotel Co. (1890) 43 Fed. Rep. 463 (complaint showing knowledge of danger, not demurrable); and the Missouri cases cited *infra*, h.

In Kane v. Northern C. R. Co. (1888) 128 U. S. 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16, it was remarked that negligence was predicable of the exposure of oneself to dangers "so obvious and threatening that a prudent man would have avoided them."

But these words can hardly be intended to carry that restrictive significance which they bear in the Missouri cases, as they should be construed with special reference to the facts, the point being (see h. *infra*), whether the plaintiff was bound to abandon his duties immediately upon the discovery of the defect. The doctrine of the Supreme Court of the United States is, as is shown by the decision in Hough v. Texas & P. R. Co. (1879) 100 U. S. 224, 25 L. ed. 617, that, under ordinary circumstances, the action is barred by knowledge of any dangerous defect.

Under the peculiar Illinois doctrine as to comparative negligence, an unequalled instruction to the effect that mere knowledge by the servant of circumstances which render the usual method of doing work more than ordinarily hazardous will disable him from recovery, is rightly refused. Such circumstances demand a commensurate degree of care on the part of the master, and the plaintiff has a right to have the question passed upon, whether the master's duty in this regard has been performed. Illinois C. R. Co. v. Gilbert (1895) 157 Ill. 354, 41 N. E. 724 (servant's work was taking wheels across tracks where trains were passing every few minutes).

The result of this theory obviously is that, whenever the danger is not of that obviously imminent and glaring character which it contemplates, the question whether the servant is debarred from recovering on the ground of contributory negligence depends on the use which he made of his knowledge of the danger. *Wilson v. Louisville & N. R. Co.* (1887) 85 Ala. 269, 4 So. 701; *Mobile & B. R. Co. v. Holborn* (1887) 84 Ala. 133, 4 So. 146. But these Alabama cases embody a doctrine different from that of the decisions of the same court cited in *l. e. supra*.

h. Missouri doctrine as to the effect of the servant's continuance of work with knowledge.

The Missouri decisions upon the disabling effects of the servant's continuance of work with knowledge of abnormal conditions produced by the master's breach of duty are so extraordinarily conflicting that it will be convenient to review them separately.

In a later subdivision, the confusion, both of doctrine and terminology, which these cases exhibit, will be noted. At present we are concerned merely with the effect of the actual rules administered.

About fifteen years ago the supreme court, which then had dealt with the defenses of contributory negligence and assumption of risks on precisely the same footing as the courts of other states, enunciated a doctrine.

The rulings based on the latter defense have been noted elsewhere. A case in which the servant was held unable, as a matter of law, to recover on the ground that he was negligent in continuing to work with knowledge of a breach of duty by the master, and without reporting it, is *McDermott v. Hannibal & St. J. R. Co.* (1885) 87 Mo. 285, where it was held that the action was barred because the plaintiff knew of the incompetency of the vice principal whose act caused the injury. Two judges dissented, but the division seems to have been merely on the special ground that the delinquent servant was a vice principal, the contention on behalf of the plaintiff being that this circumstance took the case out of the operation of the rule which would otherwise have been applied, the effect of which, as a whole, was to deprive the master of the benefit of the latter defense, in cases where the risk was due to his breach of duty, and to make the servant's right to recover turn solely upon the question whether, in remaining in the employment, he had acted as a prudent man.

This doctrine was taken up and elaborated by Messrs. Shearman & Redfield in their well-known treatise on Negligence, 4th ed. 1888, § 211, 212.

Most of this passage has been altered as respects the language, or altogether excised, in the last edition of this treatise. But the authors evidently remain of the same opinion, as they lay it down that the true rule is that a servant can recover for an injury suffered from defects due to the master's fault of which he had notice, if, under all the circumstances, a servant of ordinary prudence, acting with such prudence, would, under similar conditions, have continued the work under the same risk, and not otherwise. If the "true rule" is the one sustained by the great weight of authority the present writer takes leave to demur very strongly to the correctness of this statement.

It may be asserted with confidence that outside of jurisdictions in which the theory of the learned authors themselves has been deliberately adopted, no decision has ever been rendered which supports their view that contribu-

tory negligence is the only defense available to the master under the circumstances supposed, though it may be conceded that more authority may be found for the doctrine that the negligence of the plaintiff is for the jury, even when the conditions and the resulting risks are both known. For instance, in *McMahon v. Port Henry Iron Ore Co.* (1881) 24 Hun, 48, which is given a prominent place among their citations, we find language to this effect, but it would be putting a strained construction on the words of the court to suppose that they imply that the defense of assumption of risks is excluded altogether where the risks are caused by the master's breach of duty. Even if this construction could be regarded as the correct one, the rule thus arrived at would now be of no authority whatever in view of later decisions of the New York court of appeals. See, especially, *Knisley v. Pratt* (1896) 148 N. Y. 372, 32 L. R. A. 867, 42 N. E. 986, a strong case, as the duty violated was statutory, and the plaintiff was a minor, and yet the risk was held to have been assumed. Moreover, it is only necessary to examine the recent cases to see that the doctrine of the assumption of known risks is applied as regularly and consistently as it ever was in the great majority of the states, and that judges have, with the few exceptions adverted to, declined to countenance the logical and juridical paradox that the question whether a contract shall be implied may depend upon whether a prudent person would have bound himself by it.

It is submitted, therefore, that the statement criticised is not the "true rule," either on principle or authority. For similar reasons, the clause which has been inserted in § 206 of the same treatise, limiting the cases in which a risk is assumed by the servant to those in which "ordinary prudence would require him to refuse to encounter it, cannot be conceded to be anything but a wholly unwarrantable attempt to qualify that doctrine by the addition of an irrelevant and incongruous element. Even in Missouri itself the doctrine of the learned authors has been so severely shaken by the latest decisions that it may fairly be doubted whether the earlier ones in which it was embodied are any longer to be regarded as good law. (See *infra*).

In two Missouri cases, decided after the publication of the passage we have been reviewing, its statement of principle was expressly approved: *Hamilton v. Rich Hill Coal Min. Co.* (1891) 108 Mo. 364, 18 S. W. 977, per Black, J.; *Thorpe v. Missouri P. R. Co.* (1886) 89 Mo. 650, 58 Am. Rep. 120, 2 S. W. 3.

In *Hamilton v. Rich Hill Coal Min. Co.* Black, J., referring to earlier decisions, said: "The question, whether continuing in the service after knowledge of danger arising from a defective appliance will defeat the servant's action, is properly a question of contributory negligence, as the authorities before cited well show, and is to be determined by rules applicable in such cases."

The position of the court, as he pointed out, was that the doctrine by which a servant, who continues in the employment after knowledge of a defect in the appliance, thereby waives all objections to such defective instrumentality and takes upon himself all the risks, makes it the duty of the servant to abandon his contract of employment, because of a breach of duty on the part of the master, and is unjust and unreasonable.

In another case the same judge remarked that the qualification of the principles previously administered was "in accord with common fairness and the daily conduct of masters and

servants." *Devlin v. Wabash, St. L. & P. R. Co.* (1885) 87 Mo. 545, per Black, J.

See also, as to the reasons of abstract justice which underly the rule, *Thorpe v. Missouri P. R. Co.* (1886) 89 Mo. 650, 58 Am. Rep. 120, 2 S. W. 3; *Hughes v. Fagin* (1891) 46 Mo. App. 43.

In working out this theory the courts necessarily follow lines which, up to a certain point, are very similar to those which are traceable in the decisions in jurisdictions in which contributory negligence is treated as being a concurrent and alternative defense, and not an exclusive one. Thus, mere knowledge of a defect is held not to be enough, as a matter of law, to bar the servant's action. *Mahaney v. St. Louis & H. R. Co.* (1891) 108 Mo. 191, 18 S. W. 295 (defective track); *Sullivan v. Hannibal & St. J. R. Co.* (1891) 107 Mo. 66, 17 S. W. 748 (servant knew staging to be defective); *Hamilton v. Rich Hill Coal Min. Co.* (1891) 105 Mo. 364, 18 S. W. 977 (unblocked rail); *Donahoe v. Kansas City* (1897) 136 Mo. 657, 38 S. W. 571 (insufficient bracing of trench); *Warner v. Chicago, R. I. & P. R. Co.* (1895) 62 Mo. App. 184 (plaintiff's recovery not barred because a ladder which broke with him and caused the injury was a simple contrivance); *Stoddard v. St. Louis, K. C. & N. R. Co.* (1877) 65 Mo. 520 (holding that, although the evidence tended to show that plaintiff had knowledge of a spring frog, and the lowness of the brake beam of a tender, and that two hands instead of four were undertaking to make up the train, the question whether the action of the plaintiff in making up the train while having this knowledge was of such a reckless character as to make it contributory negligence on his part); *Hughes v. Fagin* (1891) 46 Mo. App. 44 (incompetent fellow servant); *Irmer v. St. Louis Brewing Co.* (1896) 69 Mo. App. 17 (here the servant had only partial knowledge of the conditions); *Lee v. Chicago, R. I. & P. R. Co.* (1894) 57 Mo. App. 350 (same facts); and the cases cited *infra*.

An instruction to the effect that, "if the plaintiff had equal means of knowledge with the defendant, in ascertaining the alleged incompetency of . . . [a fellow servant], then the plaintiff is not entitled to recover," is erroneous. *Williams v. Missouri P. R. Co.* (1891) 109 Mo. 475, 18 S. W. 1098.

But the language used to describe the circumstances under which the negligence of the servant still remains a question for the jury indicates that, not only is his knowledge of the danger not enough to bar the action, but that the servant may, without necessarily losing his right to an indemnity, go on working in the face of all but the more serious kinds of peril. To justify the court in determining that he was, as a matter of law, guilty of negligence, the instrumentality which caused the injury must have been so "glaringly defective" (*Huhn v. Missouri P. R. Co.* (1887) 92 Mo. 440, 4 S. W. 937; *O'Mellia v. Kansas City, St. J. & C. R. Co.* (1892) 115 Mo. 205, 21 S. W. 503), "so obviously and immediately dangerous,"—that a man of common prudence would refuse to use it. *Settle v. St. Louis & S. F. R. Co.* (1895) 127 Mo. 336, 30 S. W. 125 (brakeman allowed to recover for injuries received through a defective handhold on a car); *Waldhler v. Hannibal & St. J. R. Co.* (1885) 87 Mo. 37 (broken plate of frog, not such a "glaring and obvious" defect, as to operate as conclusive evidence that the place of work was necessarily dangerous).

Or one which it was not reasonable to suppose might be "safely used by the exercise of care and caution." *Benham v. Taylor* (1896) 49 L. R. A.

66 Mo. App. 308; *Warner v. Chicago, R. I. & P. R. Co.* (1895) 62 Mo. App. 192; *Bullmaster v. St. Joseph* (1897) 70 Mo. App. 60. If the defects or insufficiency in the appliances—which term embraces the men employed to do the work, as well as other instrumentalities employed—is so great that, obviously, with the use of great caution, the danger was imminent, then, as a matter of law, the servant who incurs the risk is guilty of contributory negligence, and cannot recover. But if, upon this question, there is substantial doubt, the question is one of fact for the jury, and a nonsuit or demurrer to the evidence is not permissible. *Thorpe v. Missouri P. R. Co.* (1886) 89 Mo. 650, 58 Am. Rep. 120, 2 S. W. 3. In the following cases, also, in which the culpability of the plaintiff was held to be a question for the jury, this aspect of the situation was emphasized: *Soeder v. St. Louis, I. M. & S. R. Co.* (1890) 100 Mo. 673, 13 S. W. 714 (brakeman knew that track was rendered unsafe by a defective rail); *Hamilton v. Rich Hill Coal Min. Co.* (1891) 108 Mo. 364, 18 S. W. 977 (want of blocking between switch rails); *McMullen v. Missouri, K. & T. R. Co.* (1894) 60 Mo. App. 231 (inadequate number of servants).

Or "so far out of repair that it would be necessarily dangerous to the mind of a prudent person" to use it. *Devlin v. Wabash, St. L. & P. R. Co.* (1885) 87 Mo. 545 (defective track injured engineer).

Or one of which the danger was "apparent and threatening." *Musick v. Jacob Bold Pkg. Co.* (1894) 58 Mo. App. 322 (open and unguarded tank in a dark room held to be of this character).

Or the defect must have been one which "threatened immediate injury." *Stephens v. Hannibal & St. J. R. Co.* (1888) 96 Mo. 207, 9 S. W. 589; *Swadley v. Missouri P. R. Co.* (1893) 118 Mo. 268, 24 S. W. 140; *Huhn v. Missouri P. R. Co.* (1887) 92 Mo. 440, 4 S. W. 937 (want of blocking on railway).

Or the "increased danger" must have been so "imminent and threatening as to require him to abandon the service." *Reichle v. Gruensfelder* (1892) 52 Mo. App. 43.

Or "so glaring and obvious that there could be no fair debate about the question whether a prudent man would assume the risk under the circumstances." *Jones v. St. Louis, N. & P. Packet Co.* (1890) 43 Mo. App. 398.

This doctrine has not obtained much foothold outside of Missouri.

The passage from Messrs. Shearman & Redfield's treatise which was quoted *supra*, has been cited with approval in *Martin v. California C. R. Co.* (1892) 94 Cal. 326, 20 Pac. 645, and *Colorado C. R. Co. v. Ogden* (1877) 3 Colo. 499.

The Missouri decisions are followed in *Dwyer v. St. Louis & S. F. R. Co.* (1892) 52 Fed. Rep. 87; *Sioux City & P. R. Co. v. Finlayson* (1884) 16 Neb. 578, 40 Am. Rep. 724, 20 N. W. 860; *Lee v. Smart* (1895) 45 Neb. 318, 63 N. W. 940; *The Serapis* (1891) 49 Fed. Rep. 393. Overruled in (1892) 8 U. S. App. 49, 51 Fed. Rep. 91, 2 C. C. A. 102.

It has been explicitly rejected in some states. In *East Tennessee, V. & G. R. Co. v. Duffield* (1883) 12 Lea, 68, 47 Am. Rep. 319, the court remarked that this modification of the general rule was difficult to maintain on principle, as it virtually changed the rule as to the free agency of the servant, and required that the master should be more careful of the servant than the servant is of himself. It is, of course, wholly inconsistent with the great majority of the American cases illustrating the doctrine of an assumption of extraordinary risks.

Even in Missouri itself the ordinary doctrine of assumption of risks has never been entirely discarded for any great length of time, and within recent years the courts have shown a marked tendency to fall into line with those of other jurisdictions.

Passing over, as immaterial in the present discussion, the decisions of a date earlier than that at which the "glaring danger" doctrine first made its appearance, we find an explicit recognition of the doctrine of assumption of risks in *Alcorn v. Chicago & A. R. Co.* (1891) 108 Mo. 81, 18 S. W. 188. *Reichla v. Gruensfelder* (1892) 52 Mo. App. 43, seems to be another affirmation of the same principle. In the following year it was held that an instruction that the plaintiff's action is not barred, unless the danger is apparent and threatening, is misleading. *Fugler v. Bothe* (1890) 43 Mo. App. 44, per *Rombauer, P. J.*, in a dissenting opinion which was adopted by the supreme court (1893) 117 Mo. 487, 22 S. W. 1113.

Countz v. Missouri P. R. Co. (1893) 115 Mo. 669, 22 S. W. 572 (defective car wheel), also seems to be argued in the assumption that, if the servant's knowledge should have been found by the jury, the servant's action would not have been maintainable.

Fugler v. Bothe, *supra*, was thought by the St. Louis court of appeals to have sounded the knell of the "immediate and threatening danger doctrine." *Moore v. St. Louis Wire Mill Co.* (1893) 55 Mo. App. 401, 495.

But *Settle v. St. Louis & S. F. R. Co.* (1895) 127 Mo. 336, 30 S. W. 125, another emphatic indorsement of the supposedly doomed rule, was still deemed to be good law.

It was remarked in *Marshall v. Kansas City Hay Press Co.* (1897) 69 Mo. App. 256, that the doctrine of *Fugler v. Bothe* was "restored and vitalized" in *Steinhauer v. Spraul* (1895) 127 Mo. 541, 27 L. R. A. 441, 28 S. W. 620, 30 S. W. 102.

It is, perhaps, open to discussion whether the risk in that case was not held to be assumed on the ground that it was an ordinary one.

But in *Nugent v. Kauffman Mill Co.* (1895) 131 Mo. 241, 33 S. W. 428, we find a categorical enunciation of the doctrine of assumption of extraordinary risks, in the court's discussion of one of the theories of the evidence upon which the plaintiff relied, though the case really turned on the view that the danger was one incident to the work for which the servant was hired.

In two late cases the decision in *Fugler v. Bothe* (1893) 117 Mo. 487, 22 N. W. 1113, was followed by the court of appeals: *Benham v. Taylor* (1896) 66 Mo. App. 308 (structure close to track in mine); *Wray v. Southwestern Electric Light & Water Power Co.* (1897) 68 Mo. App. 380 (switch in headboard in electric-light establishment was out of repair).

But, singularly enough, in *Irmer v. St. Louis Brewing Co.* (1897) 69 Mo. App. 17, decided in the same year, the court cited, in support of its ruling, the decision of the court of appeals in *Fugler v. Bothe*, which, as already mentioned, was reversed by the supreme court.

It should be remarked, moreover, that the decisions in other states, which the courts of Missouri have cited in support of this doctrine,—for example, *Perigo v. Chicago, R. I. & P. R. Co.* (1880) 55 Iowa, 326, 7 N. W. 627; *Hawley v. Northern C. R. Co.* (1880) 82 N. Y. 370; *Patterson v. Pittsburg & C. R. Co.* (1874) 76 Ia. 389, 18 Am. Rep. 412; *Snow v. Housatonic R. Co.* (1864) 8 Allen, 441, 85 Am. Dec. 720,—and relied upon in *Huhn v. Missouri P. & N. R. Co.* (1887) 92 Mo. 440, 4 S. W. 937, are not

fairly available as precedents, except to a limited extent. The mere fact that they emanate from jurisdictions in which the defenses both of assumption of risks and of contributory negligence are recognized as being appropriate to cases where the effect of the servant's continuance of work with knowledge of an unusual risk is in controversy, proves that they are not authorities for the principle that evidence of such knowledge raises a question of contributory negligence exclusively.

1. Failure of servant to report defect.

The duty of the servant to report or complain of the dangerous condition is quite frequently referred to in cases of the type now under review, as well as in those respecting the assumption of risks. From the language used in some of them it would seem that the failure to perform this duty was regarded merely as a supplementary and cumulative ground for barring his action, rather than as an indispensable ingredient of the defense. *Baltimore & O. R. Co. v. Baugh* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *McQueen v. Central Branch U. P. R. Co.* (1883) 30 Kan. 691, 1 Pac. 139; *Lawrence v. Hagemeyer & Co.* (1892) 93 Ky. 591, 20 S. W. 704; *Jones v. Roach* (1876) 9 Jones & S. 248; *Pollich v. Sellers* (1890) 42 La. Ann. 623, 7 So. 786.

"If the engineer," said the court in *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 213, 224, 25 L. ed. 612, 617, "after discovering or recognizing the defective condition of the cow-catcher or pilot, had continued to use the engine without giving notice thereof to the proper officers of the company, he would undoubtedly have been guilty of such contributory negligence as to bar a recovery, so far as such defect was found to have been the efficient cause of the death. He would be held, in that case, to have himself risked the dangers which might result from the use of the engine in such defective condition."

But it has also been specifically laid down that the servant's continuance of work with knowledge of the risk is contributory negligence, as matter of law, only where the servant has failed to object or protest. *Greenleaf v. Dubuque & S. City R. Co.* (1871) 33 Iowa, 52.

And its essentiality to this extent appears to be recognized in other rulings. See, especially, the following Illinois cases: *Camp Point Mfg. Co. v. Ballou* (1874) 71 Ill. 417; *Toledo, W. & W. R. Co. v. Eddy* (1874) 72 Ill. 138; *St. Louis & S. E. R. Co. v. Britz* (1874) 72 Ill. 256; *Pennsylvania Co. v. Lynch* (1878) 90 Ill. 333; *Missouri Furnace Co. v. Abend* (1883) 107 Ill. 44, 47 Am. Rep. 425; *United States Rolling Stock Co. v. Wilder* (1886) 116 Ill. 100, 5 N. E. 100; *Wabash, St. L. & P. R. Co. v. Thompson* (1884) 15 Ill. App. 117; *Evans v. Chessmond* (1890) 38 Ill. App. 615; *St. Louis Press Brick Co. v. Kenyon* (1893) 57 Ill. App. 640; *Peoria, D. & E. R. Co. v. Puckett* (1893) 52 Ill. App. 223.

Other decisions, which are perhaps to the same effect, are *McDermott v. Hannibal & St. J. R. Co.* (1885) 87 Mo. 285; *Atlanta & C. Air Line R. Co. v. Ray* (1883) 70 Ga. 674; *McCharles v. Horn Silver Min. & Smelting Co.* (1894) 10 Utah, 470, 37 Pac. 733 (recklessness of fellow servant to plaintiff); *Coal & Min. Co. v. Clay* (1894) 51 Ohio St. 542, *sub nom.* *Consolidated Coal & Min. Co. v. Floyd*, 25 L. R. A. 848, 38 N. E. 610; *Frazier v. Pennsylvania R. Co.* (1860) 38 Pa. 104, 80 Am. Dec. 467; *Bemis v. Roberts* (1891) 143 Pa. 1, 21 Atl. 998; *Lineoski v. Susquehanna Coal Co.* (1893) 157 Pa. 133, 27 Atl. 577.

Under the characteristic Missouri doctrine reviewed in *I. h.*, neither the failure to complain, nor the making of a complaint, is decisive. *Thorpe v. Missouri P. R. Co.* (1886) 89 Mo. 652, 58 Am. Rep. 120, 2 S. W. 3.

If for any reason it has become the specific duty of the servant to inform the master of any defects which have come to his knowledge, it is clear that a dereliction of that duty constitutes contributive fault which will preclude recovery, as a matter of law, independently of the question whether such fault can be predicated of the continuance of work alone. *Knoxville Iron Co. v. Smith* (1887) 86 Tenn. 45, 3 S. E. 438 (held error for the court to refuse an instruction to the effect that a convict in a coal mine, who failed to report that a roof was dangerous as was required by an order promulgated by the penitentiary lessees, could not recover). See also the cases on this point under the various employers' liability acts.

1. Duty of the servant to quit the employment when he ascertains that he is exposed to an abnormal danger.

The doctrine that it is contributory negligence to continue working after the existence of an abnormal risk is ascertained obviously involves the corollary that there is a positive duty on the servant's part to withdraw from the dangerous environment altogether, within a reasonable time after he has, or ought to have, discovered its unsafety.

If the servant has notice of any defect from which injury may be reasonably apprehended, he should, generally speaking, quit the service for his own protection. *Eureka Co. v. Bass* (1886) 81 Ala. 200, 60 Am. Rep. 152, 8 So. 216.

In *Davis v. Baltimore & O. R. Co.* (1893) 152 Pa. 314, 25 Atl. 498, the plaintiff knew that box cars were in common use on the rear of freight trains, and, if he did not think them reasonably safe with the exercise of reasonable care it was his own folly to ride on one.

If a servant, after notice of the extra risks occasioned by the incompetency of a fellow servant, continues in the master's service, it will be at his own peril, for the law in such case will presume that he intended to assume them; otherwise he would have quit the master's service. *United States Rolling Stock Co. v. Wilder* (1886) 116 Ill. 100, 5 N. E. 92. See also *Baltimore & O. R. Co. v. Baugh* (1892) 149 U. S. 405, 37 L. ed. 787, 13 Sup. Ct. Rep. 914; *Hjorman v. Fort Bragg Redwood Co.* (1894) 104 Cal. 626, 38 Pac. 451; *Camp Point Mfg. Co. v. Ballou* (1874) 71 Ill. 417; *Chicago & A. R. Co. v. Munroe* (1877) 85 Ill. 25; *Illinois C. R. Co. v. Jones* (1882) 11 Ill. App. 324; *Missouri Furnace Co. v. Abend* (1883) 107 Ill. 44, 47 Am. Rep. 425; *Swift & Co. v. Rutkowski* (1897) 167 Ill. 156, 47 N. E. 362; *Smith v. Drake* (1889) 125 Pa. 501, 17 Atl. 449; *Philadelphia & R. R. Co. v. Huber* (1889) 128 Pa. 63, 5 L. R. A. 439, 18 Atl. 334; *Lineoski v. Susquehanna Coal Co.* (1893) 157 Pa. 153, 27 Atl. 577; *Hawv v. Pennsylvania R. Co.* (1887; Pa.) 9 Cent. Rep. 786, 11 Atl. 459; *Jackson v. Kansas City, L. & S. K. R. Co.* (1884) 31 Kan. 761, 3 Pac. 501; *Pittsburgh & W. Coal Co. v. Estievenard* (1895) 53 Ohio St. 43, 40 N. E. 725; *Coal & Min. Co. v. Clay* (1894) 51 Ohio St. 542, *sub nom.* *Consolidated Coal & Min. Co. v. Floyd*, 25 L. R. A. 848, 38 N. E. 610. In *Bannon v. Lutz* (1893) 158 Pa. 166, 27 Atl. 890, the trial judge was asked by defendant to give the following instruction: "If the employee thinks that his employer is conducting his business in an unsafe way it is his duty to leave it, and he cannot recover for injuries received by reason of the kind of machinery, or 49 L. R. A.

mode of doing business which has been used and practised for several years, and with which the employee was familiar." The following remarks made by him in reply were approved, as a whole, by the supreme court: "In some particulars, it is, in my judgment, correct, and in others it is incorrect. In my judgment, if the employee thinks that his employer is conducting his business in an unsafe way, then it is his duty to quit it; he cannot, in other words, dictate to his employer how to conduct the business; but it is the duty of the employer to furnish proper machinery to conduct it. In other words, I make a distinction between a man conducting his business, and furnishing appliances with which to conduct it. He can conduct it as he thinks proper, and if the employee don't like that way he must leave it."

Or discontinue the use of the defective instrumentality,—particularly where he has it within his power to remedy the defect. *Bemis v. Roberts* (1891) 143 Pa. 1, 21 Atl. 998.

Or, where the peril is due to the incompetence of a fellow servant, refuse to work with him. *Frazier v. Pennsylvania R. Co.* (1860) 38 Pa. 104, 80 Am. Dec. 467.

Where the doctrine prevails, that it is not, as matter of law, culpable to continue working with a knowledge of an extraordinary risk, these alternative courses are not viewed as being absolutely obligatory.

It is undoubtedly the duty of a master, where the servant is engaged in hazardous employments, to see that every reasonable caution on his part, to insure safety, is observed. The primary duty of the servant is obedience, and it is not to be expected that he will, upon mere imaginary danger, of which he may be conscious, assert his right to relinquish his employment. He naturally looks to his employer for the observance of all reasonable and proper precautions, and his continuance in the service when such precautions have not been observed is rather to be attributed to confidence reposed in those to whose superior judgment he yields. *Keegan v. Kavanaugh* (1876) 62 Mo. 232. See also the note to *Dallemand v. Saalfeldt* (Ill.) 48 L. R. A. 753, on injuries received in obeying specific orders.

One weighty reason of the considerations emphasized by the courts is the natural unwillingness of an employee to embark on a quest for other work, which may be extremely difficult to obtain.

In *Harrison v. Denver & R. G. W. R. Co.* (1891) 7 Utah, 523, 27 Pac. 728, the court, in upholding the correctness of a charge to the effect that a servant is not bound to set up his own judgment against that of his master as to the safety of the work, under peril of dismissal, where the work ordered to be done is not obviously dangerous, or of such a nature that he can see that it cannot be performed with safety, or where there may be a difference of opinion about it in the minds of reasonable and prudent persons, said: "An employee is not usually in a condition to abandon his employment for slight reason; for out of employment means often out of bread and meat for his family, and he will take unusual and hazardous risks to keep his place, and no employer ought to put him to the choice of peril, or loss of employment."

See also note to *O'Maley v. South Boston Gaslight Co.* 47 L. R. A. 161, *Volenti non fit injuria* as a defense to actions by injured servants.

What period of grace shall be allowed the servant is a question upon which the decisions do not throw much light.

Where the servant has notified the master,

or the master's representative, of the danger which he has discovered, the rule is that, if that danger is not imminent and obvious, he may continue to encounter it for what is described as a "short," or "reasonable," time with the expectation that the master will perform his duty by removing it. *Rush v. Missouri P. R. Co.* (1887) 36 Kan. 120, 12 Pac. 582; *Chicago, W. & V. Coal Co. v. Peterson* (1890) 30 Ill. App. 114 (miner apprehended that the roof of a drift was dangerous, but had demanded that the owner should, as he was bound to do by statute, supply material for propping it); *Ross v. Chicago, M. & St. P. R. Co.* (1881) 2 McCrary, 235, 8 Fed. Rep. 544 (jury charges that two or three weeks was not an unreasonable time to remain at work with an incompetent conservant whose unfitness the plaintiff had reported).

So, if he has justifiable grounds for believing that the master will remove the source of danger, whether his impression is the result of an explicit promise or not, he may continue working without culpability as long as the jury may consider it to be reasonable to retain that belief. *Hoffman v. Dickinson* (1888) 31 W. Va. 142, 6 S. E. 53.

The case of a railway servant stands upon a special footing, as he is deemed to owe a duty to the public as well as to his employers, and the effect of the decision, as a whole, is that he is justified in taking much greater risks than employees in other occupations, without necessarily forfeiting his right of action. Under ordinary circumstances, such a servant seems to be, at all events, entitled to remain at work until he obtains an opportunity of notifying the proper agent of the master as to the existence of the danger. *Henlon v. New York, N. H. & H. R. Co.* (1897) 51 U. S. App. 157, 79 Fed. Rep. 903, 25 C. C. A. 223 (injury to station master owing partly to the condition of a platform, and partly to the want of a proper system for regulating the approach of trains to the station).

In *Louisville & N. R. Co. v. Kelly* (1894) 24 U. S. App. 103, 63 Fed. Rep. 407, 11 C. C. A. 260, it was held that the trial judge had properly refused a request for an instruction to the effect that, if the plaintiff knew that the deadwoods of the cars he was attempting to couple were out of repair, that there were holes and pitfalls in the roadbed, and that the fireman in charge of the engine was incompetent, and remained in the service of the company without making objection, and without receiving any promise that the causes of danger mentioned should be removed, he was not entitled to relief. If the defendant in error, "said the court of appeals," knew that the deadwoods were out of repair, he must, in all probability, have acquired the knowledge on the spot; and, consistently with the terms of the instruction, his supposed knowledge of the condition of the track, and of the incompetency of the fireman as an engineer, may have come to him so recently as to have afforded him no opportunity to make objection or complaint. Besides, even if he had the supposed knowledge, it was a question for the jury whether or not, under the circumstances, he ought to have attempted to make the coupling, and in so doing was himself negligent, or to be considered as having voluntarily assumed the risk of his act. The question was essentially one of contributory negligence, and the instruction should have been so framed as to leave it to the jury."

It is only in very extreme circumstances that he will not be warranted in remaining on a train until it reaches the next station.

The danger arising from the want of a step
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on one of the cars in a freight train over which a brakeman may have to pass is not so imminent as to subject him to the charge of recklessness in having remained at his post, where he is assured by the conductor that the car will be removed from the train when it reaches a station a few miles distant, if, upon examining his manifests, he finds that it does not contain perishable freight. *Kane v. Northern C. R. Co.* (1888) 128 U. S. 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16.

So it has been said, *arguendo*, that an engineer is not necessarily negligent because he does not abandon his engine between two stations when he first discovers it to be defective. *Irvine v. Flint & P. M. R. Co.* (1891) 89 Mich. 416, 50 N. Y. 1008. See also the remarks of *Brewer, J.*, in *O'Rourke v. Union P. R. Co.* (1884) 22 Fed. Rep. 191.

Usually he may continue to operate the engine until he reaches a station where the defect can be cured or a new engine obtained, if the defect is such that he might reasonably believe that it could be safely operated by great care, and if the risk is not greater than persons of ordinary prudence would take. *Fordyce v. Edwards* (1895) 60 Ark. 438, 30 S. W. 758.

So, also, where the unfitness of a servant was ascertained for the first time on the trip, it was held correct to refuse to give the peremptory instructions asked for by the defendant, that if the plaintiff knew, or even had the opportunity of knowing, before he fell from the car in question, that the engineer was an unfit or unsafe man to run the engine, it was the plaintiff's duty absolutely to refuse to work with him any longer. The Supreme Court said: "The duty of the plaintiff, under such circumstances, is not to be determined by the single fact of his knowledge of the danger he incurred by continuing to serve with a coemployee known by him to be an unfit and incompetent person. It was enough for the court to say, as it did, that a failure on the part of the plaintiff to refuse to work, in view of that knowledge on his part, might be negligence on his part. The qualification was correct, that it was for the jury to say, from all the attending circumstances, whether his failure to do so was in fact contributory negligence. A suitable judgment on that question can only be reached by carefully weighing the probable consequences of both courses of conduct, and it might well happen that even at the risk of injury to himself, occasioned by the unskilfulness of his coemployee, the plaintiff might still reasonably be regarded as under a duty not suddenly and instantly to refuse to continue in the conduct of the business of his principal. Many cases might be conceived in which the latter course might even increase the danger to the plaintiff himself, and entail great injury and loss to others." *Northern P. R. Co. v. Mares* (1887) 123 U. S. 710, 31 L. ed. 296, 8 Sup. Ct. Rep. 321.

A brakeman is not chargeable with negligence in attempting to use the brakes on cars so loaded as to make their use unsafe, when he first discovers the fact at a time when the cars are in rapid motion toward a standing car upon which others are at work and in imminent danger. *Irvine v. Flint & P. M. R. Co.* (1891) 89 Mich. 416, 50 N. W. 1008. To the same effect, see *Francis v. Kansas City, St. J. & C. B. R. Co.* (1895) 127 Mo. 658, 28 S. W. 842, affirmed in (1895) 30 S. W. 129 (switchman injured by incompetence of engineer, not bound to abandon service immediately); *Groff v. Cincinnati & I. R. Co.* (1871) 1 Cin. Sup. Ct. Rep. 264 (defective bridge).

But the exigencies of railway traffic will not

excuse the servant for running the risk of almost certain injury.

No recovery can be had by a fireman who remained, without protest, on a detached engine when he knew that it was about to be run without orders over a section of the road on which, as he was aware, the engineer had no right to take it without orders. *Baltimore & O. R. Co. v. Baugh* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914, Field, J., dissenting, but only on the ground of the fireman's knowledge of the conditions. The following remarks of the learned judge, made after the review of the evidence which led him to his conclusion as to the facts, are of sufficient general interest to be worth quoting: "His information as to what was known, and consequently directed or omitted, by the engineer on that subject was too imperfect for him to act upon it. His continuance as fireman on the locomotive after its movement to return to Bellaire was not sufficient knowledge of any failure of the engineer to give the proper orders as to a scheduled train to justify an abandonment of the locomotive. It was under the direction of the engineer, not of the fireman, and he may have felt confident that it could be run on a side track if necessary to avoid any possible collision with a train coming in the opposite direction, as was sometimes done. It would be a dangerous notion to put into the heads of firemen and other employees of a railroad company that if they had reason to believe, without positive information on the subject, that dangers attended the course pursued by the movements of the train under the direction of its conductors, they would be deemed to assume the risk of such movements if they did not expostulate with him, and, if he did not heed the expostulation, leave the train, even after it had commenced one of its regular trips. A strange set of legal questions would arise, more embarrassing to the courts than the fellow servant question, if such action should be deemed essential to the retention by the employee of the right to claim indemnity for injuries which might follow from the course pursued. If the employees could abandon a train after it had commenced one of its regular trips when they had reason to believe, without absolute information, that danger might attend their continuance on it, new strikes of employees would spring up to embarrass the commerce of the country and annoy the community, founded upon such alleged apprehensions. The circumstances attending the cases in which an employee has been held to have voluntarily assumed the risks of an irregular, improper, or ill-advised movement of a train, under directions of its conductor, are essentially different from those of the case before us."

An engineer is guilty of contributory negligence, where, of his own volition and without orders, he attempts to take his train across a bridge which he has reason, from his personal examination, to believe to have become unsafe through a flood, the waters of which are still rising. *Columbus & W. R. Co. v. Bridges* (1888) 86 Ala. 448, 5 So. 864.

II. Relation between the defenses of assumption of risks and contributory negligence.

a. Introductory.

As the conception underlying the servant's assumption of a known risk is essentially that of an implied agreement to accept the responsibility for any bodily hurt which may result from his exposure to that risk, and the theory upon which contributory negligence is held to preclude him from recovery is that he was

guilty of imprudence in the premises, and that this imprudence was partially or entirely the cause of his injury (*Wharton, Neg.* § 300; *Shearm. & Redf. Neg.* 5th ed. § 63; 1 *Beven, Neg.* pp. 168 *et seq.*; *Pollock, Torts*, p. 374), the differentiation of the two defenses in practice would seem to present no great difficulties. But, as a matter of fact, the obvious distinction between them and the logical results of that distinction have, in a singularly large number of cases, been lost sight of, or treated as immaterial, or even denied to exist.

This remark is not intended to apply to cases in which the courts have laid down rules which are couched in such general terms that it is for practical purposes a mere paraphrase of the maxim, *Volenti non fit injuria*. (See note to *O'Maley v. South Boston Gaslight Co. (Mass.)* 47 L. R. A. 161.) Such are the following:

When an employee, after having the opportunity of becoming acquainted with the risks of his situation, accepts them, he cannot complain if he is subsequently injured by such exposure. *St. Louis & S. E. R. Co. v. Britz* (1874) 72 Ill. 257.

If the servant, after having knowledge of the defective machinery, apparatus, or material, remains in the service, and attempts to use the same, and is thereby injured, he cannot recover of the company for such injury. *Houston & T. C. R. Co. v. Myers* (1881) 55 Tex. 111, quoting *Pierce, Railroads*, p. 379, note 4.

If a servant wilfully encounters dangers which are known to him, or are notorious, the master is not responsible for an injury occasioned thereby. *Berns v. Gaston Gas Coal Co.* (1885) 27 W. Va. 285, 55 Am. Rep. 304.

Compare the passage quoted from *Pittsburgh & C. R. Co. v. Sentmeyer* (1879) 92 Pa. 276, 37 Am. Rep. 684, *infra*.

See also *Assop v. Yates* (1858) 2 Hurlst. & N. 768, 27 L. J. Exch. N. S. 156, where recovery was denied simply on the ground of the servant's voluntary continuance at work, without any specific allusion to his assumption of the risk, or contributory negligence; *McCharles v. Horn Silver Min. & Smelting Co.* (1894) 10 Utah, 470, 37 Pac. 733 (verdict for the defendant should be directed where the plaintiff himself has testified that he continued, with knowledge of a fellow servant's unfitness, to expose himself to the dangers arising therefrom—but theory of the defense not explicitly stated).

Sometimes the practice of the court which decided the case to determine the servant's rights from the standpoint of contributory negligence renders it reasonable to infer that, although neither of the two defenses is explicitly mentioned, that was the one really relied on. *Coal Run Coal Co. v. Jones* (1889) 127 Ill. 379, 8 N. E. 865, 20 N. E. 89 (See, as to the rule in Illinois, *e. infra*).

Where the practice of the court varies in this respect, it is a mere matter of surmise which defense was intended to operate, nor is it a matter of much consequence, if, under the given circumstances, simple knowledge of the danger, would, as matter of law, warrant the inference of negligence as well as of an assumption of the risk. Sometimes each of the two defenses seems to have been present to the mind of the judge at different stages in the progress of the case. Thus, in one of the earlier English cases turning on the effect of the servant's knowledge, Chief Baron Pollock remarked during the argument of counsel that a servant "took the risk" if he went on working after the master himself had observed a defect and expressed his opinion about it, while, in the judgment of the court, delivered by Watson, B., the serv-

ant's right to recover was denied on the ground that he knew that the defective appliance was used, and, being "contributory of the injury," came under the principle stated by Lord Cranworth in *Paterson v. Wallace* (1854) 1 Macq. H. L. Cas. 748, that a plaintiff must, as a condition precedent to recovery, establish that the injury arose from no "rashness of his own." *Griffiths v. Gildow* (1858) 3 Hurlst. & N. 648, 27 L. J. Exch. N. S. 404.

In *Dynen v. Leach* (1857) 26 L. J. Exch. N. S. 221, while the other judges rested their decision on the plaintiff's assumption of the risks, Channell, B., took the ground that, by continuing in the defendant's employ, he directly contributed to the accident.

It is most desirable, therefore, to obtain an adequate idea of the true relation between these defenses. Few lawyers, we imagine, realize the extent to which this department of the law has been unnecessarily obscured and complicated through the downright intellectual obliquity or the slovenliness of language by which the boundary line between them has been blurred or obliterated.

b. Logical independence of the two defenses.

The books contain fewer explicit allusions than might be expected to a distinction, of which the existence of two separate lines of decisions in which the servant's voluntary exposure of himself to a known risk is considered from the standpoints of an assumption of the risk and of contributory negligence in incurring that risk, constitutes a practical recognition. But several courts have adverted to the true logical situation in more or less formal language.

Carelessness is not the same thing as intelligent choice. *Bowen, L. J., in Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516. (The remainder of the passage of which this remark forms a part is quoted in note to *O'Maley v. South Boston Gaslight Co.* 47 L. R. A. 161, Div. IX.)

In the same case *Fry, L. J., said*: "There are two matters which often arise for discussion in these cases of negligence, which are, I think, liable to be confused, and yet are inseparable in reason. The one is the willingness of the plaintiff to assume the danger; and this willingness, if assumed with full knowledge, may lessen or remove any duty of the employer to the employed, and may thus prevent the arising of any cause of action, though, in the discharge of the work undertaken, the workman may have been guilty of no negligence. The other is the negligence of the plaintiff, which may have placed him in circumstances of difficulty or danger, or which, when he is placed in such circumstances, may have contributed to the injury. Here there may have been no willingness to enter on the danger, but negligence when in it. In both these questions the knowledge of the plaintiff may be a material ingredient. But the questions are nevertheless distinct."

Assuming the risks of an employment is one thing and quite an essentially different thing from incurring an injury through contributory negligence. *Mundle v. Hill Mfg. Co.* (1894) 86 Me. 400, 30 Atl. 16, following *Miner v. Connecticut River R. Co.* (1891) 153 Mass. 398, 26 N. E. 994.

If with knowledge, or with means of knowledge, equal to his employer's of defects in the machinery, the servant, without remonstrance, voluntarily continues in the service, a waiver of his claim for damages is said to have taken place, or his conduct is regarded as negligence 49 L. R. A.

contributory to the resulting injury. *Wells v. Coe* (1886) 9 Colo. 159, 11 Pac. 50.

There is a clear and logical distinction between a defense resting on the assumption of risks, and that predicated on contributory negligence. *Alcorn v. Chicago & A. R. Co.* (1891) 108 Mo. 81, 18 S. W. 188.

The defenses of contributory negligence and of assumed risk are separate and distinct. The doctrines are applicable under different conditions. Contributory negligence, in a case of this kind, implies the existence of negligence on the part of an injured servant, co-operating with that of a master, and thus aiding in producing the injury.

The doctrine of assumed risks obtains without necessary reference to the existence of negligence. If the servant, with knowledge of a defect in the master's premises, and of a danger and risk incident thereto, continues in the service of the master without proper notice to the latter, he assumes the risk incident to the service and growing out of the existence of the defect, and this without regard to the degree of care which he may exercise in the performance of his labor. *Texas & N. O. R. Co. v. Conroy* (1892) 83 Tex. 214, 18 S. W. 609; *Texas & P. R. Co. v. Bryant* (1894) 8 Tex. Civ. App. 134, 27 S. W. 825. See also *Probert v. Phipps* (1889) 149 Mass. 258, 21 N. E. 370; *Tuttle v. Detroit, G. H. & M. R. Co.* (1887) 122 U. S. 189, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1116; *Southern P. Co. v. Seley* (1894) 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530; *Snedea v. Libera* (1896) 65 Minn. 337, 68 N. W. 36; *Anderson v. C. N. Nelson Lumber Co.* (1896) 67 Minn. 79, 69 N. W. 630; *Wuotilla v. Duluth Lumber Co.* (1887) 37 Minn. 153, 33 N. W. 551; *St. Louis, Ft. S. & W. R. Co. v. Irwin* (1887) 37 Kan. 701, 16 Pac. 146; *Pennsylvania Co. v. Witte* (1896) 15 Ind. App. 583, 43 N. E. 320; and cases cited in II. c.

Not infrequently, also, the distinction emerges in statements, to the effect that evidence of the servant's having begun or continued work with a knowledge of the danger arising from the master's breach of duty raises both the questions whether he assumed that danger, and whether he was negligent. *Donahue v. Drown* (1891) 154 Mass. 21, 27 N. E. 675; *DeLisle v. Ward* (1897) 168 Mass. 579, 47 N. E. 436; *Southern P. Co. v. Seley* (1894) 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530; *McQueen v. Central Branch U. P. R. Co.* (1883) 30 Kan. 691, 1 Pac. 139; *Bailou v. Chicago, M. & St. P. R. Co.* (1882) 54 Wis. 257, 41 Am. Rep. 31, 11 N. W. 559, quoted in *Brossman v. Lehigh Valley R. Co.* (1886) 113 Pa. 490, 57 Am. Rep. 479, 6 Atl. 226; *Bemisch v. Roberts* (1891) 143 Pa. 1, 21 Atl. 998; *Hanrahan v. Brooklyn Elev. R. Co.* (1897) 17 App. Div. 588, 45 N. Y. Supp. 474; *Cook v. St. Paul, M. & M. R. Co.* (1885) 34 Minn. 45, 24 N. W. 311 (a case of specific orders); *Craver v. Christian* (1887) 36 Minn. 413, 31 N. W. 457; *McDonald v. Chicago, St. P. M. & O. R. Co.* (1889) 41 Minn. 439, 43 N. W. 386; *Smith v. E. W. Backus Lumber Co.* (1896) 64 Minn. 447, 67 N. W. 358; *Stone v. Oregon City Mfg. Co.* (1870) 4 Or. 52.

In view of the fact that the defenses are alternative and concurrent, a statement like the following is too broad:

The law does not impute negligence to a servant for using the machinery of his master which he knows to be defective. He merely assumes the risk incident to such defect, and cannot recover damages for any injury which results from it. *Green v. Cross* (1890) 79 Tex. 130, 15 S. W. 220.

Negligence may clearly be imputed if the

master chooses to rely on that defense. *Missouri P. R. Co. v. Somers* (1890) 78 Tex. 439, 14 S. W. 779.

c. Assumption of risk a conclusive defense irrespective of whether servant exercised due care.

It would seem that, in view of the contractual relations of the parties, the first question which, in a natural logical sequence, first demands settlement, is whether the risk which caused the injury was one of those accepted under an implied agreement; and that the question whether the servant's conduct was imprudent only becomes material after the conventional assumption of the risk has been negatived.

That this is the true logical sequence is implied in the remark of the supreme court of Massachusetts that, if the servant has not exercised such care as ordinary persons are accustomed to exercise under like circumstances, he cannot recover, even if he did not assume the risk voluntarily. *Mahoney v. Dore* (1892) 155 Mass. 520, 30 N. E. 366.

In a good many cases we find the essentially secondary and ulterior character of the second question fully recognized. Thus, courts have refused to consider the defense of contributory negligence where the evidence shows that the risk was assumed either as being ordinary (*Northern C. R. Co. v. Husson* (1882) 101 Pa. 1; *McIntosh v. Missouri P. R. Co.* (1894) 58 Mo. App. 281; *Jones v. Roberts* (1894) 57 Ill. App. 56), or for the reason that the servant went on working with a full comprehension of its nature and extent.

In *Carbine v. Bennington & R. R. Co.* (1889) 61 Vt. 348, 17 Atl. 491, the court said, the employee having assumed the perils of his employment in respect to the bridge (low overhead) the question of contributory negligence was not in this case.

An assumption of the risks of the employment by a servant will bar recovery, independently of the principle of contributory negligence. *Conley v. American Exp. Co.* (1895) 87 Me. 352, 32 Atl. 965.

The master's liability arises from the fact that he subjects his servants to dangers which in good faith he ought to provide against, but he is not responsible for those dangers to which the servant voluntarily subjects himself, though he does so without carelessness or breach of duty. *Pittsburgh & C. R. Co. v. Sentmeyer* (1879) 92 Pa. 276, 37 Am. Rep. 684.

The assumption of the risk will exonerate the master from liability, though the servant was himself free from negligence. *Louisville & N. R. Co. v. Orr* (1882) 84 Ind. 50.

An employee may not shield himself from the consequences of a conscious encountering of risk on the ground that he exercised prudence in the undertaking to which the risk attaches, and from which the injury results. *Texas & P. R. Co. v. Bryant* (1894) 8 Tex. Civ. App. 134, 27 S. W. 825.

It matters not what care and caution a servant uses in the discharge of his duties, if his injuries are received on account of the hazards he has assumed,—those that he was acquainted with,—he cannot recover. *Chicago, R. I. & P. R. Co. v. Clark* (1882) 11 Ill. App. 104.

In *Saxon v. Hawksworth* (1872) 26 L. T. N. S. 851, Mellor, J., corrected counsel, who was proceeding to argue that there was no contributory negligence, by the remark: "You mean no acquiescence in the insufficient supply of hands."

In *Perigo v. Chicago, R. I. & P. R. Co.* (1879) 49 L. R. A.

52 Iowa, 276, 3 N. W. 43, the court after referring to decisions relating to the doctrine of assumption of risks, said: The doctrine of these cases is that the negligence of the defendant, in furnishing defective or improperly constructed machinery and implements, is waived by remaining in the employment without protest or promise of amendment. The waiver of the negligence of the defendant places the case in the same position as though the defendant had not been negligent, and without the negligence of the defendant there can be no recovery. This waiver cannot be affected by the particular situation in which the employee may be placed, or the rapidity and promptness with which he may be required to act at the time of the accident. These questions may, very properly, bear upon the question of the contributory negligence of the employee, but they can have no bearing upon the question whether the defendant has been guilty of negligence, about which the employee has a legal right to complain.

In *St. Louis, I. M. & S. R. Co. v. Davis* (1891) 54 Ark. 369, 15 S. W. 895, a case of an unblocked frog, the court said: "We think confusion has sometimes crept into cases like this, from the effort to determine them by the rules of contributory negligence. We do not think they necessarily furnish the correct criterion for determination, but that the contract of employment is a necessary element of consideration. It is an elemental principle that an employee, when he enters into service, agrees to assume all risks ordinarily incident to his employment, and if he is of mature years, experienced in the business undertaken, and knows what instrumentalities are to be used by him, he contracts that he will assume the risks incident to using that class of instrumentality, as well as any other risk incident to the business, and, if the master use proper care in providing the kind contemplated, the employee cannot complain, although some other kind would have been less dangerous; his contract hushes his complaint, regardless of the employer's negligence."

In *Texas & P. R. Co. v. Bradford* (1886) 66 Tex. 732, 59 Am. Rep. 739, 2 S. W. 595, the court remarks: "It has sometimes been held that, although the servant may have been aware of the defect, yet if a man of ordinary prudence on this account would not have refused to do the work, but would have continued in the service and have attempted to perform it, that then he may recover for an injury resulting from such defect. It seems to us that such a rule is unsound; for if the servant, acting as a prudent man would ordinarily act, would undertake to do the work with knowledge of the defect, this very test relieves the master from liability, for the obligations and duties of master and servant are correlative; each is held to that degree of care, in reference to all matters affecting the safety of the servant while in the master's employment, which men of ordinary prudence would or ought to exercise under the same circumstances. If the servant, with a knowledge of the defect, as a prudent man, may undertake the work, can it be said that the master has not exercised that degree of care required of him?" See also *Feely v. Pearson Cordage Co.* (1894) 161 Mass. 426, 37 N. E. 368; *Conley v. American Exp. Co.* (1895) 87 Me. 352, 32 Atl. 965; *Morris v. Gleason* (1877) 1 Ill. App. 517; *Ames v. Lake Shore & M. S. R. Co.* (1893) 135 Ind. 363, 35 N. E. 117; *Louisville & N. R. Co. v. Kemper* (1897) 147 Ind. 561, 47 N. E. 214; *Louisville, N. A. & C. R. Co. v. Sandford* (1889) 117 Ind. 269, 19 N. E. 770; *Wilson v. Winona & St. P. R. Co.* (1887) 37 Minn. 327, 33 N. W. 908; *Gulf, C.*

& S. F. R. Co. v. Schwabbe (1892) 1 Tex. Civ. App. 373, 21 S. W. 708.

Under the strict rules of common-law pleading, an allegation that plaintiff was free from fault does not supply the lack of averments negating the voluntary assumption of the risk. Louisville, N. A. & C. R. Co. v. Corps (1890) 124 Ind. 429, 8 L. R. A. 638, 24 N. E. 1048.

The doctrine of comparative negligence has no application where an unwise or injudicious rule of the master, well known and understood by the servant, produces a hazard which he is presumed to incur voluntarily as an incident of his employment. Illinois C. R. Co. v. Neer (1887) 26 Ill. App. 356.

Accordingly, whenever the evidence suggests that the servant knew of the extraordinary risk which caused the accident, the jury should be instructed regarding the legal consequences of such knowledge, as justifying the inference both of an assumption of the risk and of contributory negligence. Texas & P. R. Co. v. French (1893) 86 Tex. 99, 23 S. W. 642. This requirement was held not to have been satisfied by the following instruction: "If it should appear that plaintiff knew that in performing said duty in the manner that he undertook to do so, or by the exercise of ordinary care might have known, that it was dangerous, and he still continued performing said work, then plaintiff cannot recover. It was the duty of the plaintiff, for his own safety, to exercise that degree of care that a reasonably prudent person would have exercised under the same circumstances; and if his injury resulted to him from a failure on his part to use such care, then you will find for the defendant, and that without regard to whether Collins had or had not failed to perform the duty required of him." The court said: "That the servant must use ordinary diligence to protect himself from danger, and that he is chargeable with notice of such defects as he might discover by the exercise of such diligence, is a different proposition from that embraced in the charge asked and refused. While the charge given is correct, yet the appellant was entitled to have both propositions submitted to the jury, since both issues arose upon the evidence and under the pleadings."

In Texas & N. O. R. Co. v. Conroy (1892) 83 Tex. 216, 18 S. W. 609, the following charge was held incorrect: "If the goose-neck coupling apparatus was not more dangerous than an ordinary coupler, and if plaintiff knew of it being there, and did not use ordinary care as a man of ordinary care and skill should have used, under the circumstances and danger attending the making of such coupling, then the verdict should be for the defendant;" also: "The existence of either one of the facts referred to in the charge, connected by 'and,' would be sufficient to exempt defendant of liability, and each of them should have been given as separate defenses."

An instruction to the effect that continuance of work with actual or constructive knowledge of a defect increasing the dangers of one's employment tends to show contributory negligence has been considered to confound waiver with contributory negligence. Crabell v. Wapello Coal Co. (1886) 68 Iowa, 751, 28 N. W. 56.

The following passage, though not relating to an accident to a servant, may be usefully quoted in the present connection: Ordinarily, in actions to recover damages for injuries to person or property, an instruction as to the effect of contributory negligence on the part of the plaintiff will cover all that need be said to the jury upon this branch of the case. But 40 L. R. A.

the principle that one may be debarred from a recovery when he voluntarily assumes the risk is not identical with the principle on which the doctrine of contributory negligence rests, and in proper cases this ought to be explained to the jury. One may, with his eyes open, undertake to do a thing which he knows is attended with more or less peril, and he may, both in entering upon the undertaking and in carrying it out, use all the care he is capable of. But whether or not he thereby assumes the risk may depend on other circumstances. One may, without fault of his own, be in a situation where he must choose a perilous alternative. The degree of danger, the stress of circumstances, the expectation or hopes that others will fully perform the duties resting on them may all have to be considered. Miner v. Connecticut River R. Co. (1891) 153 Mass. 398, 26 N. E. 994.

Any instructions are erroneous which give the jury to understand that, although the servant possessed that knowledge, he is entitled to recover provided he was in the exercise of due care. Chicago, R. I. & P. R. Co. v. Clark (1882) 11 Ill. App. 104; Wink v. Weller (1891) 41 Ill. App. 342 (instead of instruction that, if the plaintiff used the defective appliance knowing it to be defective, then the jury should consider such fact in determining whether the plaintiff exercised due care); Mexican C. R. Co. v. Shean (1891; Tex.) 18 S. W. 151; Mundle v. Hill Mfg. Co. (1894) 86 Me. 400, 30 Atl. 18 (held error to give an instruction permitting the jury to find for the plaintiff if she was not negligent, where both the defense raised by the defendant, and the hypothetical state of facts on which the jury asked for instructions, raised the question whether the plaintiff had assumed the risks of the defect).

In Foley v. Jersey City Electric Light Co. (1892) 54 N. J. L. 411, 24 Atl. 487, the jury was directed to inquire whether the danger arising from the absence of a step on a lamp pole was of such imminent character that a person of ordinary prudence, having regard for his own safety, would have declined to use it. If so, they were told that the plaintiff could not recover; but if it were otherwise, if the peril was not so imminent and threatening but that he might with safety go up to the light and trim it and get back again by the exercise of extra care, he could recover. Under these instructions the jury rendered a verdict for the plaintiff. A new trial was ordered, the court saying: "If the servant knows of the defect, and it is of such a nature that a prudent person will not abandon the service on account of it, then no negligence can be charged to the master for permitting the defect to continue. If the plaintiff was justified in concluding that he could ascend the pole and return with safety by using care, the defendant had the right to draw the same conclusion, and, in that event, the defendant was in no fault. If the peril was of such imminent character that it was imprudent on the part of the plaintiff to attempt to ascend the pole, then, under the rule laid down by the trial judge, the verdict is wrong. If the plaintiff acted as a prudent man in undertaking to ascend the pole, the injury must be ascribed to mere accident, the casual slipping of his foot. In that case neither he nor his employer is to be held guilty of a want of care. The servant and the master had equal means of forming a correct judgment. Therefore, whatever want of prudence in taking the risk is chargeable to the one must be imputed to the other. The attempt to engraft this exception upon the general rule introduces the element of the absence or presence of due pru-

dence on the part of the servant into this discussion, which is a circumstance, in my judgment, wholly foreign to it. The immunity of the master rests upon the contract of hiring, and not upon the absence or presence of negligence in either party. The master says to the servant: You understand fully the nature of the employment and the danger attending it; will you enter upon it? The servant says: I accept it; and the law implies that he accepts it, with all the risk incident to it, without regard to the magnitude of the danger. The question is not whether it was prudent on his part to encounter the peril. In contemplation of law, his undertaking to assume the apparent risk of the work was general and unqualified. He might have restricted his assumption of danger by stipulating that he would take upon himself such liability to injury only as could be avoided by due care on his part. In the absence of such a term in the engagement, it cannot be introduced, by implication, without changing its purport, and importing into it a condition unfavorable to the master, and which has not his consent."

In *Garety v. King* (1896) 9 App. Div. 443, 448, 41 N. Y. Supp. 633, the question of the plaintiff's knowledge being raised by the defendant's counsel, the trial judge in his main charge instructed the jury "that, if the deceased did know of the existence of that window [in the roof], and nevertheless undertook to work there, he assumed the risk of the apparent danger;" and "it is for you, therefore, to say whether the decedent did know of the existence of that peril." But at a subsequent stage of the trial he retracted this instruction, and specifically charged the jury that it was an erroneous statement of the law; and that, even if the decedent did know of the existence of the skylight, but exercised due care to avoid accident, the plaintiff might recover. The appellate court said: "That instruction was tantamount to saying that, if the decedent were free from negligence, he did not assume the risk of working at a dangerous place, known to him to be dangerous; and it put the subject definitely before the jury in such a way as to authorize them to ignore altogether (if they found on the other issues in favor of the plaintiff), the question of the assumption by the decedent of the risks attendant upon his working in a known place of danger. The learned judge virtually eliminated from the case the entire question of the assumption of the risk, and made that issue identical with the one relating to contributory negligence, and thus inadvertently the jury were misled on that subject."

Instructions are also erroneous which give the jury to understand that the only defense predicable from the servant's knowledge is contributory negligence. *Koehler v. New York Elev. R. Co.* (1896) 9 App. Div. 449, 51 N. Y. Supp. 209.

It is equally erroneous, under such circumstances, to refuse instructions explaining the doctrine of assumption of risks. *Woodell v. West Virginia Improv. Co.* (1893) 38 W. Va. 23, 17 S. E. 386. In *Texas & P. R. Co. v. Bryant* (1894) 8 Tex. Civ. App. 134, 27 S. W. 825, where the servant was injured by a hole in a railway platform, the court refused to give an instruction, demanded by the defendant, which affirmatively invoked the defense of an assumption of the risk, and gave the following charge: "A railroad employee is bound to use, in caring for his own safety while in such employment, such care as a man of ordinary prudence would exercise, under like circumstances. In entering the service of a railroad company

he assumes all the ordinary risks incident to his employment, among which is the risk of an injury that may result to him from working in a place which he knows to be in such an unsafe condition as would render it probable to a man of ordinary prudence that to work there would be attended with danger, and, should he go upon or into such a place, knowing it to be unsafe, he is bound to use all the care which a man of ordinary prudence would exercise under like circumstances, and prevent injury to himself." The court sustained the objection of the defendant to this construction, that it "confounded the distinction between an assumed risk and contributory negligence, to the prejudice of defendant, inasmuch as defendant's contention is, and was, that the hole in the platform was an obvious defect, and apparently dangerous, and that its defective condition was known to plaintiff so as to preclude recovery by him when he exposed himself to the danger, irrespective of any negligence on his part"; especially if it also laid down explicitly that the servant's knowledge merely casts upon him the duty of using greater care in the use of and in avoiding danger from such appliance. *Peirce v. Clavin* (1897) 53 U. S. App. 492, 82 Fed. Rep. 550, 27 C. C. A. 227.

But an instruction treating the employee's knowledge as affecting only the question of contributory negligence, while erroneous, is not ground for reversal, where other instructions treat his knowledge as affecting the assumption of the risk, and the jury find specially that the employee did not have knowledge of the increased peril. The instructions objected to here read thus: "The fact, if it is a fact, that Leyden had knowledge that the roof was in a dangerous condition does not necessarily preclude a recovery by the plaintiff. Knowledge is always an important matter for consideration, but it does not always establish contributory negligence. If one undertakes to pass a known danger so great that no person of ordinary prudence would voluntarily encounter it, then he is guilty of contributory negligence, for no person possessing knowledge of danger has a right to go into a place which ordinarily prudent men would avoid. If, however, the danger is known, but it is not of such a character as that prudent men would not decline to encounter it, then the attempt to pass it is not, in and of itself, such negligence as will defeat the action. But if he does not attempt it, he must exercise care proportioned to the known danger." *Rogers v. Leyden* (1890) 127 Ind. 50, 26 N. E. 210.

d. Contributory negligence in respect to risks assumed.

It must be admitted, however, that the books contain not a few cases in which the above principles are wholly ignored, or are not given their proper effect; as where the theory on which the plaintiff is denied recovery is contributory negligence, although the evidence shows that there was no breach of duty on the master's part. *Jones v. Sutherland* (1895) 91 Wis. 567, 65 N. W. 496 (servant familiar with saw mills stepped, without looking, on a slanting floor which was usual and necessary at the place, and, slipping, fell against a circular saw); *Loring v. Kansas City, Ft. S. & M. R. Co.* (1895) 128 Mo. 349, 31 S. W. 6 (section hand familiar with the usages of yards and the dangers from passing trains, held negligent in crossing a track in front of an engine in motion without looking. But it was also found that the men in charge of the train were not negligent, and therefore there was no fault com-

mitted by anyone for whose conduct the company was responsible); *Chesapeake & O. R. Co. v. Lee* (1888) 84 Va. 642, 5 S. E. 579 (no duty to warn servant of approach of train drawn by engine which had an unusually loud exhaust discharge, a better signal than a bell,—servant also held negligent in uncoupling standing cars on an incline when loaded train was drawing near); *Sheeler v. Chesapeake & O. R. Co.* (1885) 81 Va. 188, 50 Am. Rep. 654 (fireman held unable to recover, because, without any necessity, he leaned so far out of the engine that he was struck by the timbers of a bridge-truss of the usual width).

Or where it is laid down that if a servant is injured when obeying the orders of a superior in a branch of business for which he was "specially" employed, his knowledge of the danger will be considered in estimating the degree of care he should use to avoid it. *Mann v. Oriental Print Works* (1875) 11 R. I. 153. See also *Crowe v. New York C. & H. R. Co.* (1893) 70 Hun, 37, 23 N. Y. Supp. 1100 (track repairer held unable to recover on the ground that, being familiar with the danger from cars constantly passing in a yard without warning, he stepped on a track without looking; yet, in another part of the opinion, that danger is spoken of as one of those assumed by such an employee).

The Chandos (1880) 6 Sawy. 554, *Deady, J.*, held that a sailor who went on a crane-line (a rope subjected to a continual chafing), in the dark, without any precaution against its breaking, or observation as to its then condition, was negligent, and added: "The libellant assumed the ordinary risks of his employment, and the liability of the crane-line to part appears to be one of them. The negligence of the libellant was the proximate, if not the sole, cause of the injury."

Nor are these principles applied, where it was explicitly held, or the evidence warranted the inference, that the servant had assumed the risk, or was culpable, as a matter of law, in continuing to work; and yet the actual rationale of the decision is that he failed to take proper precautions to safeguard himself against that risk. *New York, L. E. & W. R. Co. v. Lyons* (1888) 119 Pa. 324, 13 Atl. 205 (flagman who attempted to board a moving engine with a defective step, the condition of which he knew, while his hands were encumbered with two lanterns, and he might have stopped the train, held negligent as a matter of law); *Mansfield Coal & Coke Co. v. McEnery* (1879) 91 Pa. 185, 36 Am. Rep. 662 (plaintiff, who knew that a bridge was defective, held negligent in driving his team on to it); *Taylor v. Carew Mfg. Co.* (1885) 140 Mass. 150, 3 N. E. 21 (held that appropriate precautions were not taken by a servant who walked quickly into a dark basement room, when the eyes afford practically no assistance, without attempting, either by hands or feet, to find a hole which he knew to be somewhere in the room, although he could not tell exactly where); *Pingree v. Leyland* (1883) 135 Mass. 398 (servant injured through his inadvertence in handling unboxed machinery, of the condition of which he was fully cognizant); *Odell v. New York C. & H. R. Co.* (1890) 120 N. Y. 323, 24 N. E. 478 (servant injured by the unexpected starting of a sawing-machine while he was engaged in changing saws, was guilty of such contributory negligence as will prevent a recovery, if he knew that the machine was out of order when he placed his hand upon the saw); *Alcorn v. Chicago & A. R. Co.* (1891) 108 Mo. 81, 18 S. W. 188 (servant aware of the constant dangers caused by the wearing away of the blocking of frogs, but held unable to re-

cover because he failed to use proper care in the manner of making the coupling); *Clark v. St. Paul & S. City R. Co.* (1881) 28 Minn. 131, 9 N. W. 581 (trackman knew of roof projecting over track and through his inattention was struck); *Illick v. Flint & P. M. R. Co.* (1886) 67 Mich. 632, 35 N. W. 708 (brakeman, knowing of position of bridge near track, swung himself out so far from a car that he came into contact with it—no call of duty to go upon the car till after the bridge was passed); *Pittsburg & C. R. Co. v. Sentmeyer* (1879) 92 Pa. 276, 37 Am. Rep. 684 (railroad servant rode on top of freight train without any call of duty, and was struck by a low bridge the position of which he knew); *Louisville & N. R. Co. v. Hall* (1888) 87 Ala. 708, 4 L. R. A. 710, 6 So. 277 (brakeman, notified of low bridge, failed to take necessary steps to avoid being struck by it); *Quibell v. Union P. R. Co.* (1891) 7 Utah, 122, 25 Pac. 734 (servant failed to look out for coal-chute which he knew to be near the track); *Stubbs v. Atlanta Cotton-Seed Oil Mills* (1893) 92 Ga. 495, 17 S. E. 746 (servant while cleaning machinery carelessly exposed himself to an unseen danger which he had opportunities for discovering if he had kept his faculties on the alert while manipulating it); *Paland v. Chicago, St. L. & N. O. R. Co.* (1892) 44 La. Ann. 1003, 11 So. 707 (one employed as keeper of a building to prevent trespassers from dilapidating and stripping it is guilty of such contributory negligence as will prevent a recovery, where the building fell and killed him, owing partly to his failure to perform such duty, the possibility of an accident from this cause having been apparent for some time before its occurrence, so as to make the risk one of those incident to the service); *Albert v. New York C. & H. R. Co.* (1894) 80 Hun, 152, 29 N. Y. Supp. 1126 (brakeman negligent in, seeing that a car is crippled, he does not take proper precautions to avoid the consequences of handling it in that condition); *Ray v. Jeffries* (1887) 86 Ky. 367, 5 S. W. 867 (servant injured by his careless handling of a compound of nitroglycerine the nature of which he understood); *Evans v. Chessmond* (1890) 38 Ill. App. 615 (servant worked under loose rock in mine, the condition of which was as well known to the servant as to the master, without making any examination, or asking the master to remove it); *Way v. Chicago & N. W. R. Co.* (1888) 76 Iowa, 393, 41 N. W. 51 (car-repairer, who knew that the ground was slippery with ice, and who had complained of the absence of his assistant, attempted to raise a heavy draft-iron, and slipped); *Wormell v. Maine C. R. Co.* (1887) 79 Me. 397, 10 Atl. 49 (servant held to have carelessly put himself in the way of obvious peril); *Nolan v. Shickle* (1879) 60 Mo. 336 (unnecessarily going on obviously dangerous scaffold); *Carroll v. Pennsylvania Coal Co.* (1888) 22 W. N. C. 439, 15 Atl. 688 (men engaged in dumping coal from a track upon trestles, and knowing that the track was dangerous because the end of the track had become depressed, failed to take the obvious and simple precautions necessary to obviate accidents by using blocks to arrest the cars, or by raising the track at the end); *Krafft v. Meyer* (1896) 92 Wis. 252, 65 N. W. 1032 (stevedore fell down a scuttle which he should have known was left open while the vessel was loading); *Chicago & N. W. R. Co. v. Donahue* (1874) 75 Ill. 106 (yard switchman understanding that trains were constantly passing, unnecessarily stepped on a track and was run down by one of them); *Peoria, D. & E. R. Co. v. Puckett* (1893) 52 Ill. App. 222 (brakeman who knows that there is a cattle-guard at a designated place

bound to guard against it in performing his duties, although it is not properly constructed; instruction disapproved, which made right of recovery dependent on the "proper construction"; *La Pierre v. Chicago & G. T. R. Co.* (1894) 99 Mich. 212, 58 N. W. 60 (conditions known but ground of decision was that the accident might have been obviated by common prudence); *Louisville & N. R. Co. v. Law* (1893) 14 Ky. L. Rep. 850, 21 S. W. 648 (negligence in coupling held a bar to the action of a brakeman, the danger of coupling being also said to be one of the ordinary risks of the employment); *St. Louis, A. & T. R. Co. v. Mara* (1891; Ark.) 16 S. W. 196 (displate fell from and derailed a hand-car which the plaintiff knew to be defective in such a way as to render it likely that objects would fall, he himself being the person who had supervised the loading).

The same failure to realize the supererogatory nature of the defense of contributory negligence in cases where an assumption of the risk is established seems to be apparent in the following extract:

Minor servants are held to assume, by their contract of employment, those ordinary risks of their service which are obvious to them, or have been pointed out in a manner suited to the comprehension of their youth and inexperience. They cannot ignore the dictates of common prudence or the instructions of their superiors to guard themselves from these apparent dangers, and charge the consequences upon their employers. *Beckham v. Hillier* (1885) 47 N. J. L. 12.

In view of the division of functions between court and jury under our system of procedure, it is manifest that a failure to raise the preliminary defenses of assumption of risks or of culpability in continuing to work may often be seriously prejudicial to the master, for although the circumstances may show that one or both of these defenses was available, it may be impossible to say, as a matter of law, that the servant did not act prudently in dealing with the known perils.

For an instance in which the master might have escaped liability, see *Plank v. New York C. & H. R. Co.* (1875) 60 N. Y. 607, holding that a brakeman's knowledge of the existence of a trench across a railroad track was not sufficient to charge him with contributory negligence in failing to govern his conduct, while coupling cars, with due reference to the fact of the dangerous condition of the place of work, inasmuch as the act of coupling cars necessarily required his whole attention and thought.

Manifestly the correct method of dealing with cases in which both an assumption of the risks and contributory negligence are legitimate inferences from the facts disclosed is to differentiate the defenses clearly, and indicate by appropriate language that they are cumulative. This has sometimes been done. *Woodley v. Metropolitan Dist. R. Co.* (1877) L. R. 2 Exch. Div. 384, 46 L. J. Exch. N. S. 521 (servant held to have assumed the risks of the situation, and to have been guilty of a "want of particular care" in regard to the act which immediately preceded the accident); *Marean v. New York, S. & W. R. Co.* (1895) 167 Pa. 220, 31 Atl. 562 (car inspector, who had assumed risk of want of signal flag, held negligent in going under a car without inquiring about the movements of cars); *Nuss v. Rafsnyder* (1896) 178 Pa. 397, 35 Atl. 958 (risk of defective scaffold first declared to be assumed and then plaintiff held negligent in using it); *Rumsey v. Delaware, L. & W. R. Co.* (1892) 151 Pa. 74, 25 Atl. 37 (brakeman, who was declared to have assumed

the risk of the want of a watchman at a crossing, was held negligent in being in a place of danger on the pilot of the engine); *Kelly v. Baltimore & O. R. Co.* (1887; Pa.) 10 Cent. Rep. 36, 10 Atl. 659 (servant injured by being caught between a building near the track and a car, while descending from the car, the location of the building being familiar to him, was nonsuited on the grounds, (1) that he assumed the risks arising from the situation of the building; (2) that he was negligent in not paying proper attention to the risk he was incurring in the performance of the act); *Brossman v. Lehigh Valley R. Co.* (1886) 113 Pa. 490, 57 Am. Rep. 479, 6 Atl. 226 (servant knew of low bridge, but, his mind being on his work, he was paying no attention to the impending danger); *Devitt v. Pacific R. Co.* (1872) 50 Mo. 302 (servant knew of low bridge, and was caught while sitting on the brake in broad daylight with his face towards the bridge); *Williams v. Delaware, L. & W. R. Co.* (1889) 116 N. Y. 628, 22 N. E. 1117 (brakeman had constructive notice of the height of a low overhead bridge, and failed to stoop sufficiently); *Owen v. New York R. Co.* (1869) 1 Lans. 108 (same decision on like facts); *Clark v. Richmond & D. R. Co.* (1884) 78 Va. 709, 49 Am. Rep. 394 (same decision on like facts); *Chesapeake & O. R. Co. v. Hafner* (1894) 90 Va. 621, 19 S. E. 166 (brakeman raised his head too soon while passing under a low bridge which he knew to be dangerous); *Norfolk & W. R. Co. v. McDonald* (1891) 88 Va. 352, 13 S. E. 706 (mismatched couplings handled in an unnecessarily dangerous manner); *McGrath v. New York & N. E. R. Co.* (1884) 14 R. I. 357 (1885) 15 R. I. 95, 22 Atl. 927 (recovery denied, where injured trackman rode in a hand car knowing that there were no general regulations as to warning train hands that cars were on the track, and was careless, like the other men on the car, in not seeing that special precautions were not taken to signal approaching trains).

Of course, under the Missouri doctrine, by which the rights of a servant who has continued work with knowledge of a risk are viewed entirely from the standpoint of contributory negligence, and such negligence is not inferable from the mere fact of such continuance, the servant's want of care in respect to taking appropriate precaution against the known danger may be the only theory on which the master can escape liability. See, for example, *Gleeson v. Excelsior Mfg. Co.* (1887) 94 Mo. 201, 7 S. W. 188 (watchman in building, knowing that hatchways were frequently left open, and charged with duty of closing them, fell into one, owing to his failure to look out).

Compare *English v. Chicago, M. & St. P. R. Co.* (1885) 24 Fed. Rep. 908, where Brewer, J., applying a doctrine practically the same as that of the Missouri courts, held the plaintiff's action not sustainable for the reason that he had not taken proper precautions against an obvious danger.

e. Defenses confused owing to inaccuracies of terminology.

Federal courts.

The ambiguity of the term "assume," which is so commonly used to describe the position of a servant with regard to a known risk which he continues to encounter, is responsible for a good deal of the confusion between the defenses which is traceable in many cases.

The same remark applies to such phrases as these:

"Continues work at his own risk." *Lineoski v. Susquehanna Coal Co.* (1893) 157 Pa. 153, 27 Atl. 577.

"Takes the risk." *Griffiths v. Gidlow* (1858) 3 Hurlst. & N. 648 (Pollock, C. B.); *Taylor v. Carew Mfg. Co.* (1885) 140 Mass. 150, 3 N. E. 21; *Bunt v. Sierra Butte Gold Min. Co.* (1891) 188 U. S. 485, 34 L. ed. 1032, 11 Sup. Ct. Rep. 461.

There is also a want of precision about the statement that, "If the servant will engage in the hazardous undertaking, he must be considered as doing it at his peril." *Conroy v. Vulcan Iron Works* (1876) 62 Mo. 35.

In the vast majority of the cases in which such knowledge has been held to bar the action, this term simply expresses a predicament resulting from an implied contract.

Mr. Beven (1 Negligence, 774) thinks the facts in this class of cases more often indicate election than agreement. The objection of the learned author is rather hypercritical, and opposed to the weight of authority. But, even if we suppose it to be well-founded, the legal relation created by an election must, primarily at least, be quasi contractual, and therefore quite distinct, in the aspect, from that which results from a tort like contributory negligence.

It does not express a predicament arising from the commission of a tortious breach of duty. This is the meaning attached to the phrases "assumption of risks" in the leading decision of *Farwell v. Boston & W. R. Corp.* (1841) 4 Met. 40, 38 Am. Dec. 339, and there can be no question that this has always been its normal import ever since.

But it happens that the same word has also acquired, in popular parlance, a shade of meaning which implies that the person to whose conduct it is applied has been acting carelessly, and many courts, not being sufficiently alive to the importance of a scientifically exact terminology, have, unfortunately, allowed this loose and untechnical signification to insinuate itself into their judgments. The extraordinary prevalence of this phraseological error—for it can hardly be described otherwise, in view of the specialized meaning which the word has acquired,—will be apparent from the passages collected below. (The italics in every instance are ours.)

An employee is guilty of contributory negligence if he exposes himself to dangers "so obvious and threatening that a reasonably prudent man . . . would have avoided them."

He will be deemed in such case to have assumed the risks involved in such heedless exposure of himself to danger." *Kane v. Northern C. R. Co.* (1888) 128 U. S. 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16.

The evidence would warrant no other conclusion than that he took the risks of the work, and that his negligence was the direct cause of his death. *Bunt v. Sierra Butte Gold Min. Co.* (1891) 138 U. S. 485, 34 L. ed. 1032, 11 Sup. Ct. Rep. 461. See also *Atkyn v. Wabash R. Co.* (1889) 41 Fed. Rep. 193; *The Serapis* (1891) 40 Fed. Rep. 393; *The Chandos* (1880) 6 Sawy. 554; *Richmond & D. R. Co. v. Finley* (1894) 25 U. App. 16, 63 Fed. Rep. 228, 12 C. C. A. 595.

Alabama.

A servant who "voluntarily undertakes to perform a duty not within the scope of his employment assumes the risk." *Alabama G. S. R. Co. v. Hall* (1894) 105 Ala. 599, 17 So. 176 (discussing the defense of contributory negligence).

Plaintiff was under no obligation to obey the order without assuming the risk himself, if, by so doing, he incurred the risks of obvious peril, such as a reasonably prudent man would regard as extra-hazardous. *Davis v. Western* 49 L. R. A.

Railway of Alabama (1894) 107 Ala. 626, 18 So. 173.

The duty of a brakeman requires him, at any time, to put on the brakes, and if it is necessary to traverse a car filled with coal in order to reach the brake, from a point where the brakeman properly is, we cannot say, as matter of law, he assumes the risk of a jerk or lurch of the train caused by the negligence of the engineer, if the jury so find, while walking across the car. If, however, the conductor or engineer directed the brakeman to remain at the first and second brakes, as some of the evidence tends to show, and if of his own accord he left and attempted to reach a third brake, we would say, under these circumstances, he assumed the risk of the venture, and, if the injury was in consequence of such disobedience of instructions, he would be guilty of contributory negligence. *Louisville & N. R. Co. v. Woods* (1894) 105 Ala. 561, 17 So. 41.

Where the servant fails to quit the service, after a reasonable time has elapsed for making promised repairs, "is it illogical to presume he agrees to incur the risk? And would he not thereby be guilty of proximate contributory negligence?" *Woodward Iron Co. v. Jones* (1885) 80 Ala. 123. See also *Eureka Co. v. Bass* (1886) 81 Ala. 200, 60 Am. Rep. 152, 8 So. 216.

California.

If the servant "has knowledge of the circumstances, he is equally culpable, and he assumes the risk." *McGlynn v. Brodie* (1866) 31 Cal. 376.

In *Goggin v. D. M. Osborne & Co.* (1896) 115 Cal. 437, 4 Pac. 248, it was said to be a question for the jury whether the plaintiff knew of the danger of using an appliance, and so assumed the danger consequent upon such use, and, "what is much the same proposition, it cannot be said, as a matter of law, that a person of ordinary prudence would have refused to use" the appliance.

Illinois.

If the master refuses to remedy the dangerous conditions after the servant has complained of them, the latter "will have no alternative but to quit the master's employ. If he does not, he will be deemed to have assumed the extra hazard of his position thus occasioned. The case suggested, it will be perceived, is one of mutual negligence. On the part of the master, it is negligence to retain the derelict servant in his employ. It is, on the other hand, negligence in the complaining servant to continue longer in the master's service, unless he intends to assume the extra risk himself; *United States Rolling Stock Co. v. Wilder* (1886) 116 Ill. 100, 5 N. E. 92.

The employer's breach of duty "furnishes no excuse for the conduct of an employee who voluntarily incurs a known danger." If he enters a service where he has to use defective agencies, he "assumes the risk, and must bear the consequences." *Pennsylvania Co. v. Lynch* (1878) 90 Ill. 333 (In the first part of his opinion Schofield, J., lays down the rule that the servant assumes the known risks of the service, and after stating the evidence, asks the question: "If appellant [the master] was negligent in not furnishing different platforms, in what respect does that negligence differ from appellee's negligence in continuing to use them, without objection, and without an effort to change or improve them?")

The general rule is that an employee who continues in the service of his employer after notice of a defect augmenting the danger of the service, assumes the risk, as increased by the defect. But this rule is subject to qualifica-

tions. The servant is not chargeable with contributory negligence, if he knows that defects exist, but does not know, or cannot know by the exercise of ordinary prudence, that risks exist. *Illinois Steel Co. v. Schymanowski* (1896) 162 Ill. 459, 44 N. E. 876.

A party who voluntarily exposes himself to a danger that he knows, or by reasonable attention might know, *assumes all the risks*. Such voluntary exposure is necessarily incompatible with the exercise of ordinary care. *Chicago & T. R. Co. v. Simmons* (1882) 11 Ill. App. 147. See also *Camp Point Mfg. Co. v. Ballou* (1874) 71 Ill. 417; *Chicago, R. I. & P. R. Co. v. Clark* (1882) 11 Ill. App. 104; *Illinois C. R. Co. v. Jones* (1882) 11 Ill. App. 324; *Chicago, B. & Q. R. Co. v. Montgomery* (1884) 15 Ill. App. 205.

Indiana.

If the employee had actual knowledge of the unsafe condition of the appliance, then it would be negligence to use it, and if, knowing the unsafe condition of the appliance, the employee attempted to use it, he would assume the extra hazard of so doing. *Ohio & M. R. Co. v. Percy* (1890) 128 Ind. 197, 27 N. E. 479.

When an employee has within his own control the manner of using an obviously defective tool, and the means of securing safety if he choose to employ them, if he neglects the means of security to himself, he elects to take the risk. *Jenney Electric Light & P. Co. v. Murphy* (1888) 115 Ind. 570, 18 N. E. 30.

Speaking of the position of a servant who is injured in obeying a direct command of the master, the same court has used this language: "When the master orders a servant to do something which involves encountering a risk, not contemplated in his employment, although the risk is equally open to the observation of both, it does not necessarily follow that the servant either assumes the increased risk, or is negligent in obeying the order. If the apparent danger is such that a man of ordinary prudence would not take the risk the servant acts at his peril. But, unless the apparent danger is such as to deter a man of ordinary prudence from encountering it, the servant will not be compelled to abandon the service, or assume all additional risk, but may obey the order, using care in proportion to the risk apparently assumed." *Nail v. Louisville, N. A. & C. R. Co.* (1891) 129 Ind. 268, 271, 28 N. E. 183, 611 (repeated in *Brazil Block Coal Co. v. Hoodlet* (1891) 129 Ind. 327, 336, 27 N. E. 741).

If the risk is great, or is such as a prudent person would not assume, then the person who does assume it is guilty of such contributory negligence as will preclude a recovery. *Lake Shore & M. S. R. Co. v. Pinchin* (1887) 112 Ind. 596, 13 N. E. 677.

In *Sheets v. Chicago & I. Coal R. Co.* (1894) 139 Ind. 682, 39 N. E. 154 (the court speaks of a plaintiff who had negligently placed himself in front of moving cars as having assumed all the dangers incident to such exposure).

In another case "assumption of a needless risk" is spoken of. *Spencer v. Ohio & M. R. Co.* (1892) 130 Ind. 181, 20 N. E. 915.

In the following passage the confusion of terms is particularly objectionable. The phrase "assume the risk" is used in different senses in sentences which are in immediate juxtaposition: "There is a class of cases where a man has no right to assume the risk. Society has an interest in the lives of its members, and no citizen has a right to knowingly and voluntarily place himself in a position of immediate and certain danger. . . . Where the danger is not immediate and certain, a man may assume the risk without violating the rule last stated, 49 L. R. A.

but, in doing so, he divests himself of a right to recover from his employer in cases where the danger is fully and seasonably brought to his knowledge, since the known danger becomes in such cases one of the risks he assumes as an incident of his service. He may not be guilty of contributory negligence in taking some risk, since he may be doing what other reasonably prudent men likewise do; but, like all the others in the common service in which he engages, he assumes all the risks arising from dangers of which he has full notice, by continuing in service after he obtains that knowledge." *Louisville, N. A. & C. R. Co. v. Sandford* (1889) 117 Ind. 269, 19 N. E. 770.

The distinction between the two defenses is plainly intended to be noted here, and therefore precision in the use of words was especially necessary.

Kansas.

In *Rush v. Missouri P. R. Co.* (1887) 36 Kan. 129, 12 Pac. 582, the court uses the phrase: "If the danger is such that an ordinarily prudent man could assume it without being guilty of negligence," etc.

Kentucky.

Undoubtedly, if the employee, after discovering the defective condition of machinery furnished to him for his use, continues to use it without complaint or giving notice to the employer, or the proper officers of a company, he will be guilty of such contributory negligence as will prevent a recovery for an injury arising from the defect. He will be injured as having assumed the risk of danger arising from its defective condition. *Lawrence v. Hagemeyer & Co.* (1892) 93 Ky. 591, 20 S. W. 704.

Louisiana.

Sufficient knowledge on the part of the deceased is not established to justify the assertion that he had assumed the risk of danger, and was consequently guilty of contributory negligence, whereby the defendants are exonerated. *Erslew v. New Orleans & N. E. R. Co.* (1897) 49 La. Ann. 86, 21 So. 153.

Even in the presence of a known danger, to constitute contributory negligence it must be shown that the plaintiff voluntarily and unnecessarily exposed himself to it, unless it is of that character that the plaintiff must assume the risk from the very nature of the danger to which he is exposed. *Clements v. Louisiana Electric Light Co.* (1892) 44 La. Ann. 692, 697, 16 L. R. A. 43, 11 So. 51. See also *Pollich v. Sellers* (1890) 42 La. Ann. 623, 7 So. 786, where the defense was contributory negligence, but the plaintiff was said to have "assumed" the risk.

Maryland.

In *State use of Hamelin v. Malster* (1881) 57 Md. 287, the court denied the servant's right of recovery on the ground that, upon the undisputed facts, the servant directly contributed to his misfortune by his own want of caution, yet, after reviewing the evidence which showed that the servant fully understood the dangers of the situation, the opinion proceeds thus: "Now with this knowledge and this plainly apparent risk open to the senses of the deceased, upon which principle can the defendants be made liable for the accident that happened to the deceased in consequence of the risk thus knowingly assumed by him? The principle is perfectly well settled that an employee who contracts for the performance of hazardous duties assumes such risks as are incident to their discharge from causes open and obvious, the dangerous character of which causes he had opportunity to ascertain. And so, if a man chooses to accept an employment or continue in it with the knowledge of the danger, he must

abide the consequences so far as any claim against the employer is concerned."

Massachusetts.

It is for the plaintiff to show, not merely that the place was unsafe, and that he was injured thereby, but that he himself was in the exercise of due care. His evidence fails to show this, if it appears that, knowing and appreciating the danger arising therefrom, he voluntarily exposes himself thereto. Business is sometimes carried on in buildings or places obviously unsafe, and if, with a knowledge that a business is thus conducted, the workman engages in it, he takes the risks which he must know are incident thereto. Where one capable of choosing and contracting for himself, with full notice of the risk he assumes, voluntarily uses a machine which, by reason of a known defect, exposes him to a particular and obvious danger, he is held to assume and take the risk of injury from that source. . . . In the case at bar the plaintiff knew of the defect [a well-hole], and he consented to incur the risk which he ran in passing along the floor, in the uncertain light, to examine and aid in putting on the belts. *Taylor v. Carew Mfg. Co.* (1885) 140 Mass. 151, 3 N. E. 21.

Under the decisions in this commonwealth, if he knew and appreciated this risk, and continued to work for the length of time and under the circumstances that appear in this case, he must be held voluntarily to have assumed it, so that his share in the responsibility for the accident charges him with negligence, and precludes him from recovery, if the use of the saw by the defendant constituted negligence. *Tenanti v. Boston Mfg. Co.* (1898) 170 Mass. 323, 49 N. E. 634.

Due care depends on what is reasonable under the circumstances, and is generally a question of fact for the jury. It cannot be said, we think, as matter of law, that the probability that Duckworth would leave an unexploded cartridge in one of the chambers was so great as to require the plaintiff to examine them himself, or that, by continuing in the defendant's employment after finding an unexploded cartridge in a revolver handed to him by the defendant James after testing it, he thereby assumed the risk from such unexploded cartridges as might be accidentally left in revolvers by said James. *Anderson v. Duckworth* (1894) 162 Mass. 251, 38 N. E. 510.

In *Ferren v. Old Colony R. Co.* (1887) 143 Mass. 197, 9 N. E. 608, the court, after declaring that, supposing certain inferences to be deducible from the evidence, they could not say, as matter of law, that the plaintiff assumed the risk, said that the evidence was sufficient to be submitted to the jury upon the question whether he was in the exercise of due care. It is not easy to say what the precise point of view is in the remark of Holmes, J., that even if the servant's conduct "was not negligent in the sense of culpable, still, as it involved danger manifest to him, he could not complain of the consequences." *Boyle v. New York & N. E. R. Co.* (1890) 151 Mass. 102, 23 N. E. 827. Is not culpability an essential element of negligence?

Michigan.

A party entering upon a particular employment assumes the risk and perils usual thereto, when the usual and customary means to guard against accidents are adopted. If the servant with full knowledge of the danger, and understating the increased risk occasioned thereby, consents to enter into the employment, then he voluntarily incurs the risk, and, if he suffers damages in consequence of injury received thereby, he will be without remedy. The fact that he remains in the master's employment un-

der such circumstances, and with such knowledge, is what constitutes contributory negligence on his part. In such a case the master, in permitting his machinery to be thus more than ordinarily dangerous, is guilty of negligence; but the servant, with full knowledge thereof, by remaining, contributes thereto, and hence he cannot recover if he has such knowledge. *King v. Ford River Lumber Co.* (1892) 93 Mich. 172, 182, 53 N. W. 10.

Missouri.

See II. f. *infra*.

Nebraska.

Where a servant, in obedience to the requirements of his master, incurs the risk of machinery or appliances which, although dangerous, are not of such character that they may not be safely used, by the exercise of reasonable skill and caution, he does not, as a matter of law, assume the risk of injury from accident resulting from the master's negligence. *Lee v. Smart* (1895) 45 Neb. 318, 63 N. W. 940 (syllabus by court).

New York.

In discussing the question whether the servant's knowledge of a defect rendered him chargeable with contributory negligence, the court remarked that it was "for the jury to say whether or not he voluntarily assumed the risks." *Lanning v. New York C. R. Co.* (1872) 49 N. Y. 521, 10 Am. Rep. 417.

It would seem to be unreasonable that one who has undertaken a service which, in itself, has some elements of danger, whenever he shall see that the danger has been increased through some negligence of his employer, must either stop his employment or be deemed to have accepted the increased risk. We do not think that this is the rule. And it seems to us that the plaintiff had a right to go to the jury on the question whether he was, under the circumstances, justified in going on with his work. *McMahon v. Port Henry Iron Ore Co.* (1881) 24 Hun, 48.

In *Cullen v. Norton* (1889) 52 Hun, 9, 4 N. Y. Supp. 774, it is urged that the deceased knew all about the facts, and voluntarily assumed the risks, and thus by his contributory negligence precluded recovery.

A servant does not assume the risks unless he can be properly charged with negligence arising from the master's negligence in accepting the place of labor assigned to him by his master. *Heavey v. Hudson River Water Power & Paper Co.* (1890) 57 Hun, 339, 10 N. Y. Supp. 585. See also *Farley v. New York* (1897) 152 N. Y. 222, 46 N. E. 506, *Reversing* (1896) 9 App. Div. 536, 41 N. Y. Supp. 622; *Wallace v. Central Vermont R. Co.* (1892) 43 N. Y. S. R. 639, 18 N. Y. Supp. 280.

North Carolina.

See also II. g. *infra*.

In *Crutchfield v. Richmond & D. R. Co.* (1878) 78 N. C. 300, the court, while holding the plaintiff unable to recover on the ground of contributory negligence, speaks of his continuance at work with knowledge of the defect as being an "assumption of the risks." In discussing the negligence of the plaintiff, the court said that the circumstances "must be such as to show that the employee had full knowledge of the unusual risk, and deliberately assumed it." *Sims v. Lindsay* (1898) 122 N. C. 678, 30 S. E. 19.

Pennsylvania.

In *Nuss v. Rafsnyder* (1896) 178 Pa. 397, 33 Atl. 938, as applicable to the case, the court, after laying down the rule as the assumption of known risks, declared the plaintiff to be negligent in using the appliance under the circumstances.

In *Davis v. Baltimore & O. R. Co.* (1893) 152 Pa. 314, 25 Atl. 498, the court, after declaring the plaintiff *negligent* in using the appliance, summed up by saying that he *accepted the risk* of the employment.

The plaintiff "was under no obligation to continue working in a dangerous place or employment, and if he did so he *assumed the risk*. He could not excuse his own *want of care* by the allegation that someone else had promised to care for him." *Reese v. Clark* (1892) 146 Pa. 465, 23 Atl. 246.

The very fact of the plaintiff's youth and weakness is one of the elements that go to make up the charge of *negligence on the part of the defendant* in putting such a person upon such a service. It seems to us that the master, in such circumstances, and not the servant, must be held to have *assumed the risks* of the service. *Kehler v. Schwenk* (1892) 151 Pa. 505, 25 Atl. 130.

The sentence, "The plaintiff has no one but himself to blame," occurs in a case where the risk was said to be assumed. *Beittemiller v. Bergner & E. Brewing Co.* (1888) 22 W. N. C. 33, 12 Atl. 500.

South Carolina.

In *Donahue v. Enterprise R. Co.* (1890) 32 S. C. 299, 11 S. E. 95, it was said that a servant who continued to work with knowledge of the dangerous character of the appliances *assumed the risks* of the situation, and that his knowledge defeated his action on the ground that he had, by his *negligence*, contributed to his injury.

Texas.

When a servant remains in an employment known to be dangerous because of defective machinery, implements, or appliances not sufficient for the safe conduct of the business, he is said to *assume the risks* of the business thus conducted, and to be guilty of *contributory negligence*, if an injury occurs to him through their use. *Gulf, C. & S. F. R. Co. v. Brentford* (1891) 79 Tex. 619, 15 S. W. 561.

West Virginia.

In *Graham v. Newburg Orrel Coal & Coke Co.* (1893) 38 W. Va. 273, 18 S. E. 584, the phrase "assumption of risk" occurs in a discussion of the defense of contributory negligence.

Wisconsin.

See II. f, *infra*.

f. Doctrinal confusion between the defenses.

This inexactness of terminology is doubtless responsible for much of the doctrinal confusion between the two defenses which is disclosed by the arguments of judges. Thus, in some cases the reasoning is vitiated by the misconception that the servant's duty to use care may be referred to as a standard by which to test the fact of his assumption of the risks of the employment.

Where the employee undertakes to perform labor that is necessarily attended with danger to himself, he so far assumes the risks as to require the exercise of ordinary prudence and caution on his part. He is not bound to engage in work that places his life in peril; and when labor of that sort is voluntarily assumed, and an injury occurs, he cannot look to his employer for damages upon the ground of negligence. If, by the exercise of ordinary vigilance, he could have avoided the accident. *Sullivan v. Louisville Bridge Co.* (1872) 9 Bush, 81.

This statement is plainly a blunder either in phraseology or doctrine. It is erroneous on the former score, if it is intended to embody the principle that the master is not warranted in exposing the servant to any risks except 49 L. R. A.

those from which he can preserve himself by the exercise of due care. It is erroneous on the latter score, if the implication is that the servant's exercise or omission of such care can affect in any degree his rights as regards recovery for an injury resulting from a risk assumed.

Similar remarks are applicable to the statement that, if the servant knew of the defects, and, "without taking the necessary and proper precaution to guard against danger, continued to use them, he took upon himself the risk, and waived his right as against the company." *Mad River & L. E. R. Co. v. Barber* (1856) 5 Ohio St. 541, 565, 67 Am. Dec. 312.

Equally out of place is it, in a case where the defense allowed is contributory negligence, to introduce the consideration that the fact that alterations are being made in a building in the presence of the employees is notice to them of the possibility of danger of some sort, and of the necessity of exercising greater caution. *Wanamaker v. Burke* (1886) 111 Pa. 423. Notice of the possibility of the danger plainly concludes the case, quite apart from the question whether care was exercised in avoiding it.

See also *Northern P. Coal Co. v. Richmond* (1893) 15 U. S. App. 262, 58 Fed. Rep. 756, 7 C. C. A. 485, where the court, after declaring that the plaintiff, a minor, was not, as a matter of law, guilty of contributory negligence, remarked that he only assumed the risk of services which he contracted to perform, and not those which neither he nor his father had reason to believe that he would be required to encounter.

A still more serious error is the partial or complete obliteration of the boundary line between the defenses themselves. The mildest form of this logical heresy is the view that, although there may be a distinction between the two defenses, it often becomes too subtle to be of any practical importance. (*McMullen v. Missouri, K. & T. R. Co.* (1895) 60 Mo. App. 231), or that it is not of much practical value. *Rush v. Missouri P. R. Co.* (1887) 36 Kan. 129, 12 Pac. 582.

A corollary drawn by one court from the immateriality of the distinction is that a trial judge is justified in refusing to grant the defendant's request for a specific charge on the issue of an assumption of the risk, when an instruction dealing with contributory negligence has already been given. *Rittenhouse v. Wilmington Street R. Co.* (1897) 120 N. C. 544, 26 S. E. 922. There the plea of *volenti non fit injuria*, which counsel seem to have regarded, though erroneously, as the equivalent of "assumption of risks," had been expressly relied on, and a request had been made to the defendant to submit to the jury this issue: "Did plaintiff's intestate voluntarily attempt to cross the railroad bridge, knowing the condition of track and car?" *Clark, J.*, said: "It is true that in strict parlance, and logically, there is a distinction between contributory negligence of the intestate and his voluntarily taking a risk which he knew to be dangerous. . . . But upon the issue of contributory negligence both phases of the matter, negligence and voluntary assumption of risk, could be submitted to the jury, and the charge shows that the judge did so submit this case. The defendant was not cut off from presenting any phase of his defense, and it can serve no good purpose to more minutely divide the issues. . . . It would rather serve to confuse the jury. The jury readily comprehend that, by the issue of contributory negligence, they are asked to find whether the plaintiff's fault was the proximate cause of his injury, and

It is immaterial whether that fault was carelessness or reckless assumption of risk, provided the jury are given to understand (as they were in this case by the evidence, the argument of counsel, the prayers for instruction, and the charge of the court) that the issue was broad enough to cover both phases. Reckless assumption of risk has always been taken in our courts as being embraced in the issue of contributory negligence. *Burgin v. Richmond & D. R. Co.* (1894) 115 N. C. 673, 20 S. E. 473; *Doster v. Charlotte Street R. Co.* (1895) 117 N. C. 651, 34 L. R. A. 481, 23 S. E. 449; *Turner v. Goldsboro Lumber Co.* (1896) 119 N. C. 387, 26 S. E. 23. No harm has come from this course, and there is no need of further refinement."

For the phrase "reckless assumption of risks" there is the respectable authority of the supreme court of Michigan, which in one case speaks of circumstances under which the servant cannot be said to have "either heedlessly or voluntarily assumed the risk." *Schlacker v. Ashland Iron Min. Co.* (1891) 89 Mich. 253, 50 N. W. 839.

But this eminent court, although it has used this phrase, *arguendo*, in a case where the addition of the antithetical word "voluntarily" at once indicates that the distinction between the two defenses was not forgotten, would scarcely have approved of the singular proceedings which are here described as taking place on the trial.

That the North Carolina court wholly misunderstood the true import and *rationale* of the request for the instruction refused is evident. The language used by Judge Clark presupposes that the only question requiring an answer was whether the plaintiff's injury was caused by his "fault," whereas the charge asked for presented an issue which was entirely independent of the culpability or nonculpability of the plaintiff. It was an attempt by counsel, in short, to induce the court to apply the doctrine of assumption of risks under circumstances in which, whether by accident or design, the plaintiff's rights had always, in North Carolina, been considered solely from the standpoint of contributory negligence.

It would be of deep psychological interest to learn precisely what ideas on the subject of assumption of risks and contributory negligence the jury carried with them to their consulting room, after "the argument of counsel, the prayer for instruction, and the charge of the court." The twelve *boni et legales homines* suffer many things from the perverse ingenuity with which verbose, hair-splitting instructions are accumulated in employer's liability cases, but they can rarely, we should imagine, have been reduced to profounder depths of mental perplexity than in this instance.

The transition between a theory which treats a distinction as immaterial, and one which ignores or does away with it altogether, is short and easy, as is shown by the argument in one of the cases just cited.

In *Bush v. Missouri P. R. Co.* (1887) 36 Kan. 129, 12 Pac. 582, the court, after referring to the two principles, that where the danger is not obvious or imminent the servant may rightfully continue in the employment of the master without being chargeable with contributory negligence, and that, if the servant has full knowledge of the danger, and continues in the master's employment without complaint, receiving from the master full pay for his services, he assumes the risk himself of the known danger, and waives any negligence that might otherwise be imputable to the master, proceeded thus: "This distinction between contributory negligence on the part of the servant and the waiver of the 49 L. R. A.

master's negligence on the part of the servant has been recognized in some of the books; but while it may be admitted that there is ample room for such a distinction, still it is doubtful whether the distinction can be of much practical value. In all cases of contributory negligence the employee has in some sense waived the negligence of the master, for by encountering the danger he says in effect, 'there is no danger except such as I will wholly assume myself,' and in all cases of the waiver of the master's negligence, the servant has in some sense, by his own negligence, contributed to the resulting injury."

It will be remarked that the concluding sentence of the passage quoted below embodies a conception of the meaning of waiver for which it is safe to say there is no authority to be found outside the line of employer's liability cases which are now under review. That word is commonly understood to import a voluntary and intentional renunciation of a right of action. It is evident that there is an essential difference between the position of a person who deliberately abstains from claiming damages for an injury, and the position of a person whom the law declares to have forfeited, by his own breach of duty, the right to maintain an action for that injury.

Nor is this the sole flaw in the argument. The statement contained in the final clause of the same sentence is not correct, for there are many cases in which the servant is unable to recover damages for the master's negligence, although he be entirely free from negligence,—at least under the doctrine accepted by the vast majority of the states, including Kansas itself. But even if the statement were correct, the circumstance mentioned would merely furnish one more illustration of what is an extremely common situation in jurisprudence, *viz.*, that the same set of facts is often susceptible of being considered under more than one juridical aspect. See the remarks of Bowen, L. J., in *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516.

This, however, is very far from being an adequate reason for altogether throwing down the barrier between the fundamental logical conceptions upon which, according as the case is approached from one side or the other, the rights and liabilities of the parties depend.

Obvious and elementary as these considerations are, the authorities in favor of this theory as to the practical identity of the defenses are quite numerous.

The influence of the Kansas case just cited seems to be apparent in the opinion expressed by Brewer, J., when sitting as a circuit judge in the district of which Kansas forms a part, that there was some force in the doctrine that there was really no such thing as a separate and distinct defense of waiver, and that what was called waiver was simply one form of "contributory negligence;" that the difference between waiver and contributory negligence is the difference between passive and active negligence: that what was meant by waiver was passive negligence, in omitting to do a thing which the employee ought to have done. In the case before him, it would be said that the plaintiff omitted to call for a flag,—omitted to take precautions which he ought to have taken, and that this was nothing more nor less than passive negligence. *O'Rourke v. Union P. R. Co.* (1884) 22 Fed. Rep. 189.

The logical misapprehension is, however, even more serious here, for the learned judge, as the concluding reference to the concrete facts of the case indicates, has evidently failed to dif-

ferentiate clearly in his mind the two separate questions, What inference should be drawn from the fact that the servant had gone on working in an environment known to be dangerous? and, what particular precautions a prudent man would have taken to protect himself while he remained in that environment.

Waiver and contributory negligence have also been treated as interchangeable concepts in Alabama.

For a servant to persist in exposing himself to danger on the faith of such a promise may often be a want of that ordinary prudence which the law exacts of him at every stage of his employment, according to the degree and nature of the danger. His continuance in the service for an unreasonable length of time after such promise is a waiver of the defects agreed to be remedied by his employer.

The risk, therefore, again becomes his own, and his conduct, as we have said, although not necessarily or *per se* negligent, may or may not become negligent, according to the circumstances of the particular case. *Eureka Co. v. Bass* (1886) 81 Ala. 200, 60 Am. Rep. 152, 8 So. 216.

So, also, in Wisconsin the theory now accepted is that assumption of risks is "a form of contributory negligence." *Nadau v. White River Lumber Co.* (1890) 76 Wis. 120, 43 N. W. 1135; *Darcey v. Farmers' Lumber Co.* (1894) 57 Wis. 245, 58 N. W. 382; *Hazen v. West Superior Lumber Co.* (1895) 91 Wis. 208, 64 N. W. 837; *Peterson v. Sherry Lumber Co.* (1895) 90 Wis. 83, 62 N. W. 948; *Krafft v. Meyer* (1896) 92 Wis. 252, 65 N. W. 1032.

The theory of a large group of Missouri cases, though to some extent similar to that of the courts just referred to, is in other respects *sui generis*.

In one of these cases it was regarded as an open question, whether the defense of assumption of risks is based upon the doctrine of waiver, or upon the doctrine of contributory negligence, but it was considered immaterial what answer is given to that question, as "the facts which, in the one set of cases are held to show the waiver, are such, in effect, as are held to constitute the concurring negligence in the other."

Thorpe v. Missouri P. R. Co. (1886) 89 Mo. 650, 58 Am. Rep. 120, 2 S. W. 3. "The question is," it was said, "whether the plaintiff, in remaining at work under these circumstances, must be held to have waived the discharge of defendant's duty to him in this behalf, and to have assumed the risk incident to the performance, . . . or, in other words, was his knowledge of the dangers and risks involved in his undertaking to carry on the work with the reduced force such as will necessarily charge him with negligence." Yet the opinion immediately afterwards notices the fact that recovery has been denied in other cases on the different grounds of waiver or assumption of the risk, and of contributory negligence.

In another case the phrase "contributory negligence," or, what is tantamount thereto, "waiver," occurs. *Alcorn v. Chicago & A. R. Co.* (1891) 108 Mo. 81, 18 S. W. 188. Yet the court recognizes the doctrine commonly applied, that the effect of the servant's knowledge of extraordinary risks is to convert them into ordinary risks, so far as the master's liability is concerned. This doctrine certainly does not rest on the contributory negligence of the servant. Compare *Warrington v. Atchison, T. & S. F. R. Co.* (1891) 46 Mo. App. 150, where, in the argument, the servant's assumption of the risk and waiver of claim for damages is spoken of 49 L. R. A.

while the action is finally declared to be barred on the ground of contributory negligence.

But the formal doctrine which has been evolved from this supposed identity seems to be peculiar to Missouri, and may be said to represent the high-water mark of the confusion between the defenses. Stated in its simplest form, that doctrine is that the servant does not, as matter of law, "assume a risk" due to a breach of duty on the master's part, unless it was such that no prudent man would have remained in an employment in which it was necessary to encounter it.

The following extract from *Conroy v. Vulcan Iron Works* (1876) 62 Mo. 35, contains the earliest formulation of this doctrine: "Where the defect is so glaring that with the utmost care and skill the danger is still imminent, so that none but a reckless man would incur it, then, if the servant will engage in the hazardous undertaking, he must be considered as doing it at his peril. But if the defective machinery or appliances, though dangerous, are not of such a character that they may not be reasonably used by the exercise of skill and diligence, the servant does not assume the same risk. He is required to take, and will be held responsible for, the care incident to the situation in which he is placed, and whether he exercised that degree of caution is a fact for the determination of the jury." The timbers in the present case, though loose and not properly fastened, had been used and were still being used and the plaintiff might have supposed that by using care they would be entirely safe. Compare the ruling that an engineer is "not bound to quit the service, nor did he assume all risks from want of repair [in a track], unless the track was so far out of repair . . . that it would be necessarily dangerous, to the mind of a prudent person, to run an engine over it." *Devlin v. Wabash, St. L. & P. R. Co.* (1885) 87 Mo. 545.

Under former rulings of our supreme court, and of the courts of most other jurisdictions, if the defect in the fellow servant, or in the machine, was equally apparent to the servant and to the master, the servant was deemed, as matter of law, to accept the risks of injury from such defect, as one of the risks of his employment; and, if injured in consequence of it, he could not recover damages from the master. This rule declined to recognize any inequality in the situation of the master and the servant, but placed them on an equal footing. It was analogous to the well-known rule in respect of contributory negligence, under which any negligence on the part of the person injured, materially contributing to the injury, was a bar to a recovery of damages. But later decisions of our supreme court, and of other courts, seemingly recognizing the inequality in the situation of the master and the servant, and, proceeding upon conceptions more just and humane, are to the effect that the servant is not, as matter of law, deemed to accept the risks of injury from the unfitness of the fellow servant, the machine, or the appliance, unless such unfitness is so glaring and palpable that a prudent man would not remain in the service; and that, whether the servant does accept the risks by remaining in the service is ordinarily a question to be submitted to a jury. *Hughes v. Fagin* (1891) 46 Mo. App. 43. See also the majority opinion in *Fugler v. Rothe* (1890) 43 Mo. App. 44; *McMullen v. Missouri, K. & T. R. Co.* (1894) 80 Mo. App. 231.

If this statement be construed liberally, it must, according as the phrase "assume the risk" is taken in one or other of its two possible senses, either express the bald truism that the servant's action is not barred on the ground of

contributory negligence unless he was imprudent, or amount to the assertion of a doctrine which would be an entirely novel addition to the law of contracts, since it would imply that the intention of the servant to include the given risk among those covered by his agreement may depend upon whether a prudent man would have accepted the risk under the circumstances. But what the court really means, as is shown by all the decisions embodying the doctrine in question, is simply that whenever the servant was imperiled by a breach of duty on the master's part the only ground on which his recovery can be barred is that his own want of care either in remaining in the employment, or in failing to take proper precautions at the time of the accident, was an efficient cause of the injury. See, among other cases, *Blanton v. Dold* (1891) 109 Mo. 75, 18 S. W. 1149; *Settle v. St. Louis & S. F. R. Co.* (1895) 127 Mo. 336, 30 S. W. 125; *Huhn v. Missouri P. R. Co.* (1887) 92 Mo. 440, 4 S. W. 937; *Soeder v. St. Louis, I. M. & S. R. Co.* (1890) 100 Mo. 673, 13 S. W. 714; *O'Mellia v. Kansas City, St. J. & C. B. R. Co.* (1892) 115 Mo. 206, 21 S. W. 503; *Mahaney v. St. Louis & H. R. Co.* (1891) 108 Mo. 191, 18 S. W. 895.

In the formulation of this doctrine any reference to the conception of an assumption of the risk must obviously, if that phrase is to bear its usual technical significations, be wholly beside the mark. It would be difficult, if not impossible, to find in the books a more singular example of confused logic than that which has here resulted from this attempt to link together two wholly distinct ideas by means of an ambiguous phrase.

g. Concluding remarks.

The foregoing summary sets in a strong light two deplorable consequences sometimes amounting to a miscarriage of justice, which an inaccurate terminology and logical laxity have combined to produce, and shows that it is high time for every lawyer who attaches a proper

value to clarity of thought and precision of language to devote special attention to seeing that, both in the conduct of trials, and in the examination of cases in courts of review, the defenses shall be properly differentiated. The present confusion is a state of affairs for which counsel seem to be mainly responsible, as a court is naturally apt to discuss a case solely upon the theory under which the record and the arguments present it. It is not too much to say that, in view of the very appreciable advantages which the master obtains in most instances by relying on the defense of assumption of risks, an advocate who does not take care that, whenever the evidence admits it, that defense is presented as an alternative and entirely separate ground for denying the right of action, is guilty of inexcusable remissness. Few courts, if any, are irrevocably and unreservedly committed to the doctrine that, where the master has been guilty of a breach of duty, the servant can be debarred from recovery only by his own negligence; and it may be doubted whether the peculiar theories which prevail in North Carolina as to the nonnecessity of differentiating the defenses in instructions to a jury will find much favor in other states. As long as both defenses remain open in the jurisdiction where the action is brought, counsel for a master ought always to insist that their client shall receive the benefit of a consideration of his rights with reference to each of them. There are doubtless cogent reasons of abstract justice and public policy in favor of what may be called the Missouri doctrine, that the servant's claim should be barred only by contributory negligence, and that this should not, except in the clearest cases, be inferred, as a matter of law, from mere knowledge of the dangerous conditions, and the present writer owns that he would be glad to see this doctrine everywhere accepted. But, until the day of that acceptance arrives, counsel are in duty bound to take every advantage of the more vigorous rule, and never to pass by an opportunity of utilizing it.

C. B. L.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Adele WAHL, *Plff. in Err.*,
v.

Mary E. FRANZ.

(100 Fed. Rep. 680.)

The probate of a will is not "a suit of a civil nature at common law or in equity," within the meaning of the corrected act of Congress of August 13, 1888, §§ 1, 2, and is therefore not removable into a Federal court under that statute either from a probate court or from a circuit court on appeal therefrom, under Sand. & H. (Ark.) Dig. § 1152, providing for trial *de novo* on such an appeal.

(*Sanborn, Circuit Judge, dissents.*)

(March 12, 1900.)

ERROR to the Circuit Court of the United States for the Eastern District of Ar-

kansas to review a judgment in favor of plaintiff in a proceeding brought to set aside the probate of the will of Joseph H. Molen, deceased. *Reversed.*

Before *Caldwell* and *Sanborn*, Circuit Judges, and *Rogers*, District Judge.

Statement by *Rogers*, District Judge:

On the 9th day of December, 1895, Joseph Molen died at Hot Springs, Arkansas. On the 24th day of the same month Adele Wahl presented to the clerk of Garland county, Arkansas, a paper purporting to be the last will and testament of Joseph H. Molen, by the terms of which she became the sole devisee, after the payment of the debts and funeral charges. This will was proved before the clerk of the probate court, in vacation, and a certificate of probate granted to her, subject to the confirmation or rejection of

NOTE.—In connection with the present decision on the nature of a proceeding to probate a will, see note to *Martin v. Stovall* (Tenn.) 48 L. R. A. 130, on the effect of the probate of a will in another state, including the conclusion of L. R. A.

consideration of the question whether such a proceeding falls within the constitutional provision requiring full faith and credit to be given in each state to the records and judicial proceedings of every other state.

the court, as provided by § 7422, Sandels & H. Dig. Stat. Ark. On the same day that the will was presented, Adele Wahl filed her petition in the probate court of Garland county, in which she stated the death of the deceased, the existence of a will, its probate before the clerk in vacation, and that no executor was provided for in the will, and that she was the sole devisee. She also alleged that no administrator had been appointed, and prayed the court for letters of administration with the will annexed. On the 28th day of the same month Mary E. Franz filed her petition in the probate court of Garland county, Arkansas, in which she set forth, among many other things, that she was a sister of Joseph H. Molen, and his sole heir at law, and denied that the instrument propounded by the said Adele Wahl was the last will and testament of the deceased, Joseph H. Molen. She alleged, also, that the said Joseph H. Molen was, at the time he signed the said pretended will, under the undue influence of the said Adele Wahl, whereby he was deprived of his volition, and for this, among other reasons, prayed that the will be set aside and rejected. On the 8th day of January Adele Wahl responded to this petition, denying the material allegations contained therein. The probate court, after hearing the testimony, confirmed the action of the clerk in vacation, and admitted the will to record, adjudging it to be the last will and testament of the said Joseph H. Molen, deceased. From this judgment of the court probating the will the said Mary E. Franz, in due form and in apt time, took an appeal to the circuit court of Garland county, Arkansas, as provided by the statutes of that state. While the cause was pending on appeal in said court, to wit, on the 12th day of May, 1897, Mary E. Franz filed her petition and bond in the circuit court of the United States for the western division of the eastern district of Arkansas to remove the cause into said court on the ground of local prejudice, alleging that by reason thereof she could not obtain justice in the circuit court of Garland county, or in any other state court to which, under the laws of the state of Arkansas, the cause might be removed. In her petition she avers that the suit or controversy is of a civil nature, involving more than \$2,000, exclusive of interest and costs, and is wholly between citizens of different states, and which can be fully determined as to them, to wit, a controversy between the said Mary E. Franz, who avers that at the time of the commencement of this proceeding she was, and still is, a resident of the state of Ohio, and that said Adele Wahl, proponent of said will, was then, and still is, a citizen of the state of Arkansas. She alleges that the said Adele Wahl is not legally entitled to inherit from the said deceased, but is the sole devisee in said will; and also that she (Mary E. Franz) is the sister and sole heir at law of the said deceased, who died without issue. She also sets up the proceedings had in the probate court of Garland county, her appeal therefrom to the circuit court, where the same

was then pending, and that no order of court had been made directing an issue of *deviseavit vel non* to be submitted to a jury, and that the said Adele Wahl and herself are actually interested in said controversy. Adele Wahl appeared in said United States circuit court, and filed a response to the petition for removal. After hearing the same, the court adjudged that the cause was removable, and that the statute regulating removals had been complied with, and retained jurisdiction of the cause. A jury was called, and the case was tried upon its merits. The jury returned a verdict finding the issues for the contestant, and that the will was executed under undue influence, and thereupon a judgment was rendered that the instrument of writing was not the last will and testament of Joseph H. Molen; that the application to admit it to probate as such be denied, the judgment of the probate court of Garland county admitting it to probate be set aside and annulled, and that the contestant recover of the proponent all her costs in that behalf expended, and that a copy of the judgment be certified to the probate court of Garland county for action in pursuance thereof. Motions for a new trial and arrest of judgment were filed and overruled. A bill of exceptions was tendered in apt time, duly signed, a writ of error sued out, and the case is now before this court for review. Any other facts that may be necessary for the determination of this case will appear in the opinion.

Messrs. J. B. Wood and J. P. Henderson, for plaintiff in error:

The probating of a will is not a suit at common law or in equity.

Reed v. Reed, 31 Fed. Rep. 49; *Re Cilley*, 58 Fed. Rep. 977; *Re Aspinwall*, 83 Fed. Rep. 851; *Broderick's Will*, 21 Wall. 503, *sub nom. Kieley v. McGlynn*, 22 L. ed. 599; *Re Frazer*, 18 Alb. L. J. 353, Fed. Cas. No. 5,068; *Re Foley*, 76 Fed. Rep. 390, 80 Fed. Rep. 949.

The jurisdiction of the United States circuit court on removal of an action to that court from a state court under § 2 of the act of March 3, 1887, as corrected by act of August 13, 1888, is limited to such a suit as might have been brought in such circuit court in the first instance.

Mexican Nat. R. Co. v. Davidson, 157 U. S. 201, 39 L. ed. 672, 15 Sup. Ct. Rep. 563; *Yuba County v. Pioneer Gold Min. Co.* 32 Fed. Rep. 183.

There had been one trial of this case in the probate court of Garland county and judgment was rendered in said court upon such trial. It was too late to remove the cause after that trial.

Farmers' & M. Nat. Bank v. Schuster, 52 U. S. App. 612, 86 Fed. Rep. 161, 29 C. C. A. 649; *Re Frazer*, 18 Alb. L. J. 353, Fed. Cas. No. 5,068; *Nisk v. Henarie*, 142 U. S. 459, 35 L. ed. 1079, 12 Sup. Ct. Rep. 207; *Tennessee v. Bank of Commerce*, 152 U. S. 461, 38 L. ed. 514, 14 Sup. Ct. Rep. 654; *Tarver v. Tarver*, 9 Pet. 174, 9 L. ed. 91; *Louvergny v. Municipality No. 2*, 18 How

470, 15 L. ed. 399; *Ellis v. Davis*, 109 U. S. 485, 27 L. ed. 1006, 3 Sup. Ct. Rep. 327.

Messrs. U. M. Rose, W. E. Hemingway, G. B. Rose, and J. M. Harrell, for defendant in error:

Any person interested may appeal within one year, and in the circuit court for the first time all interested parties must be brought in, a jury trial may be demanded, the cause is tried *de novo*, and the decision is a bar to any further proceeding to call the probate or the rejection of the will into controversy.

The only remedy is by appeal to the circuit court.

Ouachita Baptist College v. Scott, 64 Ark. 349, 42 S. W. 536; *Mitchell v. Rogers*, 40 Ark. 91.

The proceeding in the circuit court is a suit within the meaning of the removal act.

Brodhead v. Shoemaker, 44 Fed. Rep. 518, 11 L. R. A. 567; *Richardson v. Green*, 15 U. S. App. 488, 61 Fed. Rep. 423, 9 C. C. A. 565; *Gaines v. Fuentes*, 92 U. S. 10, 23 L. ed. 524; *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206.

The fact that the statutes give the probate court exclusive jurisdiction over matters relative to the probate of wills, and to hear and determine controversies respecting wills, cannot impair the right of the Federal court to exercise its powers, if they are in other respects properly invoked.

Payne v. Hook, 7 Wall. 425, 19 L. ed. 260; *Hess v. Reynolds*, 113 U. S. 73, 28 L. ed. 927, 5 Sup. Ct. Rep. 377.

The requirement that a cause to be removable be one of which the circuit court has original cognizance has no reference to limitations imposed by rules of procedure.

Re Stutsman County, 88 Fed. Rep. 337; *Ellis v. Davis*, 109 U. S. 485, 27 L. ed. 1006, 3 Sup. Ct. Rep. 327.

The proceeding on appeal in the circuit court under § 7421, Sandels & Hill's Digest, as construed by the supreme court of the state in *Ouachita Baptist College v. Scott*, 64 Ark. 349, 42 S. W. 536, is in every essential a suit at law, although called an appeal.

The fact that it is instituted by an appeal instead of by filing a complaint cannot deprive the Federal courts of jurisdiction.

Re Stutsman County, 88 Fed. Rep. 337; *Payne v. Hook*, 7 Wall. 425, 19 L. ed. 260; *Hess v. Reynolds*, 113 U. S. 73, 28 L. ed. 927, 5 Sup. Ct. Rep. 377.

Rogers, District Judge, delivered the opinion of the court:

In *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 39 L. ed. 672, 15 Sup. Ct. Rep. 563, it was distinctly held that under § 2 of the act of March 3, 1887, as corrected by the act of August 13, 1888 (25 Stat. at L. 433), the jurisdiction of a United States circuit court, on removal by the defendant from a state court, is limited to such suits as might have been originally brought in the United States circuit court by the plaintiff under the 1st section of that act. All the courts have followed that decision, which is 49 L. R. A.

now the settled law. It is also decided in the same case, that "the question is a question of jurisdiction, as such, and cannot be waived;" citing *Capron v. Van Noorden*, 2 Cranch, 126, 2 L. ed. 229; *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 28 L. ed. 432, 4 Sup. Ct. Rep. 510; *Metcalf v. Watertown*, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173. The question, therefore, which arises on the very threshold of this case is, Was it removable from the Garland circuit court to the United States circuit court for the western division of the eastern district of Arkansas? The decision of that question turns upon the construction to be placed upon §§ 1 and 2 of the corrected act of August 13, 1888 (25 Stat. at L. 433). The portions of those sections of that act defining the jurisdiction of district and circuit courts of the United States which bear on the question involved are as follows:

"Sec. 1. That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars. . . . in which there shall be a controversy between citizens of different states," etc.

"Sec. 2. That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district. Any other suits of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit courts of the United States for the proper district, by the defendant or defendants therein, being nonresidents of that state. . . . And where a suit is now pending, or may be hereafter brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause."

By reading § 1 of the act it will be seen that to confer jurisdiction on a circuit court of the United States three things are necessary, and no others: (1) A suit of a civil

nature at common law or in equity. (2) It must involve \$2,000, exclusive of interest and costs. (3) It must arise between citizens of different states, or present one or the other conditions mentioned in the last part of § 1, which part of said section is not quoted because not involved in the questions under consideration. If the three things above-mentioned concur in a case, no methods of procedure prescribed by a state for its own courts can deprive circuit courts of the United States of original jurisdiction thereof. *Colorado Midland R. Co. v. Jones*, 29 Fed. Rep. 193; *Re Jarnecke Ditch*, 69 Fed. Rep. 161; *Hyde v. Stone*, 20 How. 170-175, 15 L. ed. 874, 875; *Ellis v. Davis*, 109 U. S. 497, 498, 27 L. ed. 1010, 3 Sup. Ct. Rep. 327; *Coules v. Mercer County*, 7 Wall. 118, 19 L. ed. 86; *Payne v. Hook*, 7 Wall. 425, 19 L. ed. 260; *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 270, 20 L. ed. 571.

Bearing in mind that the right to remove a case from a state to the Federal court depends upon whether the suit might have been originally brought in the Federal court, we have concluded that the question of removal in this case is narrowed down to this one proposition: Is the probate of a will "a suit of a civil nature at common law or in equity?" The decisions are in direct conflict, and I have found no decision on the precise question which is binding upon this court. Primarily, that the enactment of the act of August 13, 1888, was to restrict the jurisdiction of the circuit courts of the United States, has been repeatedly decided, and is now settled. *Smith v. Lyon*, 133 U. S. 315, 33 L. ed. 635, 10 Sup. Ct. Rep. 303; *Re Pennsylvania Co.* 137 U. S. 451, 34 L. ed. 738, 11 Sup. Ct. Rep. 141; *Fisk v. Henarie*, 142 U. S. 459, 35 L. ed. 1080, 12 Sup. Ct. Rep. 207; *Shaw v. Quincy Min. Co.* 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935; *Hanrick v. Hanrick*, 153 U. S. 192, 38 L. ed. 685, 14 Sup. Ct. Rep. 835; *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 208, 39 L. ed. 675, 15 Sup. Ct. Rep. 563.

So far as we know, original jurisdiction to probate, or reject the probate, of a will was never entertained by any court of the United States under the original judiciary act or the act of 1875. It might well be inquired if to recognize jurisdiction under the act of 1888 is consistent with the universally recognized and established purpose for which that act was enacted. But there is also a radical difference between the provisions of both the original judiciary act and the act of 1875 and that of 1888 in relation to removal of cases from state courts. Under the original act, as well as that of 1875, the removal was not made to depend on the question as to whether the circuit court had original jurisdiction of the suit (*Mexican Nat. R. Co. v. Davidson*, 157 U. S. 208, 39 L. ed. 675, 15 Sup. Ct. Rep. 563); but, as we have seen, under the act of 1888 a case cannot be removed to the circuit court unless it might have been originally brought there. If, therefore, we treat the discussion of Mr. Justice Matthews in the case of *Ellis v. Davis*, 109 U. S. 485, 27 L. ed. 1006, 3 Sup. Ct. Rep. 49 L. R. A.

327, as indicating the tendency of the mind of the court as recognizing the right of a circuit court to take jurisdiction of the probate of a will under certain conditions specified (which is not conceded, but is denied), it must be remembered that the act of 1875 was then in force, under which, as already shown, the right of removal was not made to depend upon the existence of the right to bring the suit originally in the circuit court, as is the case now. That case should be read keeping in view the nature of the action and the issues decided. That case was heard on appeal from a decree dismissing the bill upon demurrer. Two things were sought by the bill: First. An accounting for rents and profits to realty which formerly belonged to defendant's testatrix. To secure this relief, a decree was sought adjudging the will, under which defendant held as sole devisee, to be null and void for incapacity to make it. Second. A decree for possession of realty held by the defendant as sole devisee under the will. The will sought to be annulled had been probated, and the administration closed. The court denied the right to recover the possession of the lands because the plaintiff's remedy at law was adequate. An accounting was denied, because, when ejectment was brought for the land, the court would direct an accounting as an incident in the cause. The court then proceeded to discuss the facts in the bill to see if they excepted the case from the principles stated. It is clear the object of this bill was primarily not to probate or vacate a will. It was to recover the real estate and rents and profits. In order to do this, the will stood in the way, and hence it was insisted that jurisdiction should be entertained for the purpose of canceling the will. The jurisdiction was denied. The court said: "It is well settled that no jurisdiction belongs to the circuit courts of the United States as courts of equity; for courts of equity, as such, by virtue of their general authority to enforce equitable rights and remedies, do not administer relief in such cases. The question in this aspect was thoroughly considered and finally settled by the decision of this court in the case of *Broderick's Will*, 21 Wall. 503, *sub nom. Kieley v. McGlynn*, 22 L. ed. 599." Later, in the same opinion, in a somewhat historical discussion of the question, very elaborate, but not very satisfactory, this doubting passage occurs: "And where provision is made by the laws of a state, as is the case in many, for trying the question of the validity of a will, already admitted to probate, by a litigation between parties, in which that is the sole question, with the effect, if the judgment shall be in the negative, of rendering the probate void for all purposes as between the parties and those in privity with them. *it may be* that the courts of the United States have jurisdiction, under existing provisions of law, to administer the remedy and establish the right in a case where the controversy is wholly between citizens of different states." (Italics ours.)

And later, in the same opinion, the court

said: "Jurisdiction as to wills, and their probate as such, is neither included in nor excepted out of the grant of judicial power to the courts of the United States. So far as it is *ex parte*, and merely administrative, it is not conferred, and it cannot be exercised by them at all until, in a case at law or in equity, its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties."

This case is direct authority against the jurisdiction in cases like the one at bar, although the case is urged by learned counsel as establishing the contrary. The court then quotes approvingly from *Gaines v. Fuentes*, 92 U. S. 10, 23 L. ed. 524. In this connection it is important to examine briefly the nature of that case, and the precise points decided, for upon *Ellis v. Davis* and *Gaines v. Fuentes*, as we shall see later, is made to rest the decision of Judge Pardee in *Brodhead v. Shoemaker*, 44 Fed. Rep. 518, 11 L. R. A. 567; and, if those cases do not support his decision in that case, then it is without any support other than the high standing of the judges delivering it. *Gaines v. Fuentes* is this sort of a case: Mrs. Gaines, the plaintiff in error, and the defendant in the court below, had probated in the second district court for the parish of Orleans the will of Daniel Clark; that court being vested with jurisdiction over the estates of deceased persons and appointments necessary in the course of their administration. She afterwards brought several suits against the defendants in error to recover certain lands and properties, relying on the will as a muniment of title as "instituted heir" of Daniel Clark. Thereupon the defendants in error filed their original petition in the same court, alleging they were unable to contest the will until the decree of probate thereof was recalled, and stating as grounds for recalling it the falsity and insufficiency of the testimony upon which it was probated, and the status of the plaintiff in error incapacitating her to inherit under the will. Upon service being made upon the plaintiff in error, she applied, in proper form, with a tender of the necessary bond, for removal of the cause to the circuit court of the United States for the district of Louisiana, under the 12th section of the judiciary act of 1789, on the ground of citizenship, and her application was denied. She then applied for a removal of the action under the act of March, 1867, on the ground of prejudice and local influence, and this application was also denied. Upon a hearing in the state court the will was annulled, and the case taken to the supreme court of the state of Louisiana, and from there, by writ of error, taken to the Supreme Court of the United States, which court reversed the case for error in the parish court in not removing the case to the United States circuit court for the district of Louisiana. The court in that case says: "The action is in form to annul the alleged will of 1813 of Daniel Clark, and to recall the decree by which it was probated; but, as the petitioners are not

heirs of Clark, nor legatees, nor next of kin, and do not ask to be substituted in place of the plaintiff in error, *the action cannot be treated as properly instituted for the revocation of the probate*, but must be treated as brought against the devisee *by strangers to the estate to annul the will as a muniment of title*, and to restrain the enforcement of the decree by which its validity was established, *so far as it affects their property*. It is, in fact, an action between parties; and the question for determination is whether the Federal court can take jurisdiction of an action brought for the object mentioned, between citizens of different states, upon its removal from a state court." The court then says: "The suit in the parish court is *not a proceeding to establish a will, but to annul it as a muniment of title, and to limit the operation of the decree admitting it to probate*. It is, in all essential particulars, a suit for equitable relief,—to cancel an instrument alleged to be void, and to restrain the enforcement of a decree alleged to have been obtained upon false and insufficient testimony. There are no separate equity courts in Louisiana, and suits for special relief of the nature here sought are not there designated suits in equity. But they are none the less essentially such suits; and if, by the law obtaining in the state, customary or statutory, they can be maintained in a state court, whatever designation that court may bear, we think they may be maintained by original process in a Federal court, where the parties are, on the one side, citizens of Louisiana, and on the other citizens of other states. . . . In the case of *Broderick's Will* the doctrine is approved, which is established in both England and in this country, that by the general jurisdiction of courts of equity independent of statutes, a bill will not lie to set aside a will or its probate; and, whatever the cause of the establishment of this doctrine originally, there is ample reason for its maintenance in this country, from the full jurisdiction over the subject of wills vested in the probate courts, and the revisory power over their adjudications in the appellate courts. But that such jurisdiction may be vested in the state courts of equity by statute is there recognized, and that, when so vested, the Federal courts, sitting in the states where such statutes exist, will also entertain concurrent jurisdiction in a case between proper parties. There are, it is true, in several decisions of this court, expressions of opinion that the Federal courts have no probate jurisdiction, referring particularly to the establishment of wills; and such is undoubtedly the case under the existing legislation of Congress." (Italics ours.)

The two cases of *Ellis v. Davis* and *Gaines v. Fuentes* thus appear to rest precisely on the same ground,—one being a suit to recover lands and the rents and profits thereof, and praying the court to cancel a will in order that it might be done; and the other being a direct proceeding by a stranger, under the statutes of the state, to cancel a will already probated in order to defend the title

to real estate held by the moving party. The question presented by the case at bar is totally different. The will is presented by the sole devisee for probate only. It is resisted by the sole heir at law. A judgment was rendered in the probate court probating the will, and from that judgment an appeal has been taken, and the same question is presented *de novo* in the circuit court. It is purely and simply a contest over the probate of the will, and not a mere incident—important, it may be—to the successful prosecution of another suit for relief of a wholly different character.

The defendant in error, to sustain the jurisdiction of the Federal court, has cited the decision of *Brodhead v. Shoemaker*, 44 Fed. Rep. 518, 11 L. R. A. 567. That case was heard in the circuit court for the northern district of Georgia, Judges Pardee and Newman presiding, the opinion being delivered by the former. It must be conceded that this decision is in point, and sustains the jurisdiction contended for in this case. Judge Pardee does not discuss the question at all. He simply says: "From the statutes cited, and the record of the case as made, up to the time of removal, it appears perfectly clear that the proceeding pending in the superior court of Floyd county, Ga., taken in connection with the removal statutes of the United States, was a suit in which there was a controversy removable by the defendants to the circuit court of the United States for the northern district of Georgia upon compliance with the conditions prescribed in said removal statutes; and it is within the rule laid down by the Supreme Court in *Gaines v. Fuentes*, 92 U. S. 10, 23 L. ed. 524; *Ellis v. Davis*, 109 U. S. 485, 27 L. ed. 1006, 3 Sup. Ct. Rep. 327. See also *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206; *Hess v. Reynolds*, 113 U. S. 75, 28 L. ed. 927, 5 Sup. Ct. Rep. 377; *Payne v. Hook*, 7 Wall. 425, 19 L. ed. 260; Mr. Justice Bradley's dissenting opinion in *Rosenbaum v. Bauer*, 120 U. S. 461, 30 L. ed. 743, 7 Sup. Ct. Rep. 633."

We cannot assent to the conclusions reached by Judge Pardee. In the view we have taken, the case of *Brodhead v. Shoemaker*, 44 Fed. Rep. 518, 11 L. R. A. 567, is not supported by *Gaines v. Fuentes* or *Ellis v. Davis*; and the other cases cited by Judge Pardee, in our opinion, have no relevancy or bearing whatever upon the real question at issue, namely, "whether the probate of a will is a suit of a civil nature at common law or in equity," within the meaning of the act of 1888. We are of the opinion that Judge Pardee totally misapprehended the question decided in *Ellis v. Davis*, and *Gaines v. Fuentes*, being led astray by expressions of the court which had no direct bearing upon the precise questions at issue. We prefer the reasoning found in *Re Cilley*, 58 Fed. Rep. 977, decided by District Judge Aldrich, and concurred in by Circuit Judge Colt, in the circuit court for the district of New Hampshire. This opinion is directly in conflict with the opinion in *Brodhead v. Shoemaker*, and arose in states where the stat-

utes for probating wills are substantially the same. The opinion in the case of *Re Cilley*, 58 Fed. Rep. 977, shows exhaustive research, and was delivered after a reargument of that case. In *Ellis v. Davis*, the Supreme Court reaffirmed, what had frequently been decided before, that the terms "law" and "equity," as used in the Constitution, were intended to mark and fix a distinction between the two systems of jurisprudence as known and practised at the time of its adoption. It will not be seriously contended that the same terms used in the original judiciary act were not intended by Congress to have the same meaning, and the same is true of the acts of 1875 and 1888. In view of these decisions, it seems natural that the learned judge, in his able discussion of this question in the case of *Re Cilley*, 58 Fed. Rep. 977, should have begun with the inquiry as to what was meant by "suits of a civil nature at law or in equity" when the Constitution was adopted; or, to state it in another form, to ascertain whether those words, as then and previously understood in England and America, embraced the proceedings for the probate of wills. He demonstrates, by decisions in England and America (if anything can be demonstrated), that such was not the case in this country or in England, either at the time the Constitution was adopted or prior thereto, and that the terms used in the judiciary act, like those used in the Constitution, were not used in any local sense, but "in the broad common-law sense in which equity and common-law jurisdiction are understood in this country and in England." The opinion, in this regard, is both instructive and strong, and it seems to us conclusive; so much so that little can be added thereto. After citing various decisions of the Supreme Court of the United States and of the circuit courts (*Broderick's Will*, 21 Wall. 503, *sub nom. Kieley v. McGlynn*, 22 L. ed. 599; *Tarver v. Tarver*, 9 Pet. 174, 9 L. ed. 91; *Fowevergne v. Municipality No. 2*, 18 How. 470, 15 L. ed. 399; *Ellis v. Davis*, 109 U. S. 485, 27 L. ed. 1006, 3 Sup. Ct. Rep. 327; *Ball v. Tompkins*, 41 Fed. Rep. 496; *Reed v. Reed*, 31 Fed. Rep. 49; *Re Aspinwall*, 83 Fed. Rep. 951; *Re Frazer*, 18 Alb. L. J. 353, Fed. Cas. No. 5,068; *Simmons v. Saul*, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369) in which the jurisdiction now asserted was disclaimed, he cites numerous decisions of the state courts to show that proceedings to establish wills are not commonly classed and known as suits at common law or in equity, and were not so classed or known in the early history of this country, and, therefore, were not suits removable to the Federal courts. He distinguishes cases like that at bar from such cases as *Ellis v. Davis*, *Hess v. Reynolds*, *Gaines v. Fuentes*, and that class of cases of which *Mississippi & R. River Boom Co. v. Patterson* is a sample, and pertinently suggests that when Congress intends to make so radical a change as to confer jurisdiction of the probate of wills on the Federal courts—a jurisdiction disclaimed by the courts from the foundation of the government, and a ju-

risdiction always exercised in England by the ecclesiastical courts, and in this country by probate courts created for that and kindred special purposes—it will not be left to doubtful construction, but will be provided for by definite and unmistakable language. The argument of the learned judge is well-nigh complete and conclusive, the authorities convincing, and we are content with the result reached in that case. It is precisely in point, and it is absolutely irreconcilable with *Brodhead v. Shoemaker*, which, in our opinion, is not only unsound, but is not supported by either authority or reasoning, nor does it give evidence of careful consideration or research. It could serve no wise purpose now to quote from the opinion in the case of *Re Cilley*, 58 Fed. Rep. 977. In *Copeland v. Bruning*, 72 Fed. Rep. 5, District Judge Baker, for the district of Indiana, in a very clear and well-considered opinion rendered in 1896, reviewing many cases, follows *Re Cilley*, 58 Fed. Rep. 977. That case is important in this: that in Indiana the probate of a will is had in the circuit court,—a court of general jurisdiction. Under the statute of that state, William H. Bruning presented for probate, in the office of the clerk of the circuit court of Jefferson county, Indiana, the alleged last will and testament of John F. Bruning. Clara Copeland, a child of the deceased, under the statute of the state, filed her objections to the probate of the will. Subsequently, under a statute of that state, she filed a complaint to contest the validity of her father's will, making William H. Bruning, one of the children and heirs at law of the decedent, and a devisee under the will, party defendant. Service was had upon the defendant. Thereupon he tendered a petition, accompanied by a proper bond, for the removal of the cause into the Federal court. The state court refused to make the order of removal. He then filed a transcript of the record in the Federal court, and the plaintiff, Clara Copeland, filed her motion to remand the same. The question now at bar was, therefore, squarely presented in that case. The learned judge in that case reviewed almost every case cited in this opinion, and, after the most careful consideration, remanded the case to the state court. In *Oakley v. Taylor*, 64 Fed. Rep. 245, District Judge Priest, of the eastern district of Missouri, in a strong and well-considered opinion, reached the same conclusion; and this case is also important because of the statutes of that state regulating the probate of wills. The case is directly in point, and justly entitled to much weight. In *Everhart v. Everhart*, 34 Fed. Rep. 85, District Judge Hill, of the southern district of Mississippi (though retaining jurisdiction of that case), recognized the same rule, and in that case, as in almost every case cited, *Gaines v. Fuentes* and *Ellis v. Davis* are cited to support the doctrine announced in that case, thus evidencing the well-nigh unanimous interpretation placed by the courts upon those cases. In *Langdon v. Goddard*, 2 Story. 267, Fed. Cas. No. 8,060, decided by Mr. Justice Story at circuit (district of New Hampshire), that learned justice said: "In respect to the wills and the codicils admitted to probate, the exclusive jurisdiction as to the probate thereof belongs to the state courts of probate, and we have no authority whatsoever to inquire into it, or examine the validity thereof." And the reporter of the Federal Cases cites, in a footnote to this opinion, the following cases: *Armstrong v. Lear*, 12 Wheat. 169, 6 L. ed. 589; *King v. Netherseal*, 4 T. R. 258; *Price v. Dewhurst*, 4 Myl. & C. 76, 80; *Tompkins v. Tompkins*, 1 Story, 547, Fed. Cas. No. 14,091. It may be added that it is remarkable, indeed, that if the jurisdiction of a suit, the object and purpose of which is to settle nothing but the validity or invalidity of a will as a preliminary step in determining whether its probate should be granted or denied, was so doubtful that it was never entertained by a Federal court so far as we have been able to ascertain, prior to the decision of *Brodhead v. Shoemaker*, that it should now be entertained under the act of 1888, which act was confessedly enacted for the specific purpose of curtailing the jurisdiction of the United States courts. (On the general question of the jurisdiction of Federal courts over the administration of estates of deceased persons, see notes to *Barling v. Bank of British North America*, 1 C. C. A. 510, 513, and *Bedford Quarries Co. v. Tomlinson*, 36 C. C. A. 272.)

It must be remembered that the question is not whether Congress has the power, under the Constitution, to confer that jurisdiction upon the Federal courts. The question is, Has it done so? And the action of the courts from the foundation of the government down to the passage of the act of 1888 should be accepted as an absolute denial thereof, and, unless it can be shown that by the act of 1888 the jurisdiction in respect of the subject-matter under consideration was enlarged, the courts should await future action upon the part of Congress before assuming jurisdiction of this new and novel class of cases hitherto confided, in England, to the ecclesiastical courts, and in this country to statutory courts adapted especially for their hearing.

The law of Arkansas, and the jurisdiction of its courts, touching the probate of wills, have been settled by its own supreme court. In *Ouachita Baptist College v. Scott*, 64 Ark. 350, 42 S. W. 537, the supreme court said: "It has been held by this court that a court of equity has no jurisdiction to hear and determine a contest of a will. *Mitchell v. Rogers*, 40 Ark. 91. It has also been held by this court that such a contest cannot be made by proceedings on a writ of certiorari, but that the only remedy is by appeal. *Petty v. Ducker*, 51 Ark. 281, 11 S. W. 2. It has also been determined by this court that the circuit court has no original jurisdiction now, as formerly, to try such a contest, since the Constitution confers original and exclusive jurisdiction of wills, etc., upon the probate court. *Dowell v. Tucker*, 46 Ark. 451. It follows that such a contest, if made at all, must be made originally in the probate

court, or else, when that cannot be done, on appeal from the probate order of the probate court to the circuit court, accordingly as the will has been probated in the more solemn form or in the common form."

And it is expressly provided by statute that the trial in the circuit court shall be *de novo*. Sandels & H. Dig. § 1152. It is not therefore, an original proceeding instituted in the circuit court, but it is a continuation of the proceedings begun in the probate court. It is not a suit at law, nor is it a suit in equity, as understood either at common law or in equity, nor as recognized by the statutes and laws of the state. In its origin a proceeding to probate a will in the probate court, if the probate is sought in common form,—that is, without notice to parties interested,—it partakes very little of either. No complaint is filed, no pleadings are required, and no service had. It is in the nature of a proceeding *in rem*. If the probate is sought in the more solemn form (that is, after notice had to parties interested,—which may be done either in the probate court or on appeal in the circuit court), the proceeding is the same in both, with one exception. In the probate court there can be no jury impaneled; in the circuit court there may be, upon the demand of any one of the parties interested. The real contest of the will, in that event, may be made, as said in *Ouachita Baptist College v. Scott*, 64 Ark. 350, 42 S. W. 537, on the grounds set forth in the petition of the parties contesting the will, which, of course, will necessarily show the relationship of the parties to the deceased. The statute only provides that the case may be brought to the circuit court on appeal by simply filing the affidavit, and when in the circuit court, "upon the demand of any one of them, a jury shall be impaneled to try which or how much of any testamentary paper produced is or is not the last will of the testator." If no jury be demanded, the question is determined by the court, and the final decision is a bar to any other proceeding to call the probate or rejection of the will in question, subject to the right of appeal or writ of error to the supreme court as provided by the statute; but it is provided that nothing contained in the statute shall preclude a court of chancery from its jurisdiction to impeach such final decision for such reason as would give it jurisdiction over any other judgment at law. Sandels & H. Dig. § 7421. The contention of the defendant in error is not, therefore, advanced by anything found in the statutes of Arkansas, or the decisions of its courts. The conclusion is that, within the meaning of the first and second sections of the judiciary act of 1888, the proceeding for the probate of a will is not a "suit of a civil nature at common law or in equity," and therefore is not removable either from the probate court or from the circuit court into the Federal court.

The judgment is reversed, with instructions to the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas to remand the case to the Circuit Court of Garland county.

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Sanborn, Circuit Judge, dissenting:

Let it be conceded: (1) That under the act of 1887, as corrected by the act of 1888, this case was not removable to the United States circuit court for the district of Arkansas unless at the time of its removal it was a suit of a civil nature at common law or in equity, within the meaning of that term as it had been interpreted by the Supreme Court of the United States prior to 1887; and (2) that the United States circuit court had no original cognizance of a proceeding to probate a will as such. The question here is not, however, whether or not the Federal court has jurisdiction of a proceeding to probate a will. It is whether or not, after a will has been probated, and after a state has conferred upon its courts of law and its courts of equity jurisdiction to hear and determine in a suit between parties who are citizens of different states, and who claim property in that state, the crucial issue which determines the right to that property, the issue whether or not a will so probated which devises the property was procured by fraud and undue influence, a Federal court has concurrent jurisdiction of that suit. Let us refer to the statutes and the record for a moment, that the question at issue may be clear. The statutes of Arkansas as they are printed in Sandels & Hill's Digest, so far as they govern the proceedings in this case, provide that, when a will shall be exhibited for probate, the court of probate, or clerk thereof in vacation, shall receive the same, and grant a certificate of probate or of rejection, without summoning any party, but that this action shall be subject to the confirmation or rejection of the probate court (§ 7422); that wills may be proved and admitted to record by the court of probate (§ 1599); that they shall not be received in evidence until they have been allowed and admitted to record by the court of probate; that they shall be received in evidence thereafter; that the allowances of wills by the probate court shall be conclusive until the same shall be superseded or amended (§§ 7408, 7410, 7411); that an appeal shall lie from the allowance of a will by the court of probate to the circuit court of the state (§ 7409); that the circuit court of the state has jurisdiction of all actions for the enforcement of civil rights or the redress of civil wrongs except where exclusive jurisdiction is given to other courts; that its actions and proceedings are to be had according to the course, rules, and jurisdiction of the common law unless otherwise provided (§ 1114); that it has a superintending control and appellate jurisdiction over probate courts; that its appellate jurisdiction extends to errors of fact as well as of law (§§ 1120-1122); that on an appeal from the allowance of a will the circuit court shall proceed to try the case *de novo* (§ 1152); that all necessary parties shall be brought before the court; that upon the demand of any one of them a jury shall be impaneled to try which or how much of any testamentary paper produced is or is not the last will of the testator; that its decision shall be a bar to any other proceeding to call

the probate or rejection of the will in question except by appeal to the supreme court of the state (§ 7421); and that any person who resides out of the state, who does not appear, and is not personally served with process, may, within three years after the final decision of the circuit court, impeach that decision, and have a retrial of the question *devisavit vel non* by an original suit upon a bill in chancery (§ 7423). Thus it will be seen that, while the state of Arkansas has conferred upon its probate court jurisdiction to allow or reject a will in the first instance when it is properly presented to it, it has granted to its court of general jurisdiction—to its circuit court—the right, and has imposed upon it the duty, to try *de novo* according to the course and practice at common law, in a suit instituted in that court by appeal from the probate court, every question of fact and of law involved in the issue, whether the probated writing is such a will or not, when the controversy has arisen over that issue between opposing parties, and that it has conferred upon its court of chancery jurisdiction to hear and determine all these questions *de novo* in every case in which an interested nonresident has not appeared or been personally served with process in the suit in the circuit court. Such are the statutes. What is the case that was removed and tried in the court below? Was it an application to the probate court to allow or reject the will? Not at all. That application had been heard and granted, and the probate court had no further power over or jurisdiction of the issue. It was not a proceeding to establish the will that was removed to the court below. It was the suit between Mary Franz and Adele Wahl, instituted in the circuit court of the state by the appeal of the former from the probate court for the purpose of avoiding the will and its probate, and of trying *de novo* the issues of fact and of law presented by the pleadings which these two parties had interposed, and nothing more, that was removed to the Federal court. When that removal took place, there were two parties, and two only, to the suit and to the issues in controversy. The determination of those issues was decisive of the question whether Mary E. Franz, a citizen of Ohio, or Adele Wahl, a citizen of Arkansas, was the owner of all the property of which the decedent died seised, which was of the alleged value of \$20,000. Mary E. Franz was his sole heir, Adele Wahl his sole devisee under the alleged will, and it was the suit between these parties to determine the issues upon which the title to this property depended that was removed into the court below. The course of the proceedings through which this removal was secured was thus: Joseph H. Molen died on December 9, 1895. On December 24, 1895, the clerk of the probate court admitted to probate, in common form, without notice to anyone, his alleged will, which was propounded by Adele Wahl. On January 28, 1896, his sole heir, Mary E. Franz, filed in the probate court her petition, in which she averred that the writing presented was not the last will of Molen,

that it had been revoked, that it was procured by undue influence, and that it had been falsely represented to be the will of Molen. These averments were denied by the devisee, and the question was presented and heard upon evidence in the probate court whether the certificate of allowance made by the clerk should be confirmed or rejected, and on June 10, 1896, the probate judge confirmed it. Thereupon Mary E. Franz appealed to the circuit court of the state, and thereafter, but before the trial of the case in that court, she removed it to the Federal court on the ground of local prejudice. The case was tried by a jury in the United States circuit court, and they found that the pretended will was procured by undue influence, and was void, and the court rendered a judgment accordingly. Thus it appears that the question here is not whether the United States circuit court has original or other cognizance of a proceeding to probate a will. No application to prove such a will was presented to that court. No application to remove such a proceeding was made, and no such proceeding was removed. What was removed was the suit between Mary E. Franz and Adele Wahl, instituted in the circuit court of the state by appeal, which was to be tried in that court *de novo*, according to the course and practice of the common law, which was to determine whether or not the writing challenged was procured by fraud and undue influence; and which, in determining that question, was to decide whether a citizen of Ohio or a citizen of Arkansas was the owner of \$20,000 worth of property in that state.

The only question the case presents, therefore, is whether or not, when the state has conferred upon its courts of general jurisdiction at common law the right and power to hear and try *de novo* in a suit instituted by an appeal, and upon its courts of chancery the right to hear and try *de novo* in a suit commenced by original process, the question whether or not a writing that has been allowed as a will in the probate court of that state was procured by fraud and undue influence, a Federal court sitting in that state has concurrent jurisdiction to hear and try that issue where the property in controversy is of the value of \$20,000, and the parties to the suit are citizens of different states. This question has been answered in the affirmative by the Supreme Court in *Gaines v. Fuentes*, 92 U. S. 10, 20, 23 L. ed. 524; *Ellis v. Davis*, 109 U. S. 485, 496, 497, 27 L. ed. 1006, 1010, 3 Sup. Ct. Rep. 327; and *Byers v. McAuley*, 149 U. S. 608, 610, 620, 621, 37 L. ed. 867, 868, 873, 13 Sup. Ct. Rep. 906; by the circuit court of appeals of the ninth circuit in *Richardson v. Green*, 15 U. S. App. 488, 61 Fed. Rep. 423, 429, 435, 9 C. C. A. 565; by Judges Pardee and Newman in the circuit court in *Brodhead v. Shoemaker*, 44 Fed. Rep. 518, 11 L. R. A. 567; by Judge Hill in *Everhart v. Everhart*, 34 Fed. Rep. 82, 85; and by Judge Williams in this case in *Franz v. Wahl*, 81 Fed. Rep. 9; and in view of all the decisions upon the question the author of a leading text-book upon this subject has declared the rule to be

that "while the probate of a will *ex parte* is *in rem*, and, not being between parties, cannot be removed to the Federal courts, yet, where such will is contested in pursuance of statutory provisions, and becomes a suit *inter partes* residing in different states, the Federal courts take jurisdiction as they would in any other controversy between the parties." 1 Woerner, American Law of Administration, 2d ed. § 156, *357.

The question has been answered in the negative by Judges Colt and Aldrich in the circuit court of appeals of the first circuit, in *Re Cilley*, 58 Fed. Rep. 977; by Judge Welker in *Reed v. Reed*, 31 Fed. Rep. 49; by Judge Swayne in *Re Frazer*, 18 Alb. L. J. 353, Fed. Cas. No. 5,068; by Judge Baker in *Copeland v. Bruning*, 72 Fed. Rep. 5; and by Judge Priest in *Oakley v. Taylor*, 64 Fed. Rep. 245. The cases of *Broderick's Will*, 21 Wall. 503, *sub nom. Kieley v. McGlynn*, 22 L. ed. 599; *Tarver v. Tarver*, 9 Pet. 174, 9 L. ed. 91; *Fouevergne v. Municipality*, No. 2, 18 How. 470, 15 L. ed. 399; and *Simmons v. Saul*, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369,—from the Supreme Court; and *Re Aspinwall*, 83 Fed. Rep. 851; *Langdon v. Goddard*, 2 Story, 267, Fed. Cas. No. 8,060; and *Ball v. Tompkins*, 41 Fed. Rep. 486, are cited in support of the negative answer, but they fail to meet the issue. The case of *Simmons v. Saul*, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369, does not touch the question. All the other cases from the Supreme Court, except *Tarver v. Tarver*, were commenced when the statutes of the states in which they were brought did not authorize the trial in the respective state courts of general jurisdiction of the questions whether the wills there in controversy were fraudulently procured or invalid at the times when the suits in the Federal courts were commenced. Moreover, these are the earlier cases in the Supreme Court, and, so far as the opinions rendered in them contain expressions at variance with the later decisions in *Gaines v. Fuentes*, *Ellis v. Davis*, and *Byers v. McAuley*, they must be deemed to be overruled.

In the case of *Broderick's Will* it was expressly admitted that, if a state by statute authorized the bringing of a suit to declare a will void in its courts of appeal or equity after its probate, such a suit could be maintained, in a proper case, in a Federal court. 21 Wall. 503, 520, *sub nom. Kieley v. McGlynn*, 22 L. ed. 599; *Gaines v. Fuentes*, 92 U. S. 21, 23 L. ed. 528.

In the case *Re Aspinwall*, 83 Fed. Rep. 851, the proceeding to be removed was an appeal from the register of wills to the orphans' court. The orphans' court was a special statutory court having probate jurisdiction, but without general jurisdiction to try suits at common law and in equity. The holding was that the proceeding before the orphans' court was not removable, and it was expressly declared in the opinion in that case that the decision there rendered was not at variance with the decisions in *Gaines v. Fuentes* and *Ellis v. Davis* that where, under the state practice, a suit could be brought in

the court of general jurisdiction to annul a will and its probate after it was established; a like suit might be maintained in the Federal court.

In *Gaines v. Fuentes* the suit was commenced by petition in the parish court of New Orleans to annul a will probated years before, and to recall the decree by which it was established. That is the exact purpose of the appeal in the case in hand. Under the Code of Louisiana there was no suit in equity, and the Supreme Court divided upon the question whether or not the proceeding in that case fell within the term a "suit of a civil nature at law or in equity." The majority held that it did, that it was a suit, in equity, and that the Federal court had jurisdiction. The minority held that it was neither an action at law nor a suit in equity, and that the Federal court was without jurisdiction. Mr. Justice Field, who delivered the opinion of the majority, said of that proceeding, what is equally true of the suit instituted in the state court by appeal in this case: "The suit in the parish court is not a proceeding to establish a will, but to annul it as a muniment of title, and to limit the operation of the decree admitting it to probate. It is, in all essential particulars, a suit for equitable relief,—to cancel an instrument alleged to be void, and to restrain the enforcement of a decree alleged to have been obtained upon false and insufficient testimony." 92 U. S. 20, 23 L. ed. 528. He further said: "Whenever a controversy in a suit between such parties arises respecting the validity or construction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the Federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties." 92 U. S. 22, 23 L. ed. 529.

The dissenting opinion of Mr. Justice Bradley follows the line of argument adopted by the circuit court of appeals in the first circuit in *Re Cilley*, 58 Fed. Rep. 977, and by the trial judges who have agreed with the opinion in that case that a suit to annul a will and avoid a decree allowing it is a proceeding to probate it, that a proceeding to probate a will is not a suit at common law or in equity, and that, therefore, a Federal court has no jurisdiction of it. This contention met the reprobation of the majority of the Supreme Court in *Gaines v. Fuentes*, and it finds no support in the subsequent decisions of that court. In *Ellis v. Davis*, 109 U. S. 487, 27 L. ed. 1006, 3 Sup. Ct. Rep. 327, that court held: (1) That, where the courts of general jurisdiction of a state are authorized to try the validity of a will in a suit involving the title to real property, the Federal court has like jurisdiction in cases in which the necessary amount in controversy and the diverse citizenship exist (page 496, 109 U. S., page 1009, 27 L. ed., and page 333, 3 Sup. Ct. Rep.); (2) that, conceding that the judicial power of the Federal courts embraces only such suits as arise "in law and equity," this does not necessarily ex-

clude those which may involve the exercise of jurisdiction in reference to the proof of wills (page 497, 109 U. S., page 1010, 27 L. ed., and page 334, 3 Sup. Ct. Rep.; and (3) that the terms "law" and "equity" do not restrict the jurisdiction of the Federal courts to the rights and remedies which were employed and recognized in courts of law and equity when the national judicial system was adopted, but that they also embrace all rights and remedies newly created by the statutes of the states which may be administered according to the nature of the case in the courts of the United States. *Ibid.*

In *Byers v. McAuley*, 149 U. S. 608, 610, 620, 621, 37 L. ed. 867, 868, 873, 13 Sup. Ct. Rep. 900, a distributee of an estate, who was a citizen of another state, brought a bill in the Federal court in Pennsylvania to avoid a will which had been probated there, and to recover his share of the property of the estate while it was yet in process of administration in the orphans' court; and obtained a decree that the writing which had been allowed as a will in that court was not a will, but was a mere declaration of trust, and that he was entitled to a certain share of the estate; and the Supreme Court sustained the jurisdiction and the decree so far as it determined the rights of citizens of different states.

In *Brodhead v. Shoemaker*, 44 Fed. Rep. 518, 522, 11 L. R. A. 567, the contest of a will was first heard on pleadings in the court of ordinary, then appealed to the superior court of Floyd county, Georgia, where it was tried according to the practice at common law under the statutes of that state. Thereupon it was removed to the Federal court, and Judges Pardee and Newman held that it was an action at law, and removable under the act of 1887-88.

In *Richardson v. Green*, 15 U. S. App. 488, 61 Fed. Rep. 423, 429, 435, 9 C. C. A. 565, an original suit was brought in the Federal court in Oregon to avoid a will and the decree of the probate court allowing it on the ground that it was forged. There was a statute of the state of Oregon which permitted the maintenance of such a suit in its state courts of general jurisdiction. The circuit court of appeals of the ninth circuit held that it was a suit in equity, and that the Federal court had jurisdiction. Judge McKenna, now Mr. Justice McKenna of the Supreme Court, said: "The nature of this suit is not precisely defined by the decisions, but it is certainly *inter partes*, and seems to be within the doctrine declared in *Ellis v. Davis*, 109 U. S. 496, 497, 27 L. ed. 1009, 1010, 3 Sup. Ct. Rep. 327. This remedy existing in the Oregon courts, it could be exercised by the United States court."

In *Everhart v. Everhart*, 34 Fed. Rep. 82, 85, a similar case, Judge Hill rendered a like decision.

In this state of the law the court below was right in maintaining the removal of this case, and for the following reasons: (1) Because upon the death of Molen, Mary E. Franz, a citizen of Ohio, his sole heir. be-
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came entitled to his property, which was of greater value than \$2,000, and, under the Constitution and the acts of Congress, had the right to maintain a suit in equity in the Federal court against Adele Wahl, a citizen of Arkansas, to recover this property, and to enjoin the use of any fraudulent will to create a cloud upon the title of the real estate included within it, and no state legislation could curtail or destroy the jurisdiction of that court to hear and decide for itself every issue between these citizens which was determinative of their rights to this property. (2) Because the larger portion of the property devised by the will was real estate, and after its probate the Federal court sitting in equity had plenary jurisdiction, derived from the court of chancery in England, to entertain a suit in equity to avoid the devise of the real estate for forgery, fraud, or undue influence, and, upon the trial of the issue which it was empowered to frame and submit, to a jury, to set aside the will, and render futile the decree of probate. And (3) because the statutes of Arkansas gave to the contestant of a will the right to institute in its courts of general jurisdiction, and there to try *de novo*, a suit involving the question of the validity of the will after its probate; and under these statutes the Federal court had like jurisdiction of all suits involving the requisite amount between citizens of different states.

1. When the owner of property dies, his estate is immediately impressed with a trust for the benefit of his creditors, heirs, and legatees. The court of chancery of England and the courts of equity of the United States have plenary jurisdiction, at the suit of any proper creditor, heir, or legatee, to enforce this trust against any occupants, executors, administrators, or parties into whose control any part of the estate may come. 1 Story, Eq. Jur. § 532, etc.; *Atty. Gen. v. Cornthwaite*, 2 Cox, Ch. Cas. 44; *Comstock v. Herron*, 6 U. S. App. 626, 627, 55 Fed. Rep. 803, 5 C. C. A. 266; *Hagan v. Walker*, 14 How. 29, 14 L. ed. 312; *Adams, Eq. 257*; *Green v. Creighton*, 23 How. 90, 93, *sub nom. Kendall v. Creighton*, 16 L. ed. 419; *Borer v. Chapman*, 119 U. S. 587, 598, 599, 30 L. ed. 532, 536, 7 Sup. Ct. Rep. 342. In suits between citizens of different states to enforce this trust this jurisdiction vests in the Federal courts, and, while statutes of the various states may provide for the appointment of administrators, the allowance of claims and the probate of wills as muniments of title and as *prima facie* evidence of their validity in their courts, they can make no valid provisions which will deprive the national courts of the right or the duty to determine for themselves, independently of these provisions, every issue which involves the rights of citizens of different states to the property of the decedent, when these rights are drawn in question in proper suits brought in apt time.

In *Green v. Creighton*, 23 How. 90, 93, *sub nom. Kendall v. Creighton*, 16 L. ed. 419,—a suit against a legatee by a creditor whose claim was barred under the statutes

of the state by his failure to present it to commissioners,—Mr. Justice Campbell said, in delivering the opinion of the Supreme Court: "In the court of chancery, executors and administrators are considered as trustees, and that court exercises original jurisdiction over them in favor of creditors, legatees, and heirs in reference to the proper execution of their trust;" and the suit was maintained, notwithstanding the bar of the statutes of the state.

In *Borer v. Chapman*, 119 U. S. 587, 598, 599, 30 L. ed. 532, 536, 7 Sup. Ct. Rep. 348,—another suit against a legatee by a creditor of New York whose claim was barred by the laws of California, where the estate had been administered, through the failure of the creditor to present his claim within the time fixed by those laws,—Mr. Justice Matthews, delivering the opinion of the Supreme Court, and speaking of the jurisdiction of the Federal courts over suits in equity to administer estates of decedents, said: "As a part of the ancient and original jurisdiction of courts of equity it vested, by the Constitution of the United States and the laws of Congress in pursuance thereof, in the Federal courts, to be administered by the circuit courts in controversies arising between citizens of different states. It is the familiar and well-settled doctrine of this court that this jurisdiction is independent of that conferred by the states upon their own courts, and cannot be affected by any legislation except that of the United States;" and the suit was maintained, and a decree for the complainant sustained over the objection that his claim was barred under the administration statutes of California.

Immediately after the death of Molen, then, this was the situation: Adele Wahl, a citizen of Arkansas, the devisee in the fraudulent will, was in the possession of the property of the decedent and of a fraudulent instrument under which she intended to acquire the title to it. Mary E. Franz, a citizen of Ohio, was the sole heir of the deceased, and had the right to all his property, and that property was held in trust for her by Adele Wahl, who was in possession of it. Under the Constitution and the acts of Congress she had the right to maintain a suit in equity in the Federal court in Arkansas against Adele Wahl to enforce that trust, and to have every claim of the latter under the fraudulent will or otherwise, and every issue involving her right to that property, tried and determined in that court. She also had the right to maintain a suit in equity in that court to restrain Adele Wahl from imposing the threatened cloud of that fraudulent will upon the title to the real estate of which Molen died seised, and to compel a surrender and cancellation of the instrument, and in this suit she had the right to have the question of the fraudulent character of the will tried in the Federal court. Could the legislature of Arkansas destroy these rights? Could the statutes of that state, by providing that this fraudulent will should be presented to, contested, and allowed, with or without notice, in its probate court, or in

any of its other courts, and that, if there established, its validity should never be questioned elsewhere, deprive this citizen of Ohio of the right granted to her by the Constitution and laws of the United States to try in the Federal court the only issue involving her right to her property,—the issue whether or not this will was procured by fraud and undue influence? Could the statutes of Arkansas provide that a fraudulent deed should be presented to the register of deeds, or to any of its courts, and, if there allowed, deprive the citizens of other states of the right to contest its validity in a Federal court as against the citizens of Arkansas when its validity was determinative of their rights of property in that state? These questions are susceptible of but one answer. The proposition that no state legislation can destroy or impair the right of citizens of different states to maintain their suits for and to try their issues involving rights of property in the Federal courts is fundamental in the jurisprudence of the United States, and it is nowhere affirmed more decisively or illustrated more copiously than in the suits in the Federal courts by creditors and distributees for their shares of the estates of decedents. The statutes of the various states commonly provide that claims against the estates of decedents shall be presented to their probate courts, or surrogate courts, or orphans' courts, or to commissioners within a certain time after a published notice, and that, if disallowed by them, or if not presented within the time fixed, they shall be barred; that wills shall be presented for probate, and that all persons who fail to contest them in these courts shall be estopped to question their validity; that administrators' and executors' accounts shall be allowed by these courts, and that their allowances shall be conclusive upon all the world. But creditors, heirs, and legatees who are citizens of other states are not deprived of their right to maintain and try their suits in the Federal courts against administrators, executors, and all other parties who are citizens of the state of the decedent, to determine their rights in the property of the estate; nor are they barred of their original rights to maintain and to try these suits in the Federal courts by their failure to present their claims to the state courts, as provided by the administration statutes of the states. *Snydam v. Broadnax*, 14 Pet. 67, 74, 10 L. ed. 357; *Union Bank v. Vaiden*, 18 How. 503, 507, 15 L. ed. 472, 474; *Borer v. Chapman*, 119 U. S. 587–589, 30 L. ed. 532, 533, 7 Sup. Ct. Rep. 342; *Lawrence v. Nelson*, 143 U. S. 215, 224, 36 L. ed. 130, 134, 12 Sup. Ct. Rep. 440; *Payne v. Hook*, 7 Wall. 425, 430, 19 L. ed. 260, 261; *Arrowsmith v. Gleason*, 129 U. S. 86, 98, 32 L. ed. 630, 635, 9 Sup. Ct. Rep. 237; *Johnson v. Waters*, 111 U. S. 640, 667, 28 L. ed. 547, 556, 4 Sup. Ct. Rep. 619; *Hayes v. Pratt*, 147 U. S. 557, 570, 37 L. ed. 279, 284, 13 Sup. Ct. Rep. 503; *Byers v. McAuley*, 149 U. S. 608, 621, 37 L. ed. 867, 873, 13 Sup. Ct. Rep. 906; *Hyde v. Stone*, 20 How. 170, 175, 15 L. ed. 874, 875;

Hess v. Reynolds, 113 U. S. 73, 76, 28 L. ed. 927, 928, 5 Sup. Ct. Rep. 377.

In *Union Bank v. Vaiden* a creditor who had failed to present his claim against the estate before the probate court, as provided by the statutes of Alabama, and whose claim was by those statutes barred by such failure, brought a bill in equity against the administrators in the Federal court to enforce the trust in his favor, and to compel them to allow and pay his claim, and the Supreme Court sustained the bill, and said: "The law of a state limiting the remedies of its citizens in its own courts cannot be applied to prevent the citizens of other states from suing in the courts of the United States in that state for the recovery of any property or money to which they may be legally or equitably entitled."

In *Lawrence v. Nelson*, 143 U. S. 215, 224, 36 L. ed. 130, 134, 12 Sup. Ct. Rep. 443, it was held that a statute of the state of Illinois which required all claims against the estate of a deceased person to be filed in the county court within two years, or be forever barred, did not cut off a claim of a citizen of another state, who failed to present his claim within the time, and afterwards sued the administrator in the Federal court, and the Supreme Court said: "The general equity jurisdiction of the circuit court of the United States to administer as between citizens of different states the assets of deceased persons within its jurisdiction cannot be defeated or impaired by laws of a state undertaking to give exclusive jurisdiction to its own courts."

In *Payne v. Hook*, 7 Wall. 425, 430, 19 L. ed. 260, one of the distributees of the estate of a deceased person brought a suit in equity in the Federal court against the administrator of the estate in Missouri, who was proceeding to administer the estate in the probate court under the laws of that state. Objection was made that the suit could not be maintained because the statutes of Missouri provided that the probate court should have exclusive jurisdiction over all disputes concerning the duties and accounts of administrators. But the Supreme Court sustained the bill, determined the rights of the distributees, and declared that no legislation of a state could oust the jurisdiction of the Federal court to determine a controversy between citizens of different states.

In *Byers v. McAuley*, 149 U. S. 608, 610, 620, 621, 37 L. ed. 867, 873, 13 Sup. Ct. Rep. 906, a distributee of an estate which was in process of administration under a pretended will which had been probated as such before the register in Pennsylvania maintained a suit in equity in a Federal court to avoid the will, and to have a determination of his rights to a share in the estate, and obtained a decree that the instrument which had been probated as a will was not a will, and that determined his rights in the distribution of the estate.

The rational deduction from the decisions that have been cited and from the principle on which they rest is that immediately upon the death of Joseph Molen the Federal court 49 L. R. A.

had original jurisdiction of a civil suit in equity by Mary E. Franz against Adele Wahl to enforce the trust impressed upon the estate of the decedent in the latter's hands in favor of the former, and to enjoin the latter from using her fraudulent will to cloud the title of the real property which was the principal part of the estate; that Mary E. Franz had the right to the trial and determination of the crucial question whether or not the pretended will was fraudulent in that court; that the statutes of Arkansas could not deprive her of any of these rights; that the Federal court still has that jurisdiction; and that, since the suit she has instituted by appeal in the circuit court of the state was pending in a court of justice of general jurisdiction, is between these two parties, involves the same property and the same issues, she had the right to its removal.

2. As a part of the original jurisdiction exercised by courts of common law and equity in England to try and decide the question whether or not a devise of real estate was legally made after the will had been probated in the ecclesiastical court, the Federal court derived a like jurisdiction to hear and determine that question after the probate of this will in a suit brought for that purpose. It was long a disputed question in England, never finally put at rest until decided by a divided court in *Allen v. M'Pherson*, 1 H. L. Cas. 191, in 1847, whether or not the court of chancery had jurisdiction to avoid a will of personal property and the decree allowing it in the ecclesiastical court for forgery, fraud, or undue influence. The jurisdiction was repeatedly invoked and repeatedly maintained. *Thynn v. Thynn*, 1 Vern. 296; *Segrave v. Kirwan*, Beatty, 157; *Marriot v. Marriot*, 1 Strange, 666; *Barnesly v. Powel*, 1 Ves. Sr. 284. But it was finally refused in *Allen v. M'Pherson*. Under the English law a devise of real estate rested upon different grounds. Notwithstanding the probate of a will of both personal and real property in the ecclesiastical court, the jurisdiction of the court of chancery and of courts of law to try the issue whether or not the devise of the real estate was procured by fraud or undue influence was always conceded. *Barnesly v. Powel*, 1 Ves. Sr. 284, 285. A like jurisdiction vested in the Federal court below, and, as the bulk of the property covered by this will was real estate, it had jurisdiction of an original suit between these parties to set aside this will upon this ground. The statutes of Arkansas could not deprive it of this jurisdiction, and, as the suit removed was before a court of justice, and for the same purpose, it had jurisdiction of this suit.

3. If it is conceded, for the sake of argument merely, that the Federal court had no jurisdiction of an original suit to avoid this fraudulent will, and to render futile its probate upon the grounds that have now been considered, it still has jurisdiction of such a suit under the statutes of Arkansas, which gave the right to maintain it in its courts of general jurisdiction. Rights created and

remedies provided by the statutes of a state to be pursued in its courts may be enforced and administered in the Federal courts, either at law, in equity, or in admiralty, as the nature of the new rights and remedies may require. *Darragh v. H. Wetter Mfg. Co.* 49 U. S. App. 1, 78 Fed. Rep. 7, 14, 23 C. C. A. 609; *Gaines v. Fuentes*, 92 U. S. 10, 20, 23 L. ed. 524; *Richardson v. Green*, 15 U. S. App. 488, 61 Fed. Rep. 423, 429, 435, 9 C. C. A. 565; *Brodhead v. Shoemaker*, 44 Fed. Rep. 518, 11 L. R. A. 567; *Re Stutsman County*, 88 Fed. Rep. 337, 341; *Ellis v. Davis*, 109 U. S. 485, 497, 27 L. ed. 1006, 1010, 3 Sup. Ct. Rep. 327; *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 278, 287, 20 L. ed. 571, 577; *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 157, 25 L. ed. 903, 904; *Missouri, K. & T. Trust Co. v. Krumseig*, 40 U. S. App. 620, 77 Fed. Rep. 32, 23 C. C. A. 1; *Ex parte McNeil*, 13 Wall. 236, 20 L. ed. 624; *Broderick's Will*, 21 Wall. 503, 520, *sub nom. Kieley v. McGlynn*, 22 L. ed. 599, 605; *Holland v. Challen*, 110 U. S. 15, 25, 28 L. ed. 52, 56, 3 Sup. Ct. Rep. 495; *Frost v. Spitley*, 121 U. S. 552, 557, 30 L. ed. 1010, 1012, 7 Sup. Ct. Rep. 1129; *Reynolds v. Crawfordville First Nat. Bank*, 112 U. S. 405, *sub nom. Reynolds v. First Nat. Bank*, 28 L. ed. 733, 5 Sup. Ct. Rep. 213; *Chapman v. Brewer*, 114 U. S. 158, 170, 171, 29 L. ed. 83, 87, 88, 5 Sup. Ct. Rep. 799; *Gormley v. Clark*, 134 U. S. 338, 348, 349, 33 L. ed. 909, 913, 914, 10 Sup. Ct. Rep. 554; *Bardon v. Land & River Improv. Co.* 157 U. S. 327, 330, 39 L. ed. 719, 720, 15 Sup. Ct. Rep. 650; *Cowley v. Northern P. R. Co.* 159 U. S. 569, 583, 40 L. ed. 263, 267, 16 Sup. Ct. Rep. 127; *Davis v. Gray*, 16 Wall. 203, 221, 21 L. ed. 447, 453; *Fleitas v. Richardson*, 147 U. S. 538, 37 L. ed. 272, 13 Sup. Ct. Rep. 429; *Lincoln County v. Luning*, 133 U. S. 529, 531, 33 L. ed. 766, 767, 10 Sup. Ct. Rep. 363.

In *Darragh v. H. Wetter Mfg. Co.* 49 U. S. App. 1, 78 Fed. Rep. 7, 14, 23 C. C. A. 609, the state of Arkansas had enacted a statute which gave to a simple contract creditor of an insolvent corporation a suit in equity in its chancery court to wind up the affairs of such corporation, and to distribute its assets without the recovery of a judgment or the return of an execution. No such suit could have been maintained in the Federal court without this statute. But this court held that, inasmuch as that state had created this new right and remedy, and had provided for their enforcement in its court of chancery, an original suit in equity could be maintained in the Federal court for the same purpose.

In *Ex parte McNeil*, 13 Wall. 236, 243, 20 L. ed. 624, 626, a statute of New York had created a right to pilotage in certain cases. This right did not exist without the statute. A libel in admiralty was filed in the United States district court to enforce this right, and a decree for the libellant was rendered. An application was made to the Supreme Court for a writ of prohibition against the enforcement of the judgment be-

cause the court below had no jurisdiction. The Supreme Court denied the writ, and said: "This principle may be laid down as axiomatic in our national jurisprudence: A party forfeits nothing by going into a Federal tribunal."

In *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 270, 286, 20 L. ed. 571, 576, and *Dennick v. Central R. Co.* 103 U. S. 11, 18, 26 L. ed. 439, 441, it was held that state statutes creating causes of action for negligent killing, and providing for actions at law to enforce them in state courts, enabled the Federal courts to take jurisdiction of such actions, and to enforce the rights created by the state statutes, although no such actions could have been maintained in the absence of those statutes.

In *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 157, 25 L. ed. 903, 904, the statutes of a state had given to property holders the right to enjoin the payment of an illegal tax, and in discussing the right of the complainant to maintain a suit in a national court for the same purpose the Supreme Court declared the holding of that court to be that, "where a statute of a state created a new right, or provided a new remedy, the Federal courts will enforce that right either on the common-law or equity side of its docket, as the nature of the new right or the new remedy requires."

These decisions, and those cited with them which we have not reviewed, conclusively establish the proposition that the meaning of the term "suits of a civil nature at common law or in equity," which was re-enacted by Congress in 1887-1888, is not to be discovered by a consideration alone of what actions at law or suits in equity might have been maintained when the national system of jurisprudence was established in 1789. They demonstrate the fact that it is not to be restricted to those suits at law and in equity which might then have been maintained, but that it includes every action at law, and every suit in equity which had been authorized to enforce rights created under state laws between 1789 and 1887. The broad interpretation and liberal construction which had been given to this term by the decisions of the Supreme Court to which reference has been made was by a familiar canon of construction adopted and confirmed by Congress when it re-enacted the same words without change in the act of 1887-1888. When, therefore, the statutes of Arkansas gave this defendant in error the right to institute and maintain a suit in its courts of general jurisdiction to try the validity of this will, and to avoid it and its probate on account of fraud, undue influence, or illegality, the jurisdiction of the Federal court in that state was thereby extended over that suit between citizens of different states.

It will not do to say that the proceeding here in hand was *sui generis*, and not a suit. Chief Justice Marshall conclusively answered that suggestion in *Weston v. Charleston*, 2 Pet. 449, 464, 7 L. ed. 481, 486. He said: "The term [suit] is certainly a very comprehensive one, and is understood to ap-

ply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but, if a right is litigated between the parties in a court of justice, the proceeding by which the decision of the court is sought is a suit."

When this case was pending in the circuit court of the state, the defendant in error was pursuing the remedy in that court of justice which the law afforded her. A right was being litigated in a court of justice between two, and only two, opposing parties, and the case was, therefore, a suit and a suit of a civil nature.

To the suggestion that it is neither a suit at common law nor in equity, the answer is that it is both. It is a suit of which a court of law and a court of equity have concurrent jurisdiction. The statute which authorizes it declares that the issues it involves may be joined and tried *de novo* according to the course and practice of the common law, and that the judgment it prescribes may be rendered by a court of law. It is accordingly an action at law. The same statute provides that the same issues may be framed and tried in an original suit in the court of chancery in case the complainant is a nonresident, and has not appeared, or been served with process, in the circuit court. Moreover, this suit has the essential attributes of a suit in equity. The enforcement of trusts, the undoing of frauds, the removal of void instruments, and the record of them from the title to real estate which they cloud are well-known heads of equity jurisprudence. This is a suit to enforce the trust impressed upon the estate of Molen at his death. It is a suit to undo the fraud perpetrated by the procurement of his will by undue influence. It is a suit to remove the cloud which has been imposed upon the title to the real estate of which he died seised by a void and fraudulent will. It has every essential attribute of, and it is, a suit in equity. *Hayden v. Thompson*, 36 U. S. App. 361, 367, 368, 71 Fed. Rep. 60, 62-64, 17 C. C. A. 592, 594, 595; *Gaines v. Fuentes*, 92 U. S. 21, 23 L. ed. 524.

Nor is the argument persuasive that this was not a suit at common law or in equity, and that the jurisdiction of the Federal court over it was withheld or restricted by the fact that under the Arkansas statute it was to be instituted in the state court of general jurisdiction by appeal, and not by the issue and service of original process. This contention sticks in the bark, and sacrifices substance to form, verity to technicality. This suit in the state circuit court would have been the same that it now is, in substance and in legal effect, if the statute of Arkansas had authorized its commencement in that court, and it had been brought there by original process after the establishment of the pretended will in the probate court. The nature and character of a suit or proceeding are to be determined by its essential attributes, not by the forms or means of its institution. These attributes are the court in

which it is pending, the parties, the issues, the object of the suit, and the relief that may be rendered. The court in which the suit would have been pending, the parties to it, the purpose of the suit, the issues in it, and the relief that could have been granted, every essential attribute of it, would have been the same if it had been commenced in the circuit court of the state by original process that they now are, although it was instituted by appeal. The original jurisdiction of the Federal court over it could not be restricted, withheld, or determined by the mere mode by which it was commenced. Where a statute of a state authorizes a suit of a civil nature at common law or in equity of a nature of which a Federal court may take jurisdiction to be instituted in its courts of general jurisdiction by appeal, certiorari, notice, or other proceeding, the jurisdiction of the Federal court attaches; and a like suit between citizens of different states may be instituted in that court by original process, and maintained there. *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 406, 407, 25 L. ed. 206, 208; *Upshur County v. Rich*, 135 U. S. 467, 474, 475, 34 L. ed. 196, 198, 199, 10 Sup. Ct. Rep. 651; *Chicot County v. Sherwood*, 148 U. S. 529, 533, 37 L. ed. 546, 548, 13 Sup. Ct. Rep. 695; *Hess v. Reynolds*, 113 U. S. 73, 76, 28 L. ed. 927, 928, 5 Sup. Ct. Rep. 377; *Brodhead v. Shoemaker*, 44 Fed. Rep. 518, 522, 11 L. R. A. 567; *Re Stutsman County*, 88 Fed. Rep. 337, 340; *Re Foley*, 76 Fed. Rep. 390.

In *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 407, 25 L. ed. 206, 208, the statutes of Minnesota provided for the exercise of the power of eminent domain by a proceeding in which the boom company filed a petition in the state court for the appointment of commissioners to assess the value of the land taken, upon evidence produced before them, and that the landowner might appeal from the award of the commissioners to the state court of general jurisdiction, and there have a trial *de novo* of the issue relative to the value of his land. The Supreme Court held that "the proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of those terms. But, when it was transferred to the district court by appeal from the award of the commissioners, it took under the statute of the state the form of a suit at law, and was thenceforth subject to the ordinary rules and incidents." Page 406. 98 U. S., and page 208, 25 L. ed.

It answered the argument that the Federal court had no jurisdiction of the suit because it was instituted in the state district court by an appeal from the commissioners, and not by original process, in these apt and decisive words: "The case would have been in no essential particular different had the state authorized the company by statute to appropriate the particular property in question and the owners to bring suit against the company in the courts of law for its

value." Page 407, 98 U. S., and page 208, 25 L. ed.

This remark is equally true of the suit at bar. That there is no misconception here of the scope and effect of the holding of the Supreme Court in *Mississippi & R. River Boom Co. v. Patterson* will appear from an attentive reading of its later decisions in *Hess v. Reynolds*, 113 U. S. 73, 76, 28 L. ed. 927, 928, 5 Sup. Ct. Rep. 377; *Upshur County v. Rich*, 135 U. S. at pages 474-476, 34 L. ed. 199, 200, 10 Sup. Ct. Rep. 653, where the decision in *Mississippi & R. River Boom Co. v. Patterson* is reviewed and affirmed; and *Chicot County v. Sherwood*, 148 U. S. 529, 533, 37 L. ed. 546, 548, 13 Sup. Ct. Rep. 695. In the last case a statute of Arkansas provided that all claims against counties in that state should be presented to the county court of the county for allowance or rejection; that any claimant might appeal from the judgment of the county court to the state circuit court, and there have a trial *de novo*; but that suits against the county could be commenced and maintained in no other way. The Supreme Court expressly held that the right to maintain the revisory trial in the state court of general jurisdiction was sufficient in itself to warrant the maintenance of a like suit by original process in the Federal court. These authorities, and those cited with them which have not been reviewed, are decisive of the proposition that under the statute of Arkansas, which allows the institution of this suit by appeal, the Federal court has jurisdiction of a suit brought by original process in that court for like relief; and, since it has jurisdiction of such an original suit, it has jurisdiction of this suit by its removal from the state court.

The deductions which should be drawn from the authorities in this country on the subjects which have been under consideration are these: The Federal courts, as a part of their original jurisdiction, derived from the court of chancery in England, have jurisdiction, as between citizens of different states, to determine their rights to the property of deceased persons in process of administration, to avoid fraudulent deeds, wills, and other instruments which threaten to cloud the title to the real estate of such estates, and to deprive the owners of their property. No state legislation can destroy or impair this jurisdiction, or deprive citizens of different states of their right to try in the Federal courts, in a proper suit, brought in apt time, every issue involving their right to a

charge upon or a share in the property of the deceased person, whether that issue involves the validity of a deed, a mortgage, or a will. Federal courts have no jurisdiction of a proceeding to prove a will, or to appoint administrators of estates, or to allow claims against estates as such, in the absence of a suit at law or in equity in a court of justice between citizens of different states involving their rights of property. The statutes of the various states may lawfully provide for the proof of wills, the allowance of claims, and the appointment of administrators, and under these statutes wills may be established as muniments of title, and may become prima facie evidence of their validity, claims may be allowed and rejected, and administration of estates may proceed; but no state legislation regarding the administration of estates, and no administration under such legislation, can deprive the citizens of different states of their right to a trial *de novo*, and an independent decision by a Federal court of every issue which involves their right to a claim upon or interest in the property of the estates administered in a proper suit involving the requisite amount, and instituted in apt time, whether the issue it presents involves the validity of a will, of a debt, or of a claim of heirship. Where the statutes of a state create the right to institute in its courts of general jurisdiction, either by appeal or by original process, and to maintain and try according to the course and practice of the common law or according to the practice in equity, a suit between opposing parties to avoid a will and the probate thereof for fraud, undue influence, or illegality in its making, the Federal court in that state has original jurisdiction of a like suit between citizens of different states involving the necessary amount. A suit which involves more than \$2,000, instituted pursuant to a state statute by a citizen of Ohio against a citizen of Arkansas, in a court of general jurisdiction of a state, by appeal from a decree of a probate court allowing a will, for the purpose of avoiding the will and its probate for fraud and undue influence in procuring it, is a suit of which the Federal court could have taken original jurisdiction by original process, either as a suit at law or in equity, and is therefore removable to the Federal court under the act of 1887-88. Since the case was removable, and as there was no substantial error in its trial, the judgment below ought to be affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

DENVER & RIO GRANDE RAILROAD
COMPANY, *Plff. in Err.*,

v.

Katherine A. ROLLER *et al.*

(100 Fed. Rep. 738.)

1. A managing agent in charge of the

NOTE.—As to liability for causing fright, see *Smith v. Postal Teleg. Cable Co.* (Mass.) 47 L. R. A. 323, and footnote thereto.
49 L. R. A.

business office of a railroad company of another state for the purpose of soliciting business, in transporting passengers and freight over its road situated in another state is a "managing or business agent," within the meaning of Cal. Code Civ. Proc. § 411, authorizing the service of summons on such agents of foreign corporations.

2. Courts in California have jurisdiction of the subject-matter of an action, by a passenger against a foreign rail-

road company for injuries sustained by collision on its railroad in another state, under the provisions of Cal. Code Civ. Proc. § 395, providing for trial in any county which the plaintiff may designate, if the defendants do not reside in the state, and § 411, providing for service of summons on an agent of the corporation.

3. A railroad company is liable to a passenger for injuries caused by a collision on account of the negligence of the agents of a receiver who were jointly using the track under a lease.
4. Injuries caused by fright or shock resulting from a bodily injury in connection with a railroad collision, the accompanying explosion, fire, and wreck of cars, and the surrounding circumstances directly connected therewith and solely attributable thereto, may be included in a recovery of the damages sustained in the accident.
5. An opinion by a physician that the condition of a patient is the result of injury and shock of some sort is not incompetent when it is derived from his own knowledge, attendance, treatment, and examination of the patient, though based in part upon her statements and complaints, made at different times, as to her pains and sufferings.
6. A hypothetical question need not embrace or cover all the facts in the case, when it assumes the existence of a state of facts which the evidence directly, fairly, and reasonably tends to establish or justify, and does not transcend the range of evidence.
7. Evidence as to what was seen and heard after a passenger left a burning and wrecked car and climbed out of a deep trench up a steep embankment, where the passenger remained about thirty minutes while the cars were burning and injured persons were being brought up, is part of the *res gestæ* and competent evidence on the question of fright or nervous shock sustained by the passenger.
8. A passenger who has escaped from a wrecked and burning car is not guilty of contributory negligence in failing to close her ears and shut her eyes as to everything that transpires resulting from the collision while remaining for about thirty minutes upon an embankment to which she has climbed out of a deep trench, although the horrors incident to the collision may thus increase the fright or nervous shock which she sustains.
9. Photographs of a railroad wreck are admissible for the purpose of enabling witnesses to explain their testimony as to the facts or to assist the jury in arriving at a better understanding of such testimony.
10. A fright and nervous shock sustained by a passenger on account of the horrors incident to a collision while remaining on a railroad embankment after climbing out of a deep trench must be deemed general and not special damages for which recovery may be had under general allegations as to bodily pain and mental anguish caused by the violence of the collision and by being forced to alight from the coach.
11. The refusal of instructions prepared by counsel, although they contain correct principles of law applicable to the case, is not erroneous if the charge of the court in its entirety fairly covers the legal proportions necessary to give instructions upon.

(February 5, 1900.)

ERROR to the Circuit Court of the United States for the Southern District of California to review a judgment in favor of plaintiffs in an action brought to recover damages for injuries inflicted on the female plaintiff while a passenger on defendant's train. *Affirmed.*

Before McKenna, Circuit Justice, Gilbert, Circuit Judge, and Hawley, District Judge. The facts are stated in the opinion.

Mr. Henry T. Rogers, with Messrs. Stephen M. White and Charles Monroe, for plaintiff in error.

Mr. Lynn Helm, for defendants in error:

Courts of general jurisdiction have power to hear and determine all personal actions for money or damages, regardless alike of the place where the cause of action arose, the residence of the parties, or their character as natural persons or foreign corporations.

Story, Conf. L. §§ 542, 543; Gould, Pl. chap. 5, § 10; *Mostyn v. Fabrigas*, 1 Cowp. 181, 1 Smith, Lead. Cas. 4th Am. ed. p. 357; *Baltimore & O. R. Co. v. Harris*, 12 Wall. 65, 20 L. ed. 354; *New Orleans, J. & G. N. R. Co. v. Wallace*, 50 Miss. 244; *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439; *Block v. Atchison, T. & S. F. R. Co.* 21 Fed. Rep. 529; *McKenna v. Fisk*, 1 How. 241, 11 L. ed. 117; *Ackerson v. Erie R. Co.* 31 N. J. L. 309; *Curtis v. Bradford*, 33 Wis. 190; *Eingartner v. Illinois Steel Co.* 94 Wis. 70, 34 L. R. A. 503, 68 N. W. 664; *Great Western R. Co. v. Miller*, 19 Mich. 312; *Gardner v. Thomas*, 14 Johns. 134, 7 Am. Dec. 445; *United States v. American Bell Teleph. Co.* 29 Fed. Rep. 35.

Corporations act solely by means of agents, and those of one state are permitted only by comity to do business in other states; and it has been held that a corporation of one state could do business in another state only by the latter's consent, and that that consent might be accompanied by such conditions as that state should think it proper to impose.

Lafayette Ins. Co. v. French, 18 How. 409, 15 L. ed. 453; *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; *Baltimore & O. R. Co. v. Harris*, 12 Wall. 65, 20 L. ed. 354; *Merchants' Mfg. Co. v. Grand Trunk R. Co.* 21 Blatchf. 109, 13 Fed. Rep. 358; *Libbey v. Hodgdon*, 9 N. H. 394; *Van Dresser v. Oregon R. & Nav. Co.* 48 Fed. Rep. 202; *Block v. Atchison, T. & S. F. R. Co.* 21 Fed. Rep. 529.

Service may be had on a foreign corporation in a personal action by serving the agent doing business for such corporation, although the cause of action arose out of the state in which suit is instituted.

Baltimore & O. R. Co. v. Harris, 12 Wall. 65, 20 L. ed. 354; *Merchants' Mfg. Co. v. Grand Trunk R. Co.* 21 Blatchf. 109, 13 Fed. Rep. 358; *Van Dresser v. Oregon R. & Nav. Co.* 48 Fed. Rep. 202; *Block v. Atchison, T. & S. F. R. Co.* 21 Fed. Rep. 529; *United States v. American Bell Teleph. Co.* 29 Fed. Rep. 35; *Tuchband v. Chicago & A. R. Co.* 115 N. Y. 437, 22 N. E. 360; *New York, J. E. & W. R. Co. v. Estill*, 147 U. S. 591, 37 L. ed. 292, 13 Sup. Ct. Rep. 444; *Eingartner*

v. Illinois Steel Co. 94 Wis. 70, 34 L. R. A. 503, 68 N. W. 664.

It is not necessary that the business done should be the chief business for which the corporation is organized, nor that it should constitute the major part in volume of the entire business done by such corporation.

United States v. American Bell Teleph. Co. 29 Fed. Rep. 17; *Brewer v. George Knapp & Co.* 82 Fed. Rep. 694; *Palmer v. Chicago Evening Post*, 70 Fed. Rep. 886; *Palmer v. Pennsylvania Co.* 35 Hun, 369; *Tuchband v. Chicago & A. R. Co.* 115 N. Y. 437, 22 N. E. 360; *Foster v. Charles Betcher Lumber Co.* 5 S. D. 57, 23 L. R. A. 490, 58 N. W. 9; *Norton v. Atchison, T. & S. F. R. Co.* 61 Fed. Rep. 618.

A railroad company which permits another to make a joint use of its tracks is liable to a person injured by the negligence of the company to which the permission is granted.

Central Trust Co. v. Colorado Midland R. Co. 89 Fed. Rep. 560; 2 Elliott, Railroads, § 477; *Illinois C. R. Co. v. Barron*, 5 Wall. 90, 18 L. ed. 591.

Recovery for injuries to health, as a reasonable and natural consequence of great fright and actually and proximately occasioned thereby, which great fright was the reasonable and natural consequence of the circumstances in which a passenger was placed by a collision caused by the negligence of a railroad company, with the ensuing wreckage, explosion, and conflagration, can be had, although no physical injury was sustained except a shock or injury to the nervous system.

Sloane v. Southern California R. Co. 111 Cal. 668, 32 L. R. A. 193, 44 Pac. 320; *Bell v. Great Northern R. Co.* Ir. L. R. 26 C. L. 428; 2 Sedgw. Damages, 8th ed. p. 642; 1 Reven, Neg. pp. 77-81; *Purcell v. St. Paul City R. Co.* 48 Minn. 134, 16 L. R. A. 203, 50 N. W. 1034; *Seger v. Barkhamsted*, 22 Conn. 290; *Mack v. South Bound R. Co.* 52 S. C. 323, 40 L. R. A. 679, 29 S. E. 905; *Mo-Keon v. Chicago, M. & St. P. R. Co.* 94 Wis. 477, 35 L. R. A. 252, 69 N. W. 175; *Mann Boudoir Car Co. v. Dupre*, 13 U. S. App. 183, 21 L. R. A. 289, 64 Fed. Rep. 646, 4 C. C. A. 540.

For an injury to the person or the health an action may be maintained if it is caused by negligence.

Stutz v. Chicago & N. W. R. Co. 73 Wis. 147, 40 N. W. 653; *Consolidated Traction Co. v. Lambertson*, 59 N. J. L. 297, 36 Atl. 1000; *Lehigh & H. R. R. Co. v. Marchant*, 55 U. S. App. 427, 84 Fed. Rep. 870, 28 C. C. A. 544; *Warren v. Boston & M. R. Co.* 163 Mass. 484, 40 N. E. 895.

The question as to what is the proximate cause of an injury is one for the jury to determine, and their finding is conclusive.

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 409, 24 L. ed. 256; *Bott v. Pratt*, 33 Minn. 324, 53 Am. Rep. 47, 23 N. W. 237; *Hayes v. Michigan C. R. Co.* 111 U. S. 241, 28 L. ed. 415, 4 Sup. Ct. Rep. 369; *Crandall v. Goodrich Transp. Co.* 11 Biss. 525, 16 Fed. 49 L. R. A.

Rep. 75; *White v. Colorado C. R. Co.* 5 Dill. 437, Fed. Cas. No. 17,543.

Where the injuries were of a permanent nature there may be a recovery for future sufferings.

Washington & G. R. Co. v. Harmon, 147 U. S. 571, sub nom. *Washington & G. R. Co. v. Tobriner*, 37 L. ed. 284, 13 Sup. Ct. Rep. 557; *Koettler v. Manhattan R. Co.* 36 N. Y. S. R. 611, 13 N. Y. Supp. 458, Affirmed in 129 N. Y. 668, 30 N. E. 65; *Gainesville, H. & W. R. Co. v. Lacy*, 86 Tex. 244, 24 S. W. 269.

There was no error in the circuit court admitting evidence as to what was seen by the plaintiff Katherine A. Roller after she left the train and immediately after she ascended the embankment. It was part of the *res gestæ*, and not too remote.

Greenl. Ev. § 108; 1 Wharton, Ev. § 259; *Carter v. Buchannon*, 3 Ga. 513; 1 Rice, Ev. § 212; *Lund v. Tyngsborough*, 9 Cush. 41; *West Chicago Street R. Co. v. Kennelly*, 170 Ill. 508, 48 N. E. 996; *Hallahan v. New York, L. E. & W. R. Co.* 102 N. Y. 194, 6 N. E. 287; *Stutz v. Chicago & N. W. R. Co.* 73 Wis. 147, 40 N. W. 653.

Hawley, District Judge, delivered the opinion of the court:

This action was instituted to recover damages for injuries received by Katherine A. Roller, one of the defendants in error, on September 9, 1897, while a passenger on the railroad of plaintiff in error, in a wreck which occurred between a freight train of the Colorado Midland Company and the regular passenger train of the plaintiff in error, a corporation organized under the laws of Colorado. The Colorado Midland Railroad Company owned and operated a railroad extending from Colorado Springs to New Castle. From New Castle to Rifle Creek, it operated its trains over that portion of the Denver & Rio Grande Railroad under a lease from that corporation. The trains of the respective roads were run by the employees of the respective companies under a time-card and rules for running trains prepared by the plaintiff in error. The record shows that the collision in question was caused by the negligence of the employees on the train of the Colorado Midland Railroad Company, and that the plaintiff in error and its employees were entirely free from any negligence in the matter. This action was brought in the superior court for Los Angeles county, state of California. Summons was issued and served upon W. J. Shotwell, who was the agent of the plaintiff in error at San Francisco, California, authorized to solicit and contract for passengers and freight to be carried from the state of California over other lines, and then over the railroad of the plaintiff in error in the state of Colorado, and the soliciting and contracting for passengers and freight to be carried from Eastern points through the state of Colorado to the state of California. The plaintiff in error does not own or operate any railroad in the state of California. The cause of action arose wholly within the state of Colorado. After the service of the summons the action was removed by the

plaintiff in error from the state court to the circuit court of the United States for the southern district of California. A motion was then made to quash the summons and dismiss the action upon the ground that neither the circuit court nor the superior court of the state had, or have, any jurisdiction of the subject-matter of the action, or of the person of the corporation. The court denied this motion, and its ruling thereon is made the basis of an assignment of error.

1. Did the court err in refusing to quash the summons? In determining this question it becomes our duty to look prayerfully to the statute of California under which the service of the summons was made. The Code of Civil Procedure (§ 411), applicable to this case, provides that "the summons must be served by delivering a copy thereof, as follows: . . . (2) if the suit is against a foreign corporation, or a nonresident joint stock company or association, doing business and having a managing or business agent, cashier, or secretary within this state, to such agent, cashier, or secretary."

The plaintiff in error had an office in the city of San Francisco. Upon the windows of this office were signs which read, "Denver & Rio Grande R. R. Freight and Passenger Office." In a folder used and distributed by it for public information, giving the places of its offices and agents, is found the name of "W. J. Shotwell, Gen'l Agt. Pacific Coast, 314 California St., San Francisco." W. J. Shotwell, in his affidavit, says: "That he is the general agent for the Denver & Rio Grande Railroad Company, a defendant herein for the states of California and Nevada. . . . That it is true that in his office in San Francisco he and the clerks under him solicit passengers and freight to go over the Denver & Rio Grande Railroad. . . . This affiant endeavors to induce shippers of freight to send it from San Francisco, so that during its route east it will go over the Denver & Rio Grande road. . . . That he issues a shipping receipt or bill of lading for the goods to be shipped from San Francisco. . . . That his only employment is for the purpose of soliciting freight and passenger business, and in influencing shippers and passengers to ship their freight and to travel over the Denver & Rio Grande road in the state of Colorado."

It thus clearly appears that the plaintiff in error had a business office in the city of San Francisco, state of California, and a managing agent in charge of that office, for the purpose of soliciting business in transporting passengers and freight over its road, situated in the state of Colorado. Is not this sufficient to authorize a valid service of summons upon the authorized agent of the corporation? It will be noticed that, if there is no cashier or secretary upon whom service can be made, the Code does not specify the extent of the agency required in order to bind a nonresident corporation by service of summons, except that the person must be a "managing or business agent." It is obvious that this does not mean that it must be the general managing agent of the

corporation. The object of the service is attained when the agent served is of sufficient rank and character as to make it reasonably certain that the corporation will be notified of the service, and the statute is complied with if he be a managing or business agent in any specified line of business transacted by the corporation in the state where the service is made. That Shotwell, upon whom the service was made, was such an agent, is manifest from the facts above stated.

In *Tuchband v. Chicago & A. R. Co.* 115 N. Y. 437, 440, 22 N. E. 361, the court said: "When the corporation has an office in this state, where a substantial portion of its business is transacted by a person designated by itself as a general agent, although followed by words indicating some one department, it may safely be assumed that the object of the statute will be accomplished. It, of course, intends a 'managing agent' in this state, and, where a corporation created by the laws of any other state does business in this state, the person who, as its agent, does that business, should be considered its managing agent; and more especially should that be so where the foreign corporation has an office or place of business in this state, and when that office is in charge of that person, and he there acts for the corporation. He is there doing business for it, and so manages its business. Such person is, in every sense of the words used in the statute, 'a managing agent.'"

In *Merchants' Mfg. Co. v. Grand Trunk R. Co.* 21 Blatchf. 109, 13 Fed. Rep. 358, the court said: "A corporation, although it cannot migrate beyond the limits of the sovereignty which has created it, may by comity exercise its franchises elsewhere. A foreign corporation can transact business here upon such conditions as may be imposed upon it by the laws of the state. It can be sued whenever the technical obstacles in the way of compelling its appearance do not exist. At common law, process must be served on its principal officer within the jurisdiction of the sovereignty where the corporate body exists. But it can waive this requirement, and consent to be served in a different manner, and when it does this it stands on the same footing with a natural person. When it avails itself of the privileges of doing business in a state whose laws authorize it to be sued there, by service of process upon an agent, its assent to that mode of service is implied. Accordingly it has been repeatedly held that a foreign corporation consents to be amendable to suit by such mode of service as the laws of the state provide, when it invokes the comity of the state for the transaction of its affairs. *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451; *Baltimore & O. R. Co. v. Harris*, 12 Wall. 81, 20 L. ed. 354; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853. It waives the right to object to the mode of service of process which the state laws authorize." See also *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 596, 606, 37 L. ed. 292, 297, 300. 13 Sup. Ct. Rep. 444; *Van Dresser v. Oregon R. & Nav. Co.* 48

Fed. Rep. 202; *Norton v. Atchison*, T. & S. F. R. Co. 61 Fed. Rep. 618; *Palmer v. Chicago Herald Co.* 70 Fed. Rep. 886; *Foster v. Charles Betcher Lumber Co.* 5 S. D. 57, 68, 23 L. R. A. 490, 58 N. W. 9; *Palmer v. Pennsylvania Co.* 35 Hun, 369; *McNichol v. United States Mercantile Reporting Agency*, 74 Mo. 457; *Stone v. Traveler's Ins. Co.* 78 Mo. 655, 658.

2. Did the courts in California have jurisdiction of the subject-matter of this action? This question is dependent to a great extent upon the conclusions already reached as to the validity of the service of the summons. The Code of Civil Procedure of California, in treating of the place of trial of civil actions, specifies (1) certain civil actions that are to be tried in the county in which the subject of the action, or some part thereof, is situated; (2) of other actions, where the cause, or some part, arose in the county; (3) of the place of trial of actions against counties. Then comes § 395, as to the place of trial of other actions according to the residence of the parties. In this section we find that "if none of the defendants reside in the state . . . the same may be tried in any county which the plaintiff may designate in his complaint." It will be observed, by a careful reading of the statute, that actions of the nature and character of the one under consideration are not mentioned in the list of actions that must be tried where the subject of the action is situate, or where the cause of action arose. The contention of the plaintiff in error is that the statutes of California do not give jurisdiction, but simply provide in what county suits, over which the courts of California have jurisdiction, shall be brought, and how the service of summons may be made. Can this contention be sustained? There is no decision of the supreme court of California construing the various statutes we have cited with reference to the particular facts of this case. But in *Thomas v. Placerville Gold Quartz Min. Co.* 65 Cal. 600, 602, 4 Pac. 641, the court had under consideration a motion for a change of the place of trial. The defendant was an English corporation. It had never designated a person upon whom service of process could be had, but the summons was served upon its managing agent. One of the questions presented was whether a foreign corporation doing business in California had a residence in any particular county, such as contemplated by the provisions of the Code of Civil Procedure relating to the place of trial; and in the course of the opinion the court said: "A foreign corporation cannot do business here without subjecting itself to the jurisdiction of our courts, but it is not a necessary corollary that it is entitled to claim a 'residence' here. It cannot escape the consequences of an illegal act done by its agents, within the scope of the authority it has conferred upon them, by setting up an existence under a foreign government. *People v. Central R. Co.* 48 Barb. 478. It is liable to be sued here to the same extent as an individual or company incorporated under the laws of this state. *Austin v. New York*

& E. R. Co. 25 N. J. L. 383. It may be sued here, not because it resides here, but because it has chosen to do business here by its agents. Its home is in the country where alone it has its being. As it resides, if anywhere, out of the state, an action against it may be tried in any county designated by the plaintiff. Code Civ. Proc. § 395.

The general drift and tendency of judicial decisions, state and national, is in the direction of placing corporations upon the same plane as natural persons, in regard to the jurisdiction of suits by or against them. The statutes of the different states and of the United States have, as a general rule, been liberally construed for the purpose of sustaining this view, although the decisions of the state courts upon the precise point under discussion are not entirely harmonious. We are of opinion that the decided weight of authority and of reason is in favor of the jurisdiction of the state court over the present action, under the provisions of the statutes of California above cited, and upon the facts disclosed by the record.

In *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 596, 606, 37 L. ed. 292, 297, 300, 13 Sup. Ct. Rep. 444, the facts were in all essential respects similar to the case in hand. There two suits at law were brought against the railroad company which was incorporated under the laws of the state of New York, in the state court of Saline county, Missouri, to recover damages for injuries by the railroad company, through negligence, to live cattle. The cattle were being transported from Massachusetts to Missouri. The damage occurred from a collision which took place in Ohio. The summons was served in St. Louis, Missouri, on a city passenger agent of the railroad company in its business office there, who had charge of it at the time of the service. The company there, as here, appeared, and upon petition removed the actions to the circuit court of the United States, because of diverse citizenship, and thereafter in the circuit court moved to quash the writ of summons on the ground that it was void and conferred no jurisdiction over the railroad company. The circuit court overruled this motion. The supreme court, in considering the assignments of error based upon this ruling, following the decisions of the state court of Missouri, held that the state court acquired jurisdiction of the actions, under the provisions of subdiv. 4 of § 3489 of the Revised Statutes of Missouri of 1879, and § 3481 of the same statutes. These sections are substantially the same as §§ 395 and 411 of the Code of California, heretofore cited. This is a transitory action, and could be tried in any state where jurisdiction could be obtained by proper service upon the corporation.

In *Curtis v. Bradford*, 33 Wis. 190, 192, in proceedings against a garnishee upon a judgment obtained against a railway company, where, as here, it was claimed that the court neither had jurisdiction of the defendant, nor of the subject-matter of the action, the court said: "It further appears that the principal suit was brought to re-

cover for injuries done to the plaintiff's wife while attempting to get aboard the defendant's cars at a station in Michigan. It was doubtless an action sounding in tort, for an injury inflicted in another state, but still one transitory in its character, and triable by the courts of this state. This proposition is in accordance with reason, and is amply sustained by the authorities to which we are referred. . . . Those authorities establish the doctrine that courts of general jurisdiction entertain actions for personal injuries, even where the act complained of was committed in another state."

In *New Orleans, J. & G. N. R. Co. v. Wallace*, 50 Miss. 244, 248, the collision of the train of cars whereby Wallace, the plaintiff, was injured, occurred in the state of Louisiana. The suit was brought in the state court of Lawrence county, Mississippi. The supreme court said: "The court had jurisdiction of the subject-matter of the suit, and, as there is no objection to the service of process by which the plaintiffs in error are brought into court, . . . the court had jurisdiction of the plaintiffs in error; and, upon well-settled principles, the court having jurisdiction of the subject-matter of the suit and of the defendants can entertain the suit and try the cause. Corporations are artificial persons, existing only in contemplation of law. They must dwell in the place of their creation, and cannot migrate to another state. But they are liable to be sued like natural persons in transitory actions, arising *ex contractu* or *ex delicto*, in any state where legal service of process can be had. . . . In transitory actions, foreign private corporations, like natural persons, may be sued anywhere where the court can obtain jurisdiction of the corporation, either by legal service of process, or its appearance by attorney."

In addition to the authorities heretofore cited, see *Eingartner v. Illinois Steel Co.* 94 Wis. 70, 74, 80, 34 L. R. A. 503, 68 N. W. 664; *Ackerson v. Erie R. Co.* 31 N. J. L. 309; *Steed v. Harvey*, 18 Utah, 367, 54 Pac. 1011; *Block v. Atchison, T. & S. F. R. Co.* 21 Fed. Rep. 529.

In *Baltimore & O. R. Co. v. Harris*, 12 Wall. 65, 83, 20 L. ed. 354, 358, the facts were that Harris, while traveling as a passenger on the Baltimore & Ohio Railroad, was injured in a collision in the state of Virginia. He brought an action for damages against the railroad company in the supreme court of the District of Columbia. It will be seen, by reading the opinion in that case, that the cause of action arose neither in the state of Maryland, where the railroad company was incorporated, nor in the District of Columbia, where the action was brought, but in the state of Virginia. The decision, in effect, declares that a corporation of one state, lawfully doing business in another state, and legally served with summons in the state where the suit is brought, is subject to the jurisdiction of the court in that state. This decision has been universally followed in the United States courts.

In *Stewart v. Baltimore & O. R. Co.* 168 40 L. R. A.

U. S. 445, 448, 42 L. ed. 538, 18 Sup. Ct. Rep. 106, the court said: "An action to recover damages for a tort is not local, but transitory, and can, as a general rule, be maintained wherever the wrongdoer can be found. *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439. It may well be that, where a purely statutory right is created, the special remedy provided by the statute for the enforcement of that right must be pursued; but, where the statute simply takes away a common-law obstacle to a recovery for an admitted tort, it would seem not unreasonable to hold that an action for that tort can be maintained in any state in which that common-law obstacle has been removed."

In *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 112, 42 L. ed. 964, 908, 18 Sup. Ct. Rep. 530, the court, among other things, said: "The present action was brought by a citizen and resident of the state of New Jersey, in a circuit court of the United States held within the state of New York, against a foreign corporation doing business in the latter state. It was for a personal tort committed abroad, such as would have been actionable if committed in the state of New York, or elsewhere in this country, and an action for which might be maintained in any circuit court of the United States which acquired jurisdiction of the defendant."

Numerous authorities might be cited to the same effect, but the above is deemed sufficient. The court did not err in refusing the motion of the plaintiff in error.

3. This brings us to the consideration of the questions raised at the trial of the case.

Did the court err in instructing the jury as follows:

"There is no controversy but that the pleadings and proofs show that a collision between the train of the defendant and that of the receiver of the Colorado Midland Railway Company occurred at the time, place, and in the manner alleged in the complaint, and that said collision resulted from the negligence of the employees of the receiver of the latter company, and that plaintiffs at the time of said collision were passengers on the said train of the defendant. The pleadings and proofs further show, beyond controversy, that the defendant owned the railroad track at the place of collision, and that at the time of the collision the receiver of the Colorado Midland Railway Company, under a lease from the defendant, was using said track jointly with the defendant. Upon the foregoing facts, as admitted and proved, concerning the ownership, lease, and use of said track, the court instructs you that the negligence of the employees of the receiver of the Colorado Midland Railway Company is imputable to the defendant, and that the defendant is accordingly responsible in law for said collision."

This instruction properly stated the law upon this subject. The plaintiff in error owed the defendants in error the duty of safe carriage. It had a direct responsibility to them. That responsibility and liability upon its part for damages, if any injuries occurred to them, it cannot avoid upon the

ground that another company, to whom it had leased its road, was guilty of the negligence which caused the collision that resulted in the injuries complained of. This direct question was presented in *Illinois C. R. Co. v. Barron*, 5 Wall. 90, 104, 18 L. ed. 591, 594. The court, in considering it, said: "It will be observed the defendants owned the road upon which they were running the car in which the deceased was a passenger at the time of the collision, and that the train in fault was running on the same road with their permission. The question is not whether the Michigan company is responsible, but whether the defendants, by giving to that company the privilege of using the road, have thereby, in the given case, relieved themselves from responsibility? The question has been settled, and we think rightly, in the courts of Illinois, holding the owner of the road liable. *Chicago, St. P. & F. du L. R. Co. v. McCarthy*, 20 Ill. 385, 71 Am. Dec. 285; *Ohio & M. R. Co. v. Dunbar*, 20 Ill. 624, 71 Am. Dec. 291; *Chicago & R. I. R. Co. v. Whipple*, 22 Ill. 105. The same principle has been affirmed in other states. *Nelson v. Vermont & C. R. Co.* 26 Vt. 717, 62 Am. Dec. 614; *McElroy v. Nashua & L. R. Corp.* 4 Cush. 400, 50 Am. Dec. 794."

In *Central Trust Co. v. Colorado Midland R. Co.* 89 Fed. Rep. 560, 564, the question presented to the court arose upon exceptions to the report of the master fixing the liability for losses growing out of a collision between the trains of the respective railroad companies. The accident which was the foundation of the litigation took place, as here, between New Castle and Rifle Creek, in Colorado, under conditions precisely the same as are presented in this case. The court in the course of its opinion stated that the Denver Company, as a carrier of passengers, would be rightfully and primarily held responsible to the passengers on its train, for the injuries received in the collision. See also *Chicago & E. R. Co. v. Meech*, 163 Ill. 305, 308, 45 N. E. 290; *Central R. & Bkg. Co. v. Phinazee*, 93 Ga. 488, 21 S. E. 66; *Ogdensburg Bank v. Parsons*, 57 U. S. App. 136, 86 Fed. Rep. 398, 30 C. C. A. 133; *Patterson v. Wabash, St. L. & P. R. Co.* 54 Mich. 91, 98, 19 N. W. 761; *Kinney v. North Carolina R. Co.* 122 N. C. 961, 30 S. E. 313; *Benton v. North Carolina R. Co.* 122 N. C. 1007, 30 S. E. 333; *Pierce v. North Carolina R. Co.* 124 N. C. 83, 44 L. R. A. 316, 32 S. E. 399, 402; *Central Trust Co. v. Denver & R. G. R. Co.* 97 Fed. Rep. 237, 242, 38 C. C. A. 143.

4. It is next claimed that the court erred in charging the jury as follows: "The only questions, therefore, which will require investigation at your hands, are: Was the plaintiff Katherine A. Roller injured by said collision? And, if she was so injured, what amount of damages will compensate for the injuries received? If the evidence fails to satisfy you that said plaintiff Katherine A. Roller was injured by said collision your verdicts will be for the defendant. If, however, you find that said plaintiff Katherine A. Roller was injured by said collision, then 49 L. R. A.

your verdict will be for the plaintiffs, and pursuant to the instructions hereinafter given, you will award such an amount of damages as will be a fair compensation for all the injuries so sustained by the said Katherine A. Roller. You are further instructed that, if great fright was a reasonable and natural consequence of the circumstances in which the collision aforesaid, with the ensuing wreckage, explosion, and conflagration, placed said plaintiff Katherine A. Roller, and that she was actually put in fright by those circumstances, and that injury to her health was a reasonable and natural consequence of such great fright, and was actually and proximately occasioned thereby, said injury is one for which damages are recoverable."

And, in connection with this part of the charge of the court, it is claimed that the court erred in refusing to give the following, among other, instructions asked for by the plaintiff in error: "No damages can be given for fright or mental suffering resulting from mere risk or peril, where no actual injury has been sustained; nor for the results of mental or nervous disturbances, where no bodily harm is sustained."

The charge of the court must be construed with reference to the facts elicited at the trial. It will therefore be necessary, in relation to these, as well as other points to be hereafter discussed, to refer generally to such facts.

The passenger train of the plaintiff in error was composed of an engine, mail car, baggage car, smoking car, day coach, tourist sleeper, Pullman sleeper, and a special car. The defendants in error occupied a lower berth in the Pullman sleeper. They had retired. Mrs. Roller was clad in her nightdress when the collision occurred, near New Castle, but was not asleep. The collision occurred just before midnight, and the results were serious. The engines of the respective trains were thrown upon each other with great force. The front cars were telescoped. Immediately following the collision there was an explosion, caused by the gas with which the passenger trains were lighted. The portion of the train in front of the Pullman sleeper caught fire and was destroyed in the ensuing conflagration. The testimony of Mrs. Roller, detailing the facts, as they appeared to her at the time, and her previous and subsequent condition of health, is as follows: "I was twenty-seven years old last October. . . . I was married to Dr. Roller . . . the 9th of October, 1895. . . . Prior to the time of my marriage, . . . I cannot recall any sickness, except about eight years ago I had the croup. I had no nervous trouble, and my mother had no nervous trouble nor any member of the family. . . . My mother was not of a nervous disposition. . . . When I left Palmer, the 1st of September, 1897, I weighed 135 pounds. I was in perfect health. . . . I was not fatigued with the journey at all. Felt no effects from the altitude. . . . I retired right away after we left Glenwood Springs. I had my night-

dress and my stockings on. Dr. Roller occupied the same berth with me. We had not gone very far. I had not gotten asleep yet, when I was awakened with a terrible bump, and I was brought upright in my berth. My head was knocked onto my chest. Then my head fell back onto the board, and there was not anything there. The pillow that was there seemed to be down lower, on my back.

. . . I could see from the window a great light, and fire. When we went to bed the curtains were down almost all the way. When we were awakened they were up quite a bit. I heard what sounded like what we hear on the Fourth of July,—a cannon explosion. It was very distinct. I heard a noise right outside of my berth. Somebody said, "If we can get them out, all right; but I have my doubts about it." Then the noise went from my berth further up the car, and said, 'Get out, everybody, before you burn up.' I got up and ran for the door. I did not dress. I took out a serge skirt. I did not put it on.

. . . I went out the furthest door from the engine. When I got to the door the Pullman conductor passed me, and jumped out before me. I jumped out after him.

. . . The conductor got out on the same side, and did not help me off. I jumped off down to the ditch, quite a little distance. The next thing that happened, the doctor was trying to help me up on the embankment; and when I got up on the embankment I saw a man with his flesh all falling off, and I saw another man lying on the ground. I saw some people bringing back some more. It was light, and up in front the engines and cars were burning. . . .

There was another car behind ours, and I went back quite a distance further than that car. There I met General and Mrs. Weidner. It was not longer than five or ten minutes after I got up on the bank. My husband stayed with me all the time. While I was moving back (Dr. Roller went back to the car to get my clothes, and he helped to dress me. . . . Before I left the car,

when my head was knocked up onto my chest, I had a severe pain in my back and the back of my head. After I got out of the car, and up on the embankment, I had great pain in my back, of the weight of my head. I have suffered a great deal of pain in the back of my head and neck and in my right side. I first felt it in my right side the morning after the accident. I was up there on the embankment for three quarters of an hour. I remained there until the conductor told me to get into the car. . . . We remained in the car until we got back to New Castle.

. . . During that day in New Castle there was a terrible itching sensation all over my body. It continued until some time in October, after the accident. It was the hives. I never had anything like it before. I never had any sensation of pain prior to the accident. These sensations of pain have not ceased. They have grown very much worse. . . . Since the accident I have had a great many spells of exhaustion. . . . Before I took this journey I never knew but that my memory was all right.

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Now, if I should read anything this afternoon, I could not remember very well to-night."

Upon all material facts testified to by her she was corroborated by the testimony of other witnesses. There were several passengers in the Pullman car, at the time of the collision, who testified at the trial that they did not hear any remarks made by the conductor about any difficulty of getting the passengers out, or any statement by anybody to hurry and get out before they burned up, or anything to that effect. Some of them stated that the conductor, in answer to inquiry as to what was the trouble, said: "I am going forward to find out," and that he soon returned and stated in a loud tone of voice that: "Passengers will get out and dress. There is a wreck ahead, and the cars are on fire, but you will have plenty of time to get out." It is apparent from the entire testimony that the injury to Mrs. Roller was real, not feigned. It will be observed that she did not testify that her injuries came from any fright. The injuries which she testified to were received from the effect of the collision while in her berth. Her testimony in this respect is uncontradicted. The character of the injuries she received was such as might not fully disclose the extent of them at once. She testified, however, she felt the pain in her head and neck. The next day she realized she had a pain in her right side. The truth is, as shown by the record, that she thereafter gradually declined in health, became nervous and subject to spells of exhaustion, and suffered great pain. In fact, it was admitted upon the oral argument that she had become a physical wreck, as compared with her general state of health previous to the injury. The sole contention of the plaintiff in error is that the instructions were erroneous, because the case was tried upon the theory that the injuries were the result of fright alone, and that there was no actual bodily injury, and that upon this point there was at least a conflict in the evidence. The record furnishes no facts to support this contention. It would have been error for the court, under the facts of this case, to have instructed the jury as requested by the plaintiff in error. The charge of the court, as given of its own motion, may be subject to criticism, but it is not erroneous. It will be noticed that the court, in its charge, said to the jury, "If the evidence fails to satisfy you that said plaintiff Katherine A. Roller was injured by said collision, your verdict will be for the defendant." Was not this explicit and clear? If there was no injury, that was the end of the case. In the briefs of counsel there is a lengthy discussion of the question whether fright or mental distress alone constitutes such an injury that the law will allow a recovery for it. This question is not involved in this case, and, for the purpose of this opinion, it may be conceded that any effect of a wrongful or negligent act which affects the mind alone without injury to the body, will not furnish a ground of action. Whatever the rule in such cases

may be, *en passant*, we apprehend that it will depend upon the particular facts in each case. There is no conflict in the authorities upon the question that when, by the negligence of the defendant's acts, the plaintiff receives a bodily injury, he is entitled to recover damages, not only for such injury, but for all the injurious results which are a reasonable and natural consequence thereof, and were actually and proximately occasioned thereby. We all know, by common knowledge, that serious results may naturally follow from bodily injuries, without breaking an arm, or leg, or bones of the body. The body and mind are so intimately connected that the mind is very often directly and necessarily affected by physical injuries. A nervous shock, without a blow to the person, might, under some circumstances, be so great as to cause bodily injury. In estimating the amount of damages which the defendants in error were entitled to recover, the jury had the right to take into consideration all the testimony as to the surrounding facts and circumstances at the time of, and incident to, the collision, including the position and situation in which Mrs. Roller was placed thereby, in order to arrive at the truth as to the extent of the bodily injuries she received, and the character and extent of the fright or shock, if any, to her system, resulting from and directly attributable to the collision and injury. In a case like the present, the proximate damages which the person injured is entitled to recover are the ordinary and natural results of the collision and injury, and are such as might reasonably be expected would follow therefrom. This general principle, wherever discussed, is expressly recognized by all the authorities, which hold that damages cannot be recovered for mere fright alone, without any bodily injury. If there was any fright or shock which resulted from her bodily injury in connection with the collision, the accompanying explosion, fire and wreckage of the cars, and the surrounding circumstances directly connected therewith and solely attributable thereto, there is no substantial reason why she should not be allowed to recover all damages naturally and reasonably and approximately arising therefrom. The instruction under consideration was substantially taken from the opinion in *Bell v. Great Northern R. Co.* 1r. L. R. 26 C. L. 428, cited, reviewed, and held correct in *Sedgw. Damages* 640. In *Consolidated Traction Co. v. Lambertson*, 59 N. J. L. 297, 36 Atl. 100, it was expressly held that, where there is actual physical injury, damages resulting from the incidental fright may be recovered.

In *Warren v. Boston & M. R. Co.* 163 Mass. 484, 487, 40 N. E. 895, the plaintiff, while attempting to drive a buggy over the track at a railroad crossing, was, by the carelessness and negligence of the gate keeper, shut in between the gates; and a passing train hit the buggy, and he was thrown out upon the ground. The trial court instructed the jury: "If you should find that there was a

tortious act on the part of the defendant, then you may take it into account, as part of the damage, that the plaintiff is entitled to recover, if at all, for fright and mental suffering which he underwent, if he underwent any at all. It may be used to enhance damages,—fright caused by nervous shock." Replying to the criticism of the term "tortious act," the court said: "We think that the meaning of this phrase, in the connection in which it is used, is that if the defendant's train struck the carriage of the plaintiff, and he was thereby thrown out upon the ground, this would be a tortious act, if occasioned by the defendant's negligence, and that, if this act resulted in injury to the plaintiff, the defendant would be liable, if the plaintiff was in the exercise of due care, and that in estimating the damages the jury might take into account, not only the physical injury, but also the fright and nervous shock. This ruling, we think, was either correct, or sufficiently favorable to the defendant. It is a physical injury to the person to be thrown out of a wagon, or to be compelled to jump out, even although the harm done consists mainly of nervous shock."

In *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U.S. 469, 474, 24 L. ed. 256, 258, the court said: "The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. *Scott v. Shepherd*, 2 W. Bl. 892. The question always is, Was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. . . . When there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it."

The following additional authorities sustain the views we have expressed, and support the conclusion above announced,—that the court did not err in its charge to the jury. *Sloane v. Southern California R. Co.* 111 Cal. 668, 680, 32 L. R. A. 193, 44 Pac. 320; *Purcell v. St. Paul City R. Co.* 48 Minn. 134, 137, 16 L. R. A. 203, 50 N. W.

1034; *Lehigh & H. R. R. Co. v. Marchant*, 55 U. S. App. 427, 84 Fed. Rep. 870, 872, 28 C. C. A. 544; *Coy v. Indianapolis Gas Co.* 146 Ind. 655, 36 L. R. A. 535, 46 N. E. 17, 20; *Mack v. South Bound R. Co.* 52 S. C. 323, 324, 40 L. R. A. 679 et seq.; 29 S. E. 905; *Hamilton v. Great Falls Street R. Co.* 17 Mont. 334, 347, 42 Pac. 800, 43 Pac. 713.

5. There are several other assignments of error that bear such a close relation to the last point as not to require any extended discussion, owing to the conclusions already reached:

(1) It is claimed that the court erred in the next portion of its charge, where, after informing the jury that exemplary or punitive damages could not be allowed, and that the damages, if any, which could be recovered, are compensatory damages,—such damages as would naturally flow directly from the injury, if any, occasioned to Mrs. Roller by said collision,—it added: "These compensatory damages embrace all damages for bodily and mental pain and suffering which have resulted to said Katherine A. Roller from said injuries, and if said injuries are permanent, or she has not recovered from them, such damages, also, as you may find from the evidence it is fair to believe she will suffer from said injury in the future."

This part of the charge was unquestionably correct. It is, of course, to be considered with reference to the facts, and to the previous portions of the charge. In *District of Columbia v. Woodbury*, 136 U. S. 450, 459, 34 L. ed. 472, 475, 10 Sup. Ct. Rep. 993, the court, in discussing this question, said: "The authorities all agree that in cases of this character much latitude must be given to juries in estimating the damages sustained by the person injured. Physical suffering resulting from such injuries is necessarily attended by mental suffering in a greater or less degree. And as said in *Kennon v. Gilmer*, 131 U. S. 22, 26, 27, 33 L. ed. 110, 112, 9 Sup. Ct. Rep. 697: 'The action is for an injury to the person of an intelligent being; and when the injury, whether caused by wilfulness or negligence, produces mental as well as bodily anguish and suffering, it is impossible to exclude the mental suffering in estimating the extent of the personal injury for which compensation is to be awarded.' *Illinois O. R. Co. v. Barron*, 5 Wall. 90, 105, 18 L. ed. 591, 595; *Pennsylvania & O. Canal Co. v. Graham*, 63 Pa. 290, 3 Am. Rep. 549; *Smith v. Holcomb*, 99 Mass. 552; *Holyoke v. Grand Trunk R. Co.* 48 N. H. 541; *Stockton v. Frey*, 4 Gill, 406, 45 Am. Dec. 138; *Smith v. Overby*, 30 Ga. 241; *Cox v. Vanderkleed*, 21 Ind. 164; *Lynch v. Knight*, 9 H. L. Cas. 577."

In *Washington & G. R. Co. v. Harmon*, 147 U. S. 571, 573, 584, *sub nom. Washington & G. R. Co. v. Tobriner*, 37 L. ed. 284, 286, 289, 13 Sup. Ct. Rep. 558, the court held that the following instruction was correct: "If the jury find for the plaintiff, they will find for him such an amount of damages as will fully compensate him for the suffering of mind and body inflicted upon 49 L. R. A.

him by his injury; for the personal inconvenience, the loss of time, and the expenses of cure that naturally and proximately resulted from the injury he suffered; and, if they find that the injuries sustained by the plaintiff are permanent, they will also find for him such damages as will fully compensate him for the suffering of mind and body, the personal inconvenience, and the loss of time that he will suffer in the future. In determining this as to the future, they will consider plaintiff's bodily vigor and age, as shown by the evidence adduced." See also *Koetter v. Manhattan Elev. R. Co.* 36 N. Y. S. R. 611, 13 N. Y. Supp. 459; *Kenyon v. Mondovi*, 98 Wis. 50, 54, 73 N. W. 314; *Wilson v. Pennsylvania R. Co.* 132 Pa. 27, 33, 18 Atl. 1087; *Saldana v. Galveston, H. & S. A. R. Co.* 43 Fed. Rep. 862, 867; *Stutz v. Chicago & N. W. R. Co.* 73 Wis. 147, 151, 40 N. W. 653; *Hannibal & St. J. R. Co. v. Martin*, 111 Ill. 220, 227; *Chicago City R. Co. v. Taylor*, 170 Ill. 49, 57, 48 N. E. 831; *Cameron v. Union Trunk Line*, 10 Wash. 507, 512, 39 Pac. 128; *Hamilton v. Great Falls Street R. Co.* 17 Mont. 352, 42 Pac. 860, and 43 Pac. 713.

(2) It is argued that the court erred in allowing Dr. Brill to state his opinion as to the cause of Mrs. Roller's condition, and to answer the hypothetical question propounded to him. The latter objection was also made to the testimony of other physicians. No witnesses were introduced by the plaintiff in error to disprove the testimony and opinions of these physicians as to the extent or cause of her injuries, nor were any amendments to the hypothetical question proposed; but the objections were made to the opinions given, and exceptions taken to their admission. Dr. Brill testified that he first met Mrs. Roller September 28, 1897; that since that time he had been her family physician; that she complained at that time of pain in the back of the head and neck, in the right side and along the spine, and of the itching from the hives; that she was somewhat nervous in her appearance and bearing; that there was not at that time any external violence that he could discover at the back of the head or neck, but there was some tenderness along the spine and along the back of the neck; that he prescribed for her in the usual manner; that he saw her every few days; that about the 1st of January, 1898, she began to lose flesh and lost strength and became somewhat pale and anæmic, more nervous, and more timid and apprehensive; that her whole bearing was changed, her pulse became accelerated, ranging from 90 to 110 or 120, and that there was a slight elevation of temperature; that in the early part of the year 1898 these symptoms persisted, and became more and more noticeable; that by the last of May she had become quite emaciated, had lost a great deal of flesh, her memory was tardy and defective, and her mental action slow; that there were muscular cramps and twitching in the limbs and face; that she complained of being weak, of loss of strength, and being nervous, and of pain in the back of the head and

neck, and over the right side of the body, and in the spine. He continued detailing her condition up to the time of the trial; showing, among other things, that her sense of pain had become greatly diminished over her entire body, and that at some points it seemed almost obliterated. At the close of his testimony the following questions were propounded to him, and answers given thereto:

Q. From your examination that you have made of her, and assuming that her condition is as you have testified upon the stand, as observed by you,—from the examination that you have made,—are you, as a physician and surgeon, and from your experience as such, able to form an opinion as to what is the cause of her present condition?

A. Yes; I am.

Q. What is that cause?

A. Her condition is the result of injury and shock of some sort.

(3) Thereafter a hypothetical question was propounded to Dr. Brill, substantially detailing at great length the condition of Mrs. Roller, as to her health previous to the collision and afterwards, as testified to by him and other witnesses, and of the fact of the collision and of all the circumstances connected therewith, substantially as testified to by Mrs. Roller, and other witnesses at the trial, and closing with the statement:

Assuming these facts to be as I have stated them, and the woman as I have described her, from your experience as a physician and surgeon are you able to form an opinion as to the cause of her present condition?

A. Yes, sir.

Q. What is that opinion? . . . What would you say, then, was the cause of her present condition, assuming the facts as I have stated them?

A. The injury and shock due to the accident described.

The court did not err in permitting Dr. Brill to give his opinion as to the cause of Mrs. Roller's condition. The rule is well settled that a medical expert may form and express an opinion of the nature and cause of the bodily or mental condition of his patient,—her illness, symptoms, pains, and suffering,—derived from his own knowledge, from his attendance, treatment, and examinations, although based in part upon her statements and complaints made at different times as to her pains and sufferings, and, in this connection, to give his opinion whether her injuries are liable to be permanent, and whether her present condition is due to or caused by sickness, injury, accident, or violence. *McClain v. Brooklyn City R. Co.* 116 N. Y. 460, 468, 22 N. E. 1062; *Louisville, N. A. & O. R. Co. v. Wood*, 113 Ind. 545, 553, 570, 14 N. E. 572, 16 N. E. 197; *Turner v. Newburg*, 109 N. Y. 301, 308, 16 N. E. 344; *Johnson v. Northern P. R. Co.* 47 Minn. 430, 432, 50 N. W. 473; *Courvoisier v. Raymond*, 23 Colo. 113, 117, 47 Pac. 49 L. R. A.

284; *Cleveland, C. C. & I. R. Co. v. Newell*, 104 Ind. 204, 54 Am. Rep. 312, 3 N. E. 830; *Chicago, St. L. & P. R. Co. v. Spilker*, 134 Ind. 381, 391, 411, 33 N. E. 280, 34 N. E. 218; *McKeon v. Chicago, M. & St. P. R. Co.* 94 Wis. 477, 483, 35 L. R. A. 252, 69 N. W. 175; *Bowen v. New York C. & H. R. R. Co.* 89 Hun, 594, 597, 35 N. Y. Supp. 540; *Perkins v. Concord R. Co.* 44 N. H. 223, 225; *Jackson v. Burnham*, 20 Colo. 532, 39 Pac. 577, 578; *Travellers' Ins. Co. v. Mosley*, 8 Wall. 397, 404, 19 L. ed. 437, 440; *Northern P. R. Co. v. Urlin*, 158 U. S. 271, 275, 39 L. ed. 977, 981, 15 Sup. Ct. Rep. 840.

In *Turner v. Newburg*, 109 N. Y. 301, 308, 16 N. E. 344, the court said: "The questions addressed to the physicians, calling for their opinions as to whether the physical condition in which they found the plaintiff to be, upon their examination of her, could have resulted from a fall, were not objectionable, and infringed upon no rules of evidence. We see no objection to the expression of opinions by competent medical experts upon an ascertained physical condition of suffering or bad health, as to whether that condition might have been caused by, or be the result of, a previous injury."

In *Northern P. R. Co. v. Urlin*, 158 U. S. 271, 275, 39 L. ed. 977, 981, 15 Sup. Ct. Rep. 840, the court said: "As one of the principal questions in the case was whether the injuries of the defendant were of a permanent or of a temporary character, it was certainly competent to prove that during the two years which had elapsed between the happening of the accident and the trial there were several medical examinations into the condition of the plaintiff. Everyone knows that when injuries are internal, and not obvious to visual inspection, the surgeon has to largely depend on the responses and exclamations of the patient when subjected to examination. 'Whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence. If they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence, and often the only proof of its existence, and whether they were real or feigned is for the jury to determine. So, also, the representations by a sick person of the nature, symptoms, and effects of the malady under which he is suffering at the time are original evidence. If made to a medical attendant, they are of greater weight as evidence; but, if made to any other person, they are not, on that account, rejected.' 1 Greenl. Ev. 14th ed. § 102."

(4) The objections urged to the hypothetical question propounded to Dr. Brill and to other physicians are wholly untenable. The principal contention is that in detailing the circumstances in regard to the collision, and of Mrs. Roller's subsequent condition, some of the facts were misstated, and others exaggerated and assumed, without any warrant in the evidence. Let us see upon what foundation this claim is made:

(a) The question, in stating the facts at

the time of the collision, assumes that Mrs. Roller "was asleep," whereas her testimony was that she "had not gotten asleep yet," when she was awakened with a terrible bump, etc. What influence could such a trifling discrepancy possibly have in controlling the answers of the physicians or the judgment of the jurors? None whatever. What difference did it make whether she was at the time dozing, sound asleep, or fully awake?

(b) The next alleged misstatement and exaggeration is that there "was a series of shocks . . . accompanied by explosions and loud detonations," whereas Mrs. Roller only testified that there was one explosion and detonation. Her words were that she "heard what sounded like what we hear on the Fourth of July,—a cannon explosion." But in framing the question the counsel is not to be confined to the testimony of Mrs. Roller, nor to the use of the exact and precise words of any witness. Its substance and true meaning need only be given.

Dr. Roller, in testifying upon the point under review, said: "We had a head to head collision. We were thrown forward in our berths. We had one concussion, and immediately after that we had another."

Peter Weidner testified: "We had a collision. I could not just tell what it was at the time it happened, but I found we had stopped very suddenly, and then drew back and had another concussion, and shook us up pretty well. Immediately after the collision there was a heavy explosion."

William C. St. Pierre, a passenger, called on behalf of the plaintiff, who was only affected slightly by the stopping of the train, testified: "I noticed a sudden jar in the car, and then another one. I suppose the first jar was the application of air brakes. The next jar came immediately afterwards. A short while after that there was an explosion. I cannot tell how much time elapsed between the last jar and the explosion. It was some little time."

If the identical language used by these witnesses had been inserted in the question, it would have conveyed to the physicians and jury, in substance, the same meaning as the language inserted in the question. There was more than one concussion, more than one detonation. It is manifest that the change in the language used could not have had any greater influence with the physicians and jury than if the actual words used by the witnesses had been given.

(c) The other portions claimed to be objectionable are that: "By the said collision she was thrown violently in the said berth, and against the head end of said berth, and the back of her head and back of her neck being impressed against the head end of said berth, and, in fear of her personal safety, was compelled, in her nightdress, . . . to alight from said train in the night-time, and . . . to descend into a deep trench . . . and ascend a steep embankment, and there to be exposed until her clothes would be brought to her, and 49 J. R. A.

there was exposed to her eight persons injured in said collision."

Counsel argue that the use of the words "violently" and "compelled" was absolutely erroneous and prejudicial, and wholly unwarranted by any evidence. In lieu of the word "violently," Mrs. Roller used the word "terrible," which, in its ordinary signification, means "frightful; adapted to excite terror; dreadful." It will be noticed that the word "compelled," as used, did not, and was not intended to, convey the idea that she was compelled by any command of the plaintiff in error or its agents to leave the train, but that she was compelled in fear of her personal safety. This is virtually what she testified to.

We have examined these questions for the purpose of showing that there was no substantial ground upon which to base any valid objection to the hypothetical question. The objections noticed are the most formidable made by counsel, and the others, being equally without merit, need not be noticed. In all that we have said, it must be distinctly understood that we do not deny the general proposition urged by counsel, but here expressly affirm the same,—that it would be reversible error to admit the answer of expert witnesses to hypothetical questions which assume the existence of facts upon which no evidence is offered. But when the question assumes the existence of any state of facts which the evidence directly, fairly, and reasonably tends to establish or justify, and does not transcend the range of evidence, it is proper to permit such questions to be answered, and it is not necessary that the questions shall embrace or cover all the facts in the case. *Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 545, 554, 570, 14 N. E. 572, 16 N. E. 197; *Stearns v. Field*, 90 N. Y. 640; *Powers v. Kansas City*, 56 Mo. App. 573, 577; *Meeker v. Meeker*, 74 Iowa, 352, 357, 37 N. W. 773; *Beuer v. Spangler*, 93 Iowa, 576, 602, 61 N. W. 1072; *Manatt v. Scott*, 106 Iowa, 203, 76 N. W. 717, 720; *Russ v. Wabash Western R. Co.* 112 Mo. 45, 48, 18 L. R. A. 823, 20 S. W. 472; *Fullerton v. Fordyce*, 144 Mo. 519, 44 S. W. 1053, 1058; *Rogers, Expert Testimony*, 2d ed. § 27; 8 Enc. Pl. & Fr. 757, 758, and authorities there cited.

6. It is with much vigor and earnestness argued that the court erred in permitting witnesses to testify to what they saw and heard while upon the embankment after Mrs. Roller had left the car, and in failing to instruct the jury that there could be no recovery for any injuries resulting from what she there saw. The substance of this testimony was that Mrs. Roller and other passengers, when they got upon the embankment, saw the front end of the train burning; that the cars were telescoped and were burning fiercely; that they heard people hollering and cattle bellowing; that they heard the cracking of the fire; that wounded persons were brought near them, moaning and complaining, and women crying; that they remained upon the embankment about thirty minutes. The objections are that all

this testimony was incompetent, irrelevant, and immaterial; that it did not tend to prove any of the issues raised by the pleadings; that it was not part of the *res gestæ* and too remote. It is contended, among other things, that, inasmuch as Mrs. Roller did not testify to having been frightened or injured by anything she there saw or heard, it was error to allow any testimony as to what there occurred. The truth is that there was no direct evidence that she was frightened at the time of the collision, either while in her berth in the sleeper, at the sight of the conflagration or the sound of the explosion, or at what she saw and heard after she left the car. Whether she received any fright or shock to her system was a matter of inference to be drawn by the jury from all the established facts, as well as from the opinion of the medical experts. The jury were not bound to accept such opinion unless they believed it was supported by the facts. The shock, if any, to her system, may have, for aught that appears from the testimony been solely from the effects of the terrible bump she received while in her berth, or from some other cause, or by all combined. The reasons given, why the testimony as to what occurred on the embankment should have been excluded, would apply with equal force against any testimony as to the explosion, conflagration, or general wreckage; and, there being no positive testimony that she was frightened by the injuries she actually received while in her berth, it would appear that evidence as to that injury, to show a fright to her, would likewise, under the views contended for by counsel, be objectionable. But the reasoning of counsel is unsound. To enable the jury to determine the reasonableness of the question whether Mrs. Roller was frightened or received a shock from the collision, all the facts and circumstances connected therewith were admissible, because, in the very nature of the case, they were not divisible. Mrs. Roller was not guilty of contributory negligence in failing to close her ears and shut her eyes as to everything that transpired, resulting from the collision. She had the right to observe what was going on, to use her faculties of sight and hearing, and to exercise the ordinary speed of locomotion in seeking a place of safety, and in so doing to act at the time upon the facts as they appeared to her, regardless of the question as to whether her injuries would have been as great had she remained in the car, and taken time to fully dress before she departed therefrom. *Purcell v. St. Paul City R. Co.* 48 Minn. 134, 138, 16 L. R. A. 203, 50 N. W. 1034; *Townley v. Central Park, N. & E. River R. Co.* 69 N. Y. 158, 160, 25 Am. Rep. 162; *Kleiber v. People's R. Co.* 107 Mo. 240, 247, 14 L. R. A. 613, 17 S. W. 946; *St. Louis & S. F. R. Co. v. Murray*, 55 Ark. 248, 258, 16 L. R. A. 787, 18 S. W. 50; *Stokes v. Saltonstall*, 13 Pet. 181, 191, 10 L. ed. 115, 121. It will be observed from the record that the testimony of the witnesses as to what they saw and heard while upon the embankment did not relate to any declarations of any of-

ficer or agent of the plaintiff in error as to how the accident occurred, upon which it was sought to hold the railroad company liable, nor to a narration of past events, upon which points counsel have industriously cited a vast number of authorities, but related almost exclusively to the facts which actually transpired at the time; the same being a part of, and directly connected with, the collision and wreck. How could the jury arrive at the truth without taking the facts into consideration, with all the surrounding circumstances of the collision incident thereto and connected therewith? The defendants in error had the right, although the seriousness of the collision was not denied, to have the actual condition of affairs photographed by the sworn testimony of all the witnesses; and here we may appropriately digress, and, answering another assignment of error, add that it was not error, in addition thereto, to have the wreck, with all its surroundings, photographed by an artist, and, upon proof of their correctness, submit them to the jury. These photographs (three in number) fully illustrate the facts as testified to by the witnesses. Everything except the explosion and loud detonations is presented and truthfully delineated. The admission of such photographs is always allowed, when proven to be correct, for the purpose of enabling the witnesses to explain their testimony as to the facts, or to assist the jury in arriving at a better understanding of the testimony of the witnesses. 1 Wharton, Ev. § 676; 1 Wharton, Crim. Ev. § 544; *People v. Durrant*, 116 Cal. 179, 212, 48 Pac. 75; 11 Am. & Eng. Enc. Law, 2d ed. 539, and authorities there cited. Returning from this digression, we are of opinion that the area of events covered by the term "*res gestæ*" depends upon the circumstances of each particular case. No general definition applicable to all cases could be fully and fairly given within the limits of an ordinary opinion. The centralized thought is that the term presupposes a main fact or a principal transaction, and the "*res gestæ*" means the circumstances and facts which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character. Applying the term to the present case, with reference to the main collision as the principal fact, it necessarily follows that the immediate and surrounding circumstances interblended with and directly resulting therefrom are to be considered as a part of the accident and injury, and inseparably connected with it. 1 Wharton, Ev. § 259; 1 Greenl. Ev. § 108; *Carter v. Buchannon*, 3 Ga. 513, 517; *Hallahan v. New York, L. E. & W. R. Co.* 102 N. Y. 194, 199, 6 N. E. 287; *West Chicago Street R. Co. v. Kennelly*, 170 Ill. 508, 510, 48 N. E. 996; *Travellers' Ins. Co. v. Mosley*, 8 Wall. 397, 408, 19 L. ed. 437, 441.

In *West Chicago Street R. Co. v. Kennelly*, 170 Ill. 508, 510, 48 N. E. 996, the court said: "The question before the jury was how or in what manner the plaintiff was injured, but we think it was competent, as a part of the *res gestæ*, to show all that oc-

curred, although in doing so it might appear that others were also injured. The injuries to others were a part and parcel of the same injury received by the plaintiff, and in describing the manner in which she was injured, the injuries received by the others being so closely connected, it would be almost impossible in an intelligent manner to give an account of one injury without at the same time disclosing the others."

In *Chicago, St. L. & P. R. Co. v. Spilker*, 134 Ind. 380, 393, 411, 33 N. E. 280, 34 N. E. 218, the appellee received injuries in a collision which occurred at a railroad crossing between the train of appellant and a wagon in which Mrs. Spilker, her husband, David Casey, and others were seated. Certain evidence was objected to because it assumed that Casey was killed by the same collision, and it was argued in support of this objection that this allusion to Casey's death was calculated to prejudice the jury in favor of the appellee. The undisputed fact was that Casey was killed at the time the wagon was demolished by the collision. Upon these facts the court said: "His death was the principal circumstance connected with the accident, and we do not see how it was possible, even if proper, to keep the knowledge of this circumstance from the jury. One might almost as well object to making any remark concerning the demolition of the wagon. David Casey's death is mentioned by several of the witnesses; it was inseparably connected with the accident, and a reference to him and his death could hardly be avoided. But it was not necessary to avoid it."

With reference to the objection that the details of the collision, as given by the witnesses, while upon the embankment, were not put in issue by the pleadings, but little need be added to what we have already said in discussing other questions. The complaint alleged that: "Katherine A. Roller was by said collision, while she was in said passenger coach as aforesaid, violently and forcibly thrown down and against the sides, berths, seats, and partitions of such coach, and was in the night-time, and at the place of said collision, forced to alight from said passenger coach, and was by means of the premises greatly bruised, wounded, and injured, and also, by means of the premises, she became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, from thence hitherto, during all of which time the said plaintiff suffered and underwent great bodily pain and mental anguish, and was for a long period confined to her bed and was hindered and wholly unable to attend to the performance and transaction of her necessary duties and affairs, during all that time to be performed and transacted; and also, by means of the premises, the said plaintiff has been and will be permanently injured."

Under these allegations it was certainly competent, as we have before stated, to show any injury to her health which was the natural, probable, and reasonable result of the collision, and of her bodily injury received

therefrom. This being true, it must follow that if, alarmed by the peril in which she was placed by the collision, but acting as a person of ordinary prudence would under like circumstances, she jumped from the car into a deep trench, and, in order to reach a place of safety, climbed up a steep embankment, and there saw the horrors incident to such a collision, and the fright or shock to her system, added to the injuries to her body, impaired her health, and was directly traceable to the collision, as its primary, proximate, and responsible cause, the damages resulting therefrom would be general, not special, and therefore need not have been specifically set forth in the complaint, because, in the eye of the law, there would not be any new or independent cause between the collision and the injuries. The obvious, probable, or natural effects of the injuries which Mrs. Roller received might be given in evidence under the general allegations of the complaint. It is only those damages which are not the probable or necessary result of the injury that are required to be specially alleged. The defendants in error were not required to set forth in their complaint all the physical injuries and mental sufferings which Mrs. Roller sustained, or which might have resulted from or been aggravated by the negligent acts of the plaintiff in error; nor were they required to aver each and every specific act and thing which occurred at the time of the collision which might or did contribute to her injuries. If such injuries and such acts could reasonably be traced to the main act complained of, and are such as might and did naturally follow from the collision, and were incident thereto, they need not be specially averred. The claim made, that the plaintiff in error was not advised by any of the allegations in the complaint that any damages were or would be claimed for any injury, fright, or shock which occurred after she left the car, cannot be sustained. When the plaintiff in error was informed by the pleading generally as to the effects produced by the collision, it was bound to anticipate evidence as to the extent of her injuries, the origin or aggravation of which could be reasonably traced to the negligent act complained of. *Ehrgott v. New York*, 96 N. Y. 265, 277, 48 Am. Rep. 622; *Chicago v. McLean*, 133 Ill. 149, 153, 8 L. R. A. 765, 24 N. E. 527; *Montgomery v. Lansing City Electric R. Co.* 103 Mich. 47, 57, 29 L. R. A. 287, 61 N. W. 543; *Snyder v. Albion*, 113 Mich. 275, 71 N. W. 475; *Crook v. Oregon Short Line R. Co.* 18 Utah, 311, 44 L. R. A. 285, 54 Pac. 985; *Ohio & M. R. Co. v. Hecht*, 115 Ind. 444, 17 N. E. 297; *Denver & R. G. R. Co. v. Harris*, 122 U. S. 597, 608, 30 L. ed. 1146, 1148, 7 Sup. Ct. Rep. 1286; *Wade v. Leroy*, 20 How. 34, 44, 15 L. ed. 813, 815; 5 Enc. Pl. & Pr. 746, 748, and authorities there cited.

In *Smith v. St. Paul, M. & M. R. Co.* 30 Minn. 169, 171, 14 N. W. 797, where the injuries to the plaintiff were received from a derailment of the cars of the defendant company, the facts were in some respects similar to the facts in the present case. The com-

plaint did not allege anything about any-fright, and did not specify any more of the details of the injury than is set forth in the complaint in this action. The court, with reference thereto, said: "In the circumstances mentioned, the damages resulting directly and proximately to the person and health of plaintiff . . . from her fright and from her coming to the ground, whether by jumping or by any of the means before indicated, would be general, not special. 'General damages are such as the law implies or presumes to have accrued from the wrong complained of.' 1 Chitty, Pl. 16th Am. ed. 515. They are frequently spoken of as necessarily resulting from the wrong. 1 Chitty, Pl. 16th Am. ed. 439, 515, 516; 2 Greenl. Ev. § 254. This, however, does not mean (as defendant's counsel appears to argue) that general damages are such only as must, *a priori*, inevitably and always result from a given wrong. It is enough if, in the particular instance, they do in fact result from the wrong, directly and proximately, and without reference to the special character, condition, or circumstances of the person wronged. The law, then, as a matter of course, implies or presumes them as the effect which in the particular instance necessarily results from the wrong."

7. Finally, it is claimed that the court erred in refusing to give forty instructions asked by the plaintiff in error. In *Citizens' Gaslight & Heating Co. v. O'Brien*, 19 Ill. App. 231, 234, the court said: "To launch such a mass of legal conundrums upon a court, which can never enlighten the jury, but are generally drawn with the real, if not avowed, purpose of getting error into the record, and entangling the court in some technical contradiction that may be used in a higher court, is a perversion of the law of instructing jurors. A few plain statements of the law governing the case would suffice. If the court in the hurry of trial did not sift this unreasonable number of instructions as carefully as appellant desired, we do not feel called upon to interfere, unless some palpable error has occurred, clearly affecting the justice of the case."

Specific exceptions were taken to each instruction refused. Several of them, relating to the duties and obligations of railroad companies to their passengers, were evidently prepared upon the theory that, because the Midland Company was alone to blame, the plaintiff in error was not guilty of any negligence, and could not be held liable. These were inapplicable to the facts in this case, and were properly refused. Some were drawn upon the theory that the jury had no right to consider anything that occurred after Mrs. Roller left the car. These have been sufficiently disposed of by the views expressed with reference to the admission of the testimony. Others assert the broad principle that Mrs. Roller ought to have remained in the car, or at least should have avoided the sights upon the embankment, by returning to the car or going elsewhere, where the effects of the wreck would not have been observed. Such a narrow and lim-

ited view of the case cannot be sustained. The instructions asked, covering the measure of damages that could or could not be recovered, may, for the purpose of this opinion, be conceded to be correct and applicable to this case. The objections urged to their exclusion are based upon the criticism of counsel directed to the charge of the court,—that it was not full, did not contain the necessary limitations and qualifications, and of itself did not cover the different views that might properly be taken of the case. Our examination of the charge has failed to convince us of the soundness of these objections. In drafting or orally giving a charge to a jury, terseness, accuracy of statement, clearness of expression, and care in covering all essential particulars are commendable qualities. They furnish safe guides for all *wise* judges to follow. But absolute perfection is not required. It would indeed be difficult, if not impossible, to so frame a charge as to prevent criticism by the eagle eye of vigilant and learned counsel, or even of the appellate court, with the opportunity afforded it of mature and deliberate consideration. Substantial accuracy of the legal principles is all that the law requires. If the charge of the court in its entirety fairly covers the legal propositions necessary to give instructions upon, and is substantially correct, it is not erroneous for the court to refuse the instructions prepared by counsel, although they contain correct principles of law applicable to the case. This, in substance, has been so often declared, especially by the national courts, as to render it unnecessary to cite authorities in its support. We cannot, however, refrain from quoting with approval what is said upon this subject in 11 Enc. Pl. & Pr. 288: "Instructions on points which have been sufficiently covered by other instructions may properly be refused, although they are correctly drawn and applicable to the evidence. This is so whether the instruction requested is covered by the general charge, or by special instructions granted at the request of either party, or whether the mode of expression is the same or different. The duty of the court is fully discharged if the instructions embrace all the points of the law arising in the case, in the court's own language. Indeed, the practice of taking the instructions requested, and formulating a general charge to the jury, embracing all the matters of law arising upon the pleadings and the evidence, has been specially commended. In this way the law is sufficiently declared and clearly presented to the jury, without the unnecessary repetition and verbose language which so often mar special instructions, whereby jurors are confused and confounded, rather than instructed and directed. Of course, such action requires great labor, thought, and prudence on the part of the trial judge, in order that the substance of all special instructions shall be given to the jury when the questions therein presented are pertinent to the case, and that no omission shall occur by which either of the parties may be prejudiced. But, if the trial judge is willing to under-

take the additional labor, the jury, as a rule, will be better instructed in their duty than by hearing read the special instructions asked for on the part of the plaintiff and the defendant. The court should simplify its directions to the jury, and make every effort to render them as free from complexity as possible. . . . The reason for this is obvious. Repetition tends to encumber the

record and to confuse and embarrass the minds of the jury, and it is also liable to give undue prominence to the proposition repeated."

A careful examination of the record in this case has brought us to the conclusion that no prejudicial error is shown therein.

The judgment of the Circuit Court is affirmed, with costs.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

Charles L. RUNDELL, Admr., etc., of Edwin R. Rundell, Deceased, *Appt.*,
v.

COMPAGNIE GENERALE TRANSATLANTIQUE.

(100 Fed. Rep. 655.)

1. To make the law of the flag under which a ship was sailing applicable to an action for death of a passenger by drowning while upon the high seas, the drowning must be shown to have been upon the vessel.
2. The law of the place where the death occurred, and not where the accident happened, governs in an action for death by wrongful act.
3. A United States admiralty court will not enforce the local law of another country, in an action for negligent homicide occurring on the high seas, but such action must be governed by the general admiralty law, although the negligence occurred upon a vessel under the flag of such country.
4. By the general maritime law as administered by the admiralty courts, no recovery can be had for a death by wrongful act.

(March 22, 1900.)

A PPEAL by plaintiff from a decree of the District Court of the United States for the Northern District of Illinois dismissing a libel for damages for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

Before Woods, Circuit Judge, and Bunn and Allen, District Judges.

The facts are stated in the opinion.

Messrs. Thomas S. McClelland and Charles A. Munroe, for appellant:

The judicial power of the United States extends to all cases of admiralty and maritime jurisdiction.

U. S. Const. art. 3, § 2; *Crapo v. Kelly*, 16 Wall. 610, 21 L. ed. 430; *American S. B. Co. v. Chase*, 16 Wall. 522, 21 L. ed. 369.

The libellee is liable under the French Code.

See *Libel*, pp. 10-15; *Resal v. Compagnie Générale Transatlantique*, 32 Chicago Legal News, 17, 18 Nat. Corp. Rep. 906; *The Harrisburg*, 119 U. S. 199, *sub nom. The Harris-*

NOTE.—For right to proceed in admiralty for damages resulting from the death of a person, where by the law of the place where the casualty occurs there is a right of action for death by negligence, see also *The Willamette* (C. C. A. 9th C.) 31 L. R. A. 715.
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burg v. Rickards, 30 L. ed. 358, 7 Sup. Ct. Rep. 140.

The district court has jurisdiction, the cause of action having arisen on the high seas.

American S. B. Co. v. Chase, 16 Wall. 522, 21 L. ed. 369; *Crapo v. Kelly*, 16 Wall. 623, 21 L. ed. 436; Judiciary act, § 9.

The Federal courts will administer a foreign law when they obtain jurisdiction of the parties, and it is not against public policy.

The City of Mackinac, 43 U. S. App. 190, 73 Fed. Rep. 883, 20 C. C. A. 86; *Boston & M. R. Co. v. McDuffey*, 51 U. S. App. 111, 79 Fed. Rep. 934, 25 C. C. A. 247; *Evey v. Mexican C. R. Co.* 52 U. S. App. 118, 38 L. R. A. 387, 81 Fed. Rep. 294, 26 C. C. A. 407; *Stewart v. Baltimore & O. R. Co.* 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105.

Liability for tort is determined by the law of the place where the alleged tortious act was committed.

The Scotia, 14 Wall. 170, *sub nom. Sears v. The Scotia*, 20 L. ed. 822; *Sherlock v. Al-ling*, 93 U. S. 99, 23 L. ed. 819; *McDonald v. Mallory*, 77 N. Y. 546, 33 Am. Rep. 664; *The Egyptian Monarch*, 36 Fed. Rep. 773; *The Scotland*, 105 U. S. 24, *sub nom. National Steam Nav. Co. v. Dyer*, 26 L. ed. 1001; *The Lamington*, 87 Fed. Rep. 752; *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978; *Boston & M. R. Co. v. McDuffey*, 51 U. S. App. 111, 79 Fed. Rep. 934, 25 C. C. A. 247; *Louisville & N. R. Co. v. Whitlow*, 19 Ky. L. Rep. 1931, 41 L. R. A. 614, 43 S. W. 711; *The City of Mackinac*, 43 U. S. App. 190, 73 Fed. Rep. 883, 20 C. C. A. 86; *Stewart v. Baltimore & O. R. Co.* 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105; *Evey v. Mexican C. R. Co.* 52 U. S. App. 118, 38 L. R. A. 387, 81 Fed. Rep. 294, 26 C. C. A. 407.

The admiralty courts of the United States will entertain and enforce a libel *in personam* for damages for loss of life, where the cause of action survives.

The City of Mackinac, 43 U. S. App. 190, 73 Fed. Rep. 883, 20 C. C. A. 86; *The Willamette*, 44 U. S. App. 26, 31 L. R. A. 715, 70 Fed. Rep. 874, 18 C. C. A. 366; *The Corsair*, 145 U. S. 335, *sub nom. Barton v. Brown*, 36 L. ed. 727, 12 Sup. Ct. Rep. 949; *The City of Norwalk*, 55 Fed. Rep. 98; *The Clatsop Chief*, 7 Sawy. 274, 8 Fed. Rep. 163; *The City of Brussels*, 6 Ben. 370, Fed. Cas.

No. 2,745; *The Bernina*, L. R. 13 App. Cas. 1.

Every vessel outside the jurisdiction of a foreign power is a detached floating portion of the territory of the country whose flag it flies and under whose laws it is registered.

The Scotia, 14 Wall. 170, *sub nom. Scars v. The Scotia*, 20 L. ed. 822; *Crapo v. Kelly*, 16 Wall. 610, 21 L. ed. 430; *Wilson v. McNamee*, 102 U. S. 572, 26 L. ed. 234; *Re Moncan*, 14 Fed. Rep. 44; *Re Ah Sing*, 13 Fed. Rep. 286; *United States v. Bennett*, 3 Hughes, 466, Fed. Cas. No. 14,574; *McDonald v. Mallory*, 77 N. Y. 546, 33 Am. Rep. 664; *Wheaton*, International Law, 157, § 106; 3 Wharton, International Law Dig. 228; Wharton, Conf. L. § 356; 1 Kent, Com. 28; *Vattel*, Law of Nations, Bk. I. chap. 19, § 216; 1 Calvo, 552; *The Lamington*, 87 Fed. Rep. 752; *United States v. Rogers*, 150 U. S. 249, 37 L. ed. 1071, 14 Sup. Ct. Rep. 109. **Messrs. Edward S. Isham, William G. Beale, and Gilbert E. Porter**, for appellee:

Cases of tort arising upon the high seas between parties of different nationalities will, in the admiralty courts of the United States, be governed by the general maritime law as understood and administered in those courts.

The Scotland, 105 U. S. 24, *sub nom. National Steam Nav. Co. v. Dyer*, 26 L. ed. 1001; *The Belgenland*, 114 U. S. 355, *sub nom. The Belgenland v. Jensen*, 29 L. ed. 152, 5 Sup. Ct. Rep. 860; *The Brantford City*, 29 Fed. Rep. 373.

The general maritime law, like the common law, gives no right of action for death by wrongful act.

The Harrisburg, 119 U. S. 199, *sub nom. The Harrisburg v. Rickards*, 30 L. ed. 358, 7 Sup. Ct. Rep. 140; *The Alaska*, 130 U. S. 201, *sub nom. Metcalfe v. The Alaska*, 32 L. ed. 923, 9 Sup. Ct. Rep. 461; *Butler v. Boston & S. S. Co.* 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612.

There is nothing in the language of the French statute set forth in the libel, indicating that the French legislature intended it to have operation beyond the territorial limits of the French nation. The question as to the extraterritorial force of a statute is one of general and international law, upon which this court will exercise its own independent judgment.

Greaves v. Neal, 57 Fed. Rep. 816; *Evey v. Mexican C. R. Co.* 52 U. S. App. 118, 38 L. R. A. 387, 81 Fed. Rep. 294, 26 C. C. A. 407; *Huntington v. Attrill*, 146 U. S. 657, 33 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914.

In this country, statutes silent as to their territorial operation are construed to be limited in their effect to the territory over which the legislature had jurisdiction.

The Apollon, 9 Wheat. 362, 6 L. ed. 111; *The E. B. Ward*, 16 Fed. Rep. 255; *Armstrong v. Beadle*, 5 Sawy. 484, Fed. Cas. No. 541; *Bigelow v. Anderson*, 34 U. S. App. 261, *sub nom. Bigelow v. Nickerson*, 30 L. R. A. 336, 70 Fed. Rep. 113, 17 C. C. A. 1; *Whit-*

ford v. Panama R. Co. 23 N. Y. 465; *Lehman v. McBride*, 15 Ohio St. 573.

The laws of one nation, so far as they operate beyond the reach of its territorial sovereignty, are not sovereign laws at all, and consequently are not, by any rule of international comity, entitled to recognition or force in the courts of another.

Story, Conf. L. §§ 21, 22; *The Apollon*, 9 Wheat. 362, 6 L. ed. 111; *The Scotland*, 105 U. S. 24, *sub nom. National Steam Nav. Co. v. Dyer*, 26 L. ed. 1001; *The E. B. Ward*, 16 Fed. Rep. 255; *Carlson v. United New York Sandy Hook Pilots' Asso.* 93 Fed. Rep. 468; *Armstrong v. Beadle*, 5 Sawy. 484, Fed. Cas. No. 541; *Roth v. Roth*, 104 Ill. 35, 44 Am. Rep. 81; *Whitford v. Panama R. Co.* 23 N. Y. 465.

The doctrine respecting the "law of the flag" is one of limited application, and this case is outside of the limits.

The Scotland, 105 U. S. 24, *sub nom. National Steam Nav. Co. v. Dyer*, 26 L. ed. 1001; *Johnson v. 21 Bales*, 2 Paine, 601, Fed. Cas. No. 7,417; *The Brantford City*, 29 Fed. Rep. 373; *The Johann Friederich*, 1 W. Rob. 35; *The Leon*, L. R. 6 Prob. Div. 148; *Chartered Mercantile Bank v. Netherlands India Steam Nav. Co.* L. R. 10 Q. B. Div. 521; *Foote*, Private International Jurisprudence, 486, 495; *Woolsey*, International Law, § 44, pp. 80, 81; *Thomassen v. Whitwell*, 9 Ben. 403, Fed. Cas. No. 13,929.

As between the place of the negligence and the place of the resulting damage, it is the latter place which is the *locus* of the tort.

The Plymouth, 3 Wall. 20, *sub nom. Hough v. Western Transp. Co.* 18 L. ed. 125; *Leonard v. Decker*, 22 Fed. Rep. 741; *The City of Lincoln*, 25 Fed. Rep. 835; *Milwaukee v. The Curtis*, *The Camden & The Welcome*, 37 Fed. Rep. 705, *sub nom. The Curtis*, *The Camden & The Welcome*, 3 L. R. A. 711; *The H. S. Pickands*, 42 Fed. Rep. 239; *The Mary Garrett*, 63 Fed. Rep. 1009; *Hermann v. Port Blakely Mill Co.* 69 Fed. Rep. 646.

Bunn, District Judge, delivered the opinion of the court:

This is an appeal from a decree in admiralty dismissing a libel *in personam* for want of equity. 94 Fed. Rep. 366. The appellant, as administrator of the estate of Edwin R. Rundell, deceased, filed his bill in the district court to recover damages for the death of the deceased, for the use and benefit of a minor son. The libel sets forth that on July 2, 1898, Edwin R. Rundell, residing at Chicago, became a passenger on board the steamship *La Bourgogne*, being one of appellee's steamships, at the port of New York, and bound for the port of Havre, in France; that the ship set sail from New York on the 2d day of July, and so continued upon her voyage in the Atlantic ocean until the 4th day of July, when it collided with a ship called the *Cromartyshire*, an English sailing vessel, and in the collision was sunk and wholly lost, and Rundell was killed by being drowned, wholly through the fault and improper navigation of the steamship by its officers and crew; that said steamship was

upon said voyage being operated by the appellee, a corporation organized under the laws of France and a citizen of that country; that said steamship was sunk upon the high seas, in the Atlantic ocean, about 60 miles south of Sable island, beyond the territorial jurisdiction of any nation, but was at the time flying the French flag. The libel further avers that certain sections of the statute law of France, which are set forth *in hæc verba*, gave a legal representative a right of action for the death of his intestate occurring through the negligence of another; and that by the decisions of some of the courts of France (which are not identified or set forth) said statute law is held to extend to and operate upon all persons, whether citizens or aliens, upon the high seas, in vessels flying the French flag; and that under those statutes and decisions a right of action for the death of said deceased, enforceable in the district court, arose and exists in favor of the libellant; and prays judgment for the sum of \$50,000. Appellee, the defendant in the libel, filed exceptions to the libel, alleging points of insufficiency in substance as follows:

"First. The libel does not present or disclose any right of action in libellant against this defendant enforceable by said court in the exercise of its admiralty jurisdiction. Second. The libel is insufficient in law to enable libellant to recover from defendant in this cause, in this, that it is brought solely to recover damages for the death of Edwin R. Rundell, which is alleged to have occurred upon the high seas by reason of the negligence of the defendant, also occurring upon the high seas, when, as a matter of law, no right of action exists, and no action can be maintained in a court of admiralty of the United States, to recover damages for death by negligence occurring upon the high seas. Third. The libel is insufficient because it is brought solely to recover for death by negligence occurring on the high seas, and under the general maritime law as interpreted and enforced by the courts of the United States, which alone governs the case, no right of action arises or can be maintained in this court for death so occurring."

Other exceptions relating to the insufficiency of the libel in pleading the law of France it is not necessary here to set out.

We think there are two very substantial grounds upon which the decree of the district court should be sustained. The first is that it does not appear from the libel that the death of the deceased occurred upon the steamship *La Bourgogne*, the averments being merely that he lost his life by drowning as a result of a collision and consequent sinking of the vessel; second, that in cases arising in tort upon the high seas the United States district court, sitting in admiralty, cannot enforce the local law of France, even if in terms it applied to the case, which does not appear, but that such cases must be adjudged and governed by the general maritime and admiralty law as understood and administered by the United States courts.

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As stated, there is no allegation that the deceased was drowned while upon the appellee's ship, and there can be no implication to that effect. The implication is rather the other way, as the pleading must be construed most strongly against the pleader. The acts of negligence which caused the sinking of the vessel were committed upon the vessel, but these would be *damnum absque injuria*, unless it also appeared that the drowning of the deceased which constitutes the real damage and injury, was also upon the vessel. The drowning would not be in any sense under the French flag, unless it was upon the sinking vessel. It will not be claimed that the jurisdiction of the flag extended upon the high seas beyond the limits of the ship flying it. To make the local law of France, therefore, of any possible application, it should appear by clear averment that the drowning took place upon the steamship. The libel nowhere states that the deceased came to his death while upon the *Bourgogne*. The averments are merely that he lost his life by drowning as a result of a collision and sinking of the vessel. The plain implication, therefore, is that he was drowned upon the high seas, apart from the vessel. At least, there is nothing to show to the contrary. The *locus* of the tort, therefore, which must always be determined by the place where the injury and damage arise, rather than where the negligent act is committed, must be considered as being upon the high seas, rather than upon French territory, supposing that the flying of the French flag made the vessel French territory while upon the high seas, as is claimed. The place where the death occurred and the damage arose must be held to be the *locus in quo*. The damage is the substance and consummation of the injury, and from that alone springs the right of recovery. *The Plymouth*, 3 Wall. 20, *sub nom. Hough v. Western Transp. Co.* 18 L. ed. 125; *Leonard v. Decker*, 22 Fed. Rep. 741; *The City of Lincoln*, 25 Fed. Rep. 835; *Milwaukee v. The Curtis, The Camden, & The Welcome*, 37 Fed. Rep. 705, *sub nom. The Curtis, The Camden, & The Welcome*, 3 L. R. A. 711; *The H. S. Pickands*, 42 Fed. Rep. 239; *The Mary Garrett*, 63 Fed. Rep. 1009; *Hermann v. Port Blakely Mill Co.* 69 Fed. Rep. 646.

In the case of *The Plymouth*, 3 Wall. 20, *sub nom. Hough v. Western Transp. Co.* 18 L. ed. 125, opinion by Mr. Justice Nelson, it was held that, where the damage done is wholly upon land, the fact that the cause of the damage originated on water subject to the admiralty jurisdiction does not make the cause one for the admiralty. So that where a vessel lying at a wharf, on waters subject to admiralty jurisdiction, took fire, and the fire, spreading itself to certain storehouses on the wharf, consumed these and their stores, it was held not to be a case for admiralty proceeding. The court in the opinion used this language: "We can give, therefore, no particular weight or influence to the consideration that the injury in the present case originated from the negligence of the servants of the respondents on board

of a vessel, except as evidence that it originated on navigable waters,—the Chicago river; and, as we have seen, the simple fact that it originated there, but the whole damage done upon land, the cause of action not being complete on navigable waters, affords no ground for the exercise of the admiralty jurisdiction. The negligence, of itself, furnishes no cause of action; it is *damnum absque injuria*. The case is not distinguishable from that of a person standing on a vessel or any other support in the river, and sending a rocket or torpedo into the city, by means of which buildings were set on fire and destroyed. That would be a direct act of trespass, but quite as efficient a cause of damage as if the fire had proceeded from negligence. Could the admiralty take jurisdiction? We suppose the strongest advocate for this jurisdiction would hardly contend for it. Yet the origin of the trespass is upon navigable waters, which are within its cognizance. The answer is, as already given: The whole, or at least the substantial, cause of action arising out of the wrong, must be complete within the locality upon which the jurisdiction depends,—on the high seas or navigable waters.”

Leonard v. Decker, 22 Fed. Rep. 741, arising in the southern district of New York, was a case in admiralty for tort, where the defendants, as lessees of a wharf, negligently permitted certain bolts to project from the wharf under water, whereby injury was caused to libellant's vessels mooring there. It was contended that, as the locality of the negligence was on land, the case was not of admiralty cognizance. But the court held that the place where the injury is consummated and the damage actually received is regarded as the *locus* of the tort, and in the opinion by Judge Brown, after citing many cases, the court says: “In all the above cases the decision is made to turn, not upon the place where the negligence as the cause of the damage originates, but upon the place where the injury is received and consummated. It must appear that the damage, as the substantial cause of action, arising out of the negligence, ‘is complete within the locality upon which the jurisdiction depends; namely, upon the high seas or navigable waters.’” *The Plymouth*, 3 Wall. 36, *sub nom. Hough v. Western Transp. Co.* 18 L. ed. 128. The canal boats in this case were moored alongside the wharf for the purpose of discharging their cargoes,—a work which is maritime, and one of the necessary incidents of navigation,—and the vessels were afloat upon navigable waters. The whole damage and injury were received by them in this situation; the *locus* of the damage was upon navigable waters. That was, therefore, the *locus* of the tort, and, as that tort was upon the water, it was within the admiralty jurisdiction, and the libellants are accordingly entitled to decrees, with costs.”

The City of Lincoln, 25 Fed. Rep. 835, by the same court, was a case where a wharf which had been loaded with steel blooms, which had been discharged from the steamship City of Lincoln, gave way beneath the 49 L. R. A.

weight, throwing the blooms into the water. On suit brought against the steamship and the wharfinger, the latter denied the jurisdiction of the admiralty court, on the ground that the negligence alleged was a tort committed upon the wharf; that is, upon the land. The court held that, in cases where negligence and the injury occur in different places, the criterion is the place where the substance and the consummation of the injury are effected; and that, as the injury was caused wholly by the water into which the blooms were thrown, if the breaking down of the wharf occurred through the wharfinger's negligence, such negligence was a marine tort, of which a court of admiralty has jurisdiction. The like rule was followed by Judge Jenkins in *Milwaukee v. The Curtis, The Camden, & The Welcome*, 37 Fed. Rep. 705, *sub nom. The Curtis, The Camden, & The Welcome*, 3 L. R. A. 711. *The H. S. Pickands*, 42 Fed. Rep. 239, was a libel to recover for personal injuries received by libellant, who was engaged in repairing a vessel lying at the wharf. While standing on a ladder resting at one end on the wharf and the other against the vessel, the negligent act of the master caused the ladder to fall, whereby libellant was thrown upon the wharf and injured. Brown, J., held that a court of admiralty had no jurisdiction, saying: “It has never been doubted since the case of *The Plymouth*, 3 Wall. 20, *sub nom. Hough v. Western Transp. Co.* 18 L. ed. 125, that to enable us to take cognizance of a maritime tort the injury must have been consummated and the damage received upon the water. The mere fact that the wrongful act was done upon a ship is insufficient. Subsequent adjudications have in no wise tended to limit or qualify this rule.”

So, in *The Mary Garrett*, 63 Fed. Rep. 1009, it was held that admiralty has no jurisdiction of an action for injury to a person on a wharf, caused by negligence originating on a ship; and it made no difference that the person was employed as a seaman on the same ship. And in the opinion by Judge Morrow the court says: “Nor does it make any difference whether the tort had its inception, its origin, upon water, if the consequential effects of the wrong—the consummation of the tort—happened on land. It is immaterial, so far as the admiralty jurisdiction is concerned, that the tort originated on water, if the injury happened on land.”

And in a similar case, that of *Hermann v. Port Blakely Mill Co.* 69 Fed. Rep. 646, the same judge, after reviewing the cases, arrived at the following conclusion: “I think that the only true and rational solution of the jurisdictional question, where the tort occurs partly on land and partly on water, is to ascertain the place of the consummation and substance of the injury. This latter element of the wrong is necessarily the only substantial cause of action, otherwise, it would be *damnum absque injuria*. . . . The central idea found running through all these cases is, so far as jurisdiction over torts is concerned, that the admiralty law

looks to the place where the injury was suffered, and not to the locality of the agent causing the injury."

We think these cases abundant to show that if deceased came to his death, not in the vessel, but on the high seas outside the vessel, the local law of France, which it is only claimed extends to the vessel flying the French flag, can have no application to the case.

2. In regard to the second exception—that the libel is insufficient in law to enable the libellant to recover damages in an action of tort for the death of the deceased occurring upon the high seas by reason of the negligence of the defendant, because the general maritime law, by which the admiralty court in this country is governed, allows of no recovery in such a case,—we are of opinion that this exception was well taken, and that the decision of the district court was correct. See the opinion of the court below in 94 Fed. Rep. 366. The question is a very interesting one, and has never, so far as we can learn, been directly and in terms decided by our Supreme Court. We have examined it, however, with some care, and this is the conclusion we have reached. It is well settled that neither by the common law, nor by the general maritime law, nor by any law of Congress, will an action lie for death by a wrongful act. No such action can be sustained under any such law in the courts of the United States. *Mobile L. Ins. Co. v. Brame*, 95 U. S. 756, 24 L. ed. 580; *The Harrisburg*, 119 U. S. 199, *sub nom.* *The Harrisburg v. Rickards*, 30 L. ed. 358, 7 Sup. Ct. Rep. 140; *The Alaska*, 130 U. S. 201, *sub nom.* *Metcalfe v. The Alaska*, 32 L. ed. 923, 9 Sup. Ct. Rep. 461; *Butler v. Boston & S. S. Co.* 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612. The same rule prevailed in England under the common law until the passage of Lord Campbell's act. The effect of the common law was so recited in that act. In *The Harrisburg*, 119 U. S. 199, *sub nom.* *The Harrisburg v. Rickards*, 30 L. ed. 358, 7 Sup. Ct. Rep. 140, the Supreme Court held that in the absence of an act of Congress, or a statute of a state giving a right of action therefor, a suit in admiralty cannot be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or on waters navigable from the seas, which is caused by negligence. That decision is perhaps in terms broad enough to cover the case at bar, except that the precise question here was not in that case, because it is certain and conceded that there is no law of Congress or of a state that professes to give the right, and by the general maritime law no such right ever existed. In *The Alaska*, 130 U. S. 201, *sub nom.* *Metcalfe v. The Alaska*, 32 L. ed. 923, 9 Sup. Ct. Rep. 461, this decision was affirmed, and the same doctrine adhered to. In that case it was conceded by counsel, and concurred in by the court, that the statute of New York, on the subject of actions for death by negligence did not apply to that case, because the deaths did not oc-

cur within the state of New York or in waters subject to its jurisdiction, but upon the high seas. If the Federal court could not enforce the law of New York in such a case, it is difficult to see how it can enforce a law strictly foreign and local; for it must be conceded that the French law, allowing it to be all that is claimed for it, can only have operation within the territory and jurisdiction of France. The law of France can have no extraterritorial force. It is not within the jurisdiction of the legislative power of any one nation to make the maritime law for the whole world, so far as the courts of other countries are concerned. It can only make laws to be operative within its own territory and jurisdiction. It may undoubtedly make laws to bind its own subjects while abroad, if they should ever return, to be adjudged in the courts of their own country, but this right is not one that will always be respected by the courts of other countries. *Story*, Conf. L. §§ 21, 22; *The Apollon*, 9 Wheat. 362, 6 L. ed. 111; *The Scotland*, 105 U. S. 24, *sub nom.* *National Steam Nav. Co. v. Dyer*, 26 L. ed. 1001; *The E. B. Ward*, 16 Fed. Rep. 255; *Carlson v. United New York Sandy Hook Pilots' Asso.* 93 Fed. Rep. 468; *Armstrong v. Beadle*, 5 Sawy. 484, Fed. Cas. No. 541. Mr. Justice Story, in his *Conflict of Laws* (§ 22) says:

"Without entering upon this subject (which properly belongs to a general treatise upon public law), it may be truly said that no nation is bound to respect the laws of another nation made in regard to the subjects of the latter which are nonresidents. The obligatory force of such laws of any nation cannot extend beyond its own territories. . . . Whatever may be the intrinsic or obligatory force of such laws upon such persons if they should return to their native country, they can have none in other nations wherein they reside. Such laws may give rise to personal relations between the sovereign and subjects, to be enforced in his own domains; but they do not rightfully extend to other nations. . . . A state has just as much intrinsic right, and no more, to give to its own laws an extraterritorial force as to the property of its subjects situated abroad as it has in relation to the persons of its subjects domiciled abroad. That is, as sovereign laws, they have no obligation on either the person or the property. When, therefore, we speak of the right of a state to bind its own native subjects everywhere, we speak only of its own claim and exercise of sovereignty over them when they return within its own territorial jurisdiction, and not of its right to compel or require obedience to such laws on the part of other nations within their own territorial sovereignty."

The Supreme Court in *The Scotland*, 105 U. S. 24, *sub nom.* *National Steam Nav. Co. v. Dyer*, 26 L. ed. 1001, says: "So far as they stand on general grounds of argument [certain English cases], the most important con-

sideration seems to be this, that the British legislature cannot be supposed to have intended to prescribe regulations to bind the subjects of foreign states, or to make for them a law of the high sea; and that, if it had so intended, it could not have done it. This is very true. No nation has any such right. Each nation, however, may declare what it will accept, and by its courts enforce, as the law of the sea, when parties choose to resort to its forum for redress. And no persons subject to its jurisdiction or seeking justice in its courts can complain of the determination of their rights by that law, unless they can propound some other law by which they ought to be judged; and this they cannot do, except where both parties belong to the same foreign nation; in which case it is true they may well claim to have their controversy settled by their own law.

But where they belong to the country in whose forum the litigation is instituted, or to different countries having different systems of law, the court will administer the maritime law as accepted and used by its own sovereignty."

Armstrong v. Beadle, 5 Sawy. 484, Fed. Cas. No. 541, was an action at law, under the California statute, to recover for death upon the high seas of a passenger on board an Oregon vessel. Circuit Judge Sawyer, deciding upon the liability, in his opinion uses this language: "The first point presented is that the statute has no extraterritorial operation, and is limited to accidents occurring within the territorial jurisdiction of the state, and as the death occurred upon the high seas, beyond the legislative jurisdiction of the state, the statute is inapplicable. There was no liability at common law for the death of a party resulting under circumstances like those set out in the complaint, and, unless the statute in question gives the right of action, the plaintiff cannot recover. The statute undoubtedly creates a new right of action, and does not merely give a remedy for a right already existing. If it operates beyond the territorial jurisdiction of the state, then it becomes a universal law, applicable to all countries, and the legislature of California would be adopting a code of laws affecting the rights of parties arising out of acts done wholly in foreign countries, as well as upon the high seas. If California can pass laws of the kind, operating extraterritorially, then other states and countries can pass laws upon the same subject, operating upon the high seas, and these laws may be in conflict; but there is nothing in the statute to indicate that it was intended to operate beyond the limits of the state."

We think, also, that the evident tendency of the decisions and weight of authority is that cases of tort arising upon the high seas between parties of different nationalities will, in the admiralty courts of the United States, be governed by the law of the forum, which is the general maritime law as understood and administered in these courts. *The Scotland*, 105 U. S. 24, *sub nom. National Steam Nav. Co. v. Dyer*, 26 L. ed. 1001; *The Belgenland*, 114 U. S. 355, *sub nom.* 49 L. R. A.

The Belgenland v. Jensen, 29 L. ed. 152, 5 Sup. Ct. Rep. 860; *The Brantford City*, 29 Fed. Rep. 373. In the case of *The Scotland* the Supreme Court decided that the courts of every country will administer justice according to its laws, unless a different law be shown to apply, and this rule applies to transactions taking place on the high seas. If a collision occur on the high seas between two vessels, controversies arising therefrom will be governed in the courts of this country by our laws, unless the two colliding ships belong to the same foreign country, or, perhaps, to different countries using the same law, when they will be governed by the laws of the country to which they belong. And in the opinion by Mr. Justice Bradley the following language, which seems quite applicable in principle to this case, is used: "In administering justice between parties, it is essential to know by what law, or code, or system of laws, their mutual rights are to be determined. When they arise in a particular country or state, they are generally to be determined by the laws of that state. Those laws pervade all transactions which take place where they prevail, and give them their color and legal effect. Hence, if a collision should occur in British waters, at least between British ships, and the injured party should seek relief in our courts, we would administer justice according to the British law, so far as the rights and liabilities of the parties were concerned, provided it were shown what that law was. If not shown, we would apply our own law to the case. In the French or Dutch tribunals they would do the same. But if a collision occurs on the high seas, where the law of no particular state has exclusive force, but all are equal, any forum called upon to settle the rights of the parties would *prima facie* determine them by its own law, as presumptively expressing the rules of justice; but, if the contesting vessels belonged to the same foreign nation, the court would assume that they were subject to the law of their nation, carried under their common flag, and would determine the controversy accordingly. If they belonged to different nations having different laws, since it would be unjust to apply the laws of either to the exclusion of the other, the law of the forum—that is, the maritime law as received and practised therein—would properly furnish the rule of decision. In all other cases, each nation will also administer justice according to its own laws. And it will do this without respect of persons, to the stranger as well as to the citizen."

In *The Belgenland*, 114 U. S. 355, *sub nom. The Belgenland v. Jensen*, 29 L. ed. 152, 5 Sup. Ct. Rep. 860, the Supreme Court affirmed a similar doctrine, and held that in a proceeding in admiralty against one foreign vessel for collision with another foreign vessel on the high seas, the general maritime law, as understood and administered in the courts of the country in which the litigation is prosecuted, is, in general, the law governing the case. We think upon principle these cases, though the facts are

not the same, should determine the one at bar, and that the position taken by appellant's counsel as to the application of the local law of France to the case is quite irreconcilable with these decisions of our Supreme Court. If these decisions do not determine the case at bar, they indicate pretty clearly what the decision should be. We find no case where such a rule has ever been applied to an action arising in tort. In *The Brantford City*, 29 Fed. Rep. 373, where the subject was ably treated by Mr. Justice Brown, of the southern district of New York, in an opinion afterwards referred to with approval by the Supreme Court in *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469, the court states the rule very comprehensively in the following language: "But inasmuch as the high seas are the common ground of all nations, and not governed by the merely municipal laws of either, the quality of acts committed on the high seas, as between persons or ships belonging to different nations whose laws are different, is determined by the maritime law as accepted and administered in the forum where the suit is prosecuted. . . . The fact that in most of the cases cited the injury arose from collision is immaterial. The gravamen of the action is negligence. On that alone the action depends. It is negligence only that constitutes the tort. It is so in this case in its aspect as a tort; and, as this negligence, resulting in damage to libellants, occurred partly within our jurisdiction and partly upon the high seas, the law applicable to the case, as one of tortious negligence, would seem, upon the above authorities, to be our own law, as the law of the forum."

Any other rule would be likely to lead to much conflict and uncertainty. Nor can the fiction in regard to the law of the flag, now mainly exploded, have any force to extend the effect of the laws of any country upon the high seas or beyond that country's own territory, as will be seen by the cases following. It is merely a phrase to denote a simple fact, namely, the law of the country to which the ship belongs, and has no effect to extend the jurisdiction or add to the force of those laws in cases of tort. *Johnson v. 21 Bales*, 2 Paine, 601, Fed. Cas. No. 7417; *Thomassen v. Whitwell*, 9 Ben. 403, Fed. Cas. No. 13,929.

The decree of the District Court is affirmed.

CLEVELAND, CINCINNATI, CHICAGO, &
ST. LOUIS RAILWAY COMPANY,

Appt.,

v.

James T. TARTT, Admr., etc., of Jesse H. Phillips, Sr.

(99 Fed. Rep. 369, 39 C. C. A. 568.)

1. No duty of care to avoid injury to

NOTE.—As to duty of railroad company to trespasser on track, see *Toomey v. Southern P. R. Co.* (Cal.) 10 L. R. A. 139, and *note*; 49 L. R. A.

trespassers by a railroad train arises until those in charge of the train have discovered their presence on or dangerously near the track, and have reasonable cause to believe that injury will result unless the progress of the train is arrested, although by the exercise of due care their presence might have been sooner discovered, and the train is running at an unlawful rate of speed.

2. It is not the duty of trainmen to arrest the progress of a train as soon as they discover a trespasser on or dangerously near the track; but they have the right to proceed on the assumption that the trespasser, having a due regard for his own personal safety, will voluntarily withdraw from the track, and not remain in a place of known danger until he is injured or killed.

(January 25, 1900.)

APPEAL by defendant from a judgment of the Circuit Court of the United States for the Southern District of Illinois to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Reversed.*

Before Woods and Jenkins, Circuit Judges, and Baker, District Judge.

The statement of facts referred to in the opinion was as follows:

On July 7, 1891, the deceased, Jesse H. Phillips, Sr., the plaintiff's intestate, was killed by a collision with a train of the appellant (the defendant below) in the village of Venice, in the state of Illinois. The declaration, consisting of a single count, charges, in substance, that the defendant, on July 7, 1891, at a point within the incorporated village of Venice, killed the plaintiff's intestate, and avers that at the time of the collision, and immediately before his death, the deceased was on defendant's track, exercising all due care and diligence in seeking to rescue his minor son, aged eight years, who was in imminent peril from said train and engine, and that while exercising due care and diligence in that behalf he was killed; that there was in force in the village of Venice an ordinance by which it was provided that railroads should not run engines or trains within its limits at a greater rate of speed than 10 miles an hour; that, at the time of the killing of the deceased, the defendant's servants were running the engine and train at a rate of speed in excess of 10 miles an hour, to wit, at the speed of 60 miles an hour or thereabouts, in violation of said ordinance; that defendant's servants in charge of said engine and train saw the child upon the tracks in time to have enabled them, by the exercise of slight care, to have reduced the speed and averted the danger, "yet with gross and reckless and wanton negligence" they failed and neglected to reduce the speed until the collision occurred, and "with said gross and wanton negligence" they failed to give any signal or warning of the approach of said train, and that by

Spicer v. Chesapeake & O. R. Co. (W. Va.) 11 L. R. A. 385; *Patton v. East Tennessee, V. & G. R. Co.* (Tenn.) 12 L. R. A. 184; *Clark v.*

reason of "said gross and wanton negligence" the deceased was killed; that the deceased left surviving him a widow and two minor children, who have suffered damage in the sum of \$5,000. The pleas were the general issue, and that the deceased came to his death by his own negligence, to which latter plea there was a replication in denial.

The deceased had lived for about two months in a house located close to the railroad tracks. Every morning many trains passed his house, to and through the village of Venice, at a rapid rate of speed. The train which came into collision with him passed on the same track every morning at substantially the same rate of speed as on the morning of the fatal accident. The decedent either knew, or was chargeable with knowledge, of these facts. In going from his home to the village of Venice the deceased could take the wagon road, a public highway which passed near his house and led directly into the village, running parallel with and immediately adjoining the railway, or he could take the railroad track or right of way. He took his son, aged eight years, and started to walk down the railroad, and on its right of way, to the village of Venice, distant about 1 mile from his home. He was killed at a point about 2,400 feet distant from his house. The defendant's track was straight and level for a distance of about 2,400 feet from the point where the injury occurred in the direction from which the train was coming, and a person on the track at that place could have been seen for that distance before the train reached him. Neither Phillips nor his son was seen by the engineer or fireman until the train was under the Merchant's bridge, distant from the point of collision only 785 feet; that, when seen, the deceased was walking along the east side of the track, and his son was walking between the rails, a few steps behind the father. They were going in the same direction as the train, and did not appear to be giving any attention to avoid danger from approaching trains. As soon as they were seen, the danger signal was sounded, and the emergency air brakes applied, but the speed of the train was so great, being from 50 to 60 miles an hour, that it did not stop until it had reached a point some 1,700 feet beyond the point of collision. The decedent did not seem to have had any apprehension of the approach of the train until the danger signal was sounded, when he sprang to the rescue of his son, and, crossing the track from east to west, he caught the lad in his arms, and sought to carry him out of danger, but before he got off the track he was struck by the engine, and both were killed. The point of collision was 2,390 feet from the

house of the deceased. On the trial of the cause, to support the issues on his behalf, the plaintiff offered in evidence a copy of an ordinance of the village of Venice prohibiting the running of trains through that village at a greater rate of speed than 10 miles an hour. A certificate was attached thereto, which, so far as material, reads thus: "I, A. L. Summers, hereby certify that the annexed and foregoing is a true copy of Ordinance No. 32 of the village of Venice, passed July 7, 1877, and duly published according to law." The defendant objected to the introduction of the copy of the ordinance in evidence on the ground that it did not appear that it had been published in any of the modes prescribed by law. The objection was overruled, and the copy read in evidence over the objection and exception of the defendant. The plaintiff also offered in evidence a copy of the ordinance in question, contained in a pamphlet copy of ordinances, whose sole authentication was as follows: Ordinances Adopted by the Board of Trustees of the Village of Venice, in Madison County and State of Illinois, John Haps, Printer, 1884,"—which authentication was printed on the cover of said pamphlet. The defendant objected to the admission of the printed copy of the ordinance in evidence on the ground that it did not purport to be published by authority of the board of trustees of said village. The objection was overruled, and the copy of the ordinance was read in evidence, to which the defendant saved an exception.

Mr. John T. Dye, with Mr. George F. McNulty, for appellant:

The court erred in allowing proof that the track was used by pedestrians. There is no averment charging this or knowledge of it.

Ebsery v. Chicago City R. Co. 164 Ill. 518, 45 N. E. 1017; *Moss v. Johnson*, 22 Ill. 640; *Illinois C. R. Co. v. McKee*, 43 Ill. 120; *Bell v. Senneff*, 83 Ill. 124; *Wabash R. Co. v. Jones*, 163 Ill. 170, 45 N. E. 50; *Illinois C. R. Co. v. Godfrey*, 71 Ill. 500, 22 Am. Rep. 112; *Lake Shore & M. S. R. Co. v. Bodemer*, 139 Ill. 596, 29 N. E. 692; *Blanchard v. Lake Shore & M. S. R. Co.* 126 Ill. 416, 18 N. E. 799; *Illinois C. R. Co. v. Noble*, 142 Ill. 578, 32 N. E. 684; *Cleveland, C. C. & St. L. R. Co. v. Phillips*, 24 U. S. App. 489, 64 Fed. Rep. 823, 12 C. C. A. 622.

Deceased was guilty of contributory negligence by trespassing. Because of this the court should have directed a verdict.

Being a trespasser, defendant is only liable for wilfulness.

Illinois C. R. Co. v. Godfrey, 71 Ill. 500, 22 Am. Rep. 112; *Illinois C. R. Co. v. Hetherington*, 83 Ill. 510; *Chicago & A. R. Co. v.*

Wilmington & W. R. Co. (N. C.) 14 L. R. A. 749; *Parker v. Pennsylvania (Ind.)* 23 L. R. A. 552; *Ward v. Southern P. Co.* (Or.) 23 L. R. A. 715; *Raines v. Chesapeake & O. R. Co.* (W. Va.) 24 L. R. A. 228; *Smith v. Norfolk & S. R. Co.* (N. C.) 25 L. R. A. 287; *Pickett v. Wilmington & W. R. Co.* (N. C.) 30 L. R. A. 257; and some cases in notes to *Cincinnati, I. St. L. & C. R. Co. v. Cooper* (Ind.) 6 L. R. A. 49 I. R. A.

243; and *Daniels v. New York & N. E. R. Co.* (Mass.) 13 L. R. A. 248.

As to duty to avoid injury to small children on track, see *Bottoms v. Seaboard & R. R. Co.* (N. C.) 25 L. R. A. 784, and note; *Roth v. Union Depot Co.* (Wash.) 31 L. R. A. 855; and *Gunn v. Ohio River R. Co.* (W. Va.) 36 L. R. A. 575.

McKenna, 14 Ill. App. 472; *Chicago, B. & Q. R. Co. v. Mehlsack*, 131 Ill. 61, 22 N. E. 812; *Blanchard v. Lake Shore & M. S. R. Co.* 126 Ill. 423, 18 N. E. 799.

Use of the track by pedestrians does not change the relative rights of deceased or defendant.

Illinois C. R. Co. v. Hetherington, 83 Ill. 510; *Blanchard v. Lake Shore & M. S. R. Co.* 126 Ill. 423, 18 N. E. 799; *Cleveland, C. C. & St. L. R. Co. v. Phillips*, 24 U. S. App. 489, 64 Fed. Rep. 823, 12 C. C. A. 621.

One who knowingly goes on a railroad track is held to have assumed all risks following his act.

4 Am. & Eng. Enc. Law, p. 56, note 1; *Goldstein v. Chicago, M. & St. P. R. Co.* 46 Wis. 404, 1 N. W. 37; *Lake Shore & M. S. R. Co. v. Clemens*, 5 Ill. App. 77; *Baltimore & O. R. Co. v. Depeu*, 40 Ohio St. 121; *Pittsburgh, Ft. W. & C. R. Co. v. Collins*, 87 Pa. 405, 30 Am. Rep. 371; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697, 24 L. ed. 542; *Schofield v. Chicago, M. & St. P. R. Co.* 114 U. S. 619, 29 L. ed. 226, 5 Sup. Ct. Rep. 1125.

Where his trespass contributed to the injury, his contributory negligence prevents a recovery.

Beach, Contrib. Neg. § 52; *Wharton*, Neg. 2d ed. § 427.

The railroad did not have to anticipate children or adults on its track. Nor did it have to keep a lookout for them.

Lake Shore & M. S. R. Co. v. Clark, 41 Ill. App. 344; *Chicago & W. I. R. Co. v. Roath*, 35 Ill. App. 349; *Wabash R. Co. v. Jones*, 163 Ill. 167, 45 N. E. 50; *Illinois C. R. Co. v. Godfrey*, 71 Ill. 500, 22 Am. Rep. 112.

An engineer, seeing a person on a track, does not have to slacken speed unless he has reason to believe the person cannot or will not get off the track.

Illinois C. R. Co. v. Frelka, 9 Ill. App. 605; *Chicago, R. I. & P. R. Co. v. Austin*, 69 Ill. 426; *Illinois C. R. Co. v. Hall*, 72 Ill. 224; *Illinois C. R. Co. v. Modglin*, 85 Ill. 481.

The act of the father in seeking to rescue the boy did not free him from his first negligence in leading the boy into danger.

Cleveland, C. C. & St. L. R. Co. v. Phillips, 24 U. S. App. 489, 64 Fed. Rep. 823, 12 C. C. A. 623; 7 Am. & Eng. Enc. Law, 2d ed. note 4, p. 395.

Mr. A. R. Taylor for appellee.

Baker, District Judge, delivered the opinion of the court:

This case has been before this court, when it was reversed and remanded, with instructions to grant a new trial, and to permit the declaration to be amended. *Cleveland, C. C. & St. L. R. Co. v. Phillips*, 24 U. S. App. 489, 64 Fed. Rep. 823, 12 C. C. A. 618. On the return of the case a new trial was granted, and the declaration was amended by simply inserting the word "wilful" in three places next before the word "negligence." The evidence on the last trial differs in no essential particular from that on the former, except that upon the last trial evidence was introduced showing that the train could have

been stopped within the distance of 2,000 feet, or thereabouts. The statement of facts found in the former report of this case, except the evidence in reference to the distance within which the train could have been stopped, is adopted as a substantially correct statement of the facts in the present case. To set out the numerous instructions given and refused to which exceptions were taken would needlessly protract this opinion. The record contains fifty-two assignments of error. The instructions are not entirely harmonious in their statement of the legal principles applicable to the case, and it is not apparent how the jury could have reached the verdict they did, if they had been governed by the instructions given. But, as the case ought to be reversed for error in refusing to direct a verdict for the plaintiff in error, a careful examination of the other errors assigned is unnecessary.

It was decided when the case was here before that the deceased was, at the time he was killed, a trespasser or mere naked licensee on the right of way of the plaintiff in error, and, as such, that it owed him no duty of care to provide against accidents to him. We also held that the court erred in refusing to direct a verdict in favor of the plaintiff in error on the ground that the evidence was insufficient to justify a submission of the case to the jury. These rulings became the law of the case, and must control the decision on the present writ of error, unless the case made by the evidence differs in some material and controlling aspect from that made on the former trial. A careful study of the evidence which is in the record fails to disclose any material difference, except that in relation to the distance within which the train could have been stopped. That the deceased was a trespasser or mere naked licensee at the time he was killed is clearly shown, and is the settled law of the case; and as no new or additional evidence was produced, except as above stated, the court below, in obedience to the opinion of this court, ought to have sustained the request of the plaintiff in error to direct the jury to find a verdict in its favor. But, if this was the first time this case was before us, the result must be the same. The undisputed evidence shows that the deceased and his son were trespassers on the right of way of the plaintiff in error at the time he was killed. The evidence fails to show negligence on the part of the plaintiff in error or its servants which was the proximate cause of the death of the plaintiff's intestate. It is firmly settled that it is not the duty of the employees operating a railroad train to exercise care and diligence in looking for trespassers on the railway track, and that no duty of care in respect of such trespasser arises until he is seen upon or so near the railroad track as to show that he is liable to injury from the train moving thereon. Nor does it become the duty of the trainmen to arrest the progress of their train as soon as they discover a trespasser on or dangerously near the track. They have the right to proceed on the assumption that

the trespasser, having a due regard for his own personal safety, will voluntarily withdraw from the track, and not remain in a place of known danger until he is injured or killed. It is only when it becomes apparent that such trespasser is either unaware of, or unable to avoid, impending danger, and when those in charge of the train have reasonable cause to apprehend that injury will probably result unless an effort is made to stop the train, that it becomes their duty to do so. As between the railway company and the trespasser, no duty of care to avoid injury arises until those in charge of the train have discovered his presence on or dangerously near the track, and have reasonable cause to believe that injury will result unless the progress of the train is arrested. Although the railway track may be level and straight, so that those in charge of the train by the exercise of due care might have seen the trespasser long before they did, still such negligent failure to discover his presence on or near the track will of itself constitute no actionable wrong of which he can complain. If the train is running at a high and dangerous rate of speed, in violation of an ordinance, it is mere negligence, of which the trespasser cannot successfully complain; nor in such a case would any special duty of care arise until the presence and apparent danger of the trespasser was actually discovered. Hence, even if those employed on the engine which killed the plaintiff's intestate could have seen him when he was 2,400 feet from the train, their failure to discover his presence or that of his son until the train was a little more than 700 feet from them would give no right of action. There was no evidence offered on behalf of the plaintiff below to prove that the employees on the train actually discovered the presence of the deceased or his son on or near the track until just before the accident happened. The evidence clearly shows that the presence of the deceased and his son on the track was not actually discovered by any of the trainmen until the train was within less than 800 feet from them, and that as soon as they were seen the danger signal was sounded, the emergency brakes applied, and everything was done which with due care for the safety of the train and its passengers could have been done in the exercise of ordinary care and prudence, and that the train was actually stopped within 2,000 feet or thereabouts from the point where the train was when the deceased and his son were first seen upon or near the track. The case made by the evidence was such as made it the duty of the court to grant the request of the plaintiff in error to direct a verdict in its favor. Deciding, as we do, that the court erred in refusing to direct a verdict for the plaintiff in error, it becomes unnecessary, and would not be profitable, to consider the other fifty-one errors assigned.

Woods, Circuit Judge, concurring:

When this case was first here, our ruling was that "the declaration . . . counts upon negligence, and not upon wilful-
49 L. R. A.

ness, as the ground of action," and that it was therefore unnecessary to express an opinion whether, upon the facts disclosed, the action could be maintained for a wilful injury. Apparently for the purpose of raising that issue the declaration was amended by inserting the word "wilful" to qualify the alleged negligence, so that as amended the charge is that the defendant's servants, with gross, reckless, wanton, and wilful negligence, failed to reduce the speed of the engine, and to give any signal or warning to the deceased and his child of the approach of the train by which they were run down. Manifestly, the amendment did not affect the essential character of the charge. It is one thing to allege the wilful or intentional infliction of an injury, and quite another to allege the wilful doing or omitting to do something which caused, or contributed to the causing of, the injury. The defendant's servants, according to the amended averment, wilfully (that is to say, knowingly and purposely) failed to reduce the speed, and to give to the deceased any signal or warning of the approach of the train; but it is not alleged or implied that there was in the mind of the engineer or fireman any intention to inflict injury, or any perception that the deceased and his son were not properly regardful of the situation, and would avoid harm, as they might easily have done, by stepping aside. "Wilful or intentional injury," as we said before, "implies positive and aggressive conduct, and not the mere negligent omission of duty;" and the wilful omission to do something which duty requires, it is equally clear, does not of itself imply an intention to injure, and such intention should not be imputed unless directly proved, or, under the circumstances, that result must have been perceived to be probable. In other words, as a matter of pleading, it is the same whether an act or an omission to act be alleged to have been negligent or intentional. If it be sought to charge a wilful injury, the intention to inflict it must be directly and explicitly alleged. As a matter of proof, it may be enough to show negligence of such gross, wanton, or wilful character as to justify the inference of an intention or willingness to injure. It is easy to suppose circumstances or conditions which, if they did not in the particular case justify an omission to retard the speed of a train, or to sound the whistle sooner than it was sounded, would exclude all suspicion of bad faith. The engineer in this instance might have seen the deceased upon the track 2,000 feet away, instead of 700 feet, as he testified; and, disregarding his testimony, the jury may have inferred that he ought to have seen, and did sooner see, the deceased upon the track. But, that conceded, there is no evidence whatever to justify an inference that he entertained any purpose or had any thought of harming the deceased or his boy. The affirmative testimony of a number of witnesses is that the alarm whistle was sounded when the engine was near 700 feet from the point of collision, and against that is the testimony of a single witness that she

heard neither bell nor whistle. The affirmative testimony, it is clear, ought not to be considered as overborne by the negative; but, whether the truth in this respect was one way or the other, the case was, at most, one of negligence only, against one whose position as a trespasser made a right of action on that ground alone impossible. That he was a trespasser upon the track of the defendant's road is conceded in the brief for the defendant in error. The trial proceeded throughout on that theory, and no question, it is admitted, was made upon the point; but it is insisted that the defendant's servants, notwithstanding the negligence of the deceased, could, after discovering the peril, have averted it by timely warning, or by slackening the speed of the train. On this point reference is made to *Cahill v. Chicago, M. & St. P. R. Co.* 46 U. S. App. 85, 74 Fed. Rep. 285, 20 C. C. A. 184; *Louisville & N. R. Co. v. Morlay*, 58 U. S. App. 528, 86 Fed. Rep. 240, 30 C. C. A. 6; *Anderson v. Hopkins*, 63 U. S. App. 533, 91 Fed. Rep. 77, 33 C. C. A. 346, and other cases, as overthrowing the doctrine that there can be no recovery for an injury to a person wrongfully upon a railroad track unless the injury was wilful or intentional. The *Cahill Case* is plainly distinguishable; and the doctrine of the *Anderson* and *Morlay Cases* is manifestly not applicable here, because in this case the deceased and his son were not perceived by the engineer to be in a position of peril from which they were not likely to escape by their own exertions.

The only tangible proof of negligence which went to the jury was that the train by which the deceased was killed was running at the rate of 50 to 60 miles an hour, in violation of an ordinance of the town which forbade a speed exceeding 10 miles an hour. The proof of that ordinance should have been withdrawn from the jury. It consisted of a copy of the ordinance, with a certificate of the town clerk attached, verifying the ordinance, and certifying that it was passed on July 7, 1877, and was duly pub-

lished. This certificate was attached to the ordinance as found in a printed book of ordinances, which contained copies of other ordinances of the town of Venice; and it is claimed, on the statement of a witness, that a copy of that pamphlet was kept or preserved by the town board. The book, however, did not purport to be published by authority of the board of trustees or city council, and therefore was not admissible, under the statute, as evidence of the passage and publication of the ordinances found in it. *Lindsay v. Chicago*, 115 Ill. 120, 3 N. E. 443. And while, as shown by the opinion in that case, the certified copy of the ordinance was competent and prima facie evidence of the passage and publication of the ordinance, yet when it was shown, as it was, that in the original record there was no notation at the foot of the ordinance of the fact or date of publication, upon which the clerk could have based his certificate, and further was shown by the testimony of the clerk, who made the certificate, that he knew nothing of the fact, and did not intend to certify to the publication of the ordinance, but signed the certificate as prepared and presented to him by counsel for the defendant in error, the force of the certificate in that respect was destroyed, and there remained no adequate proof of the publication of the ordinance. But, if the publication of the ordinance were conceded, its violation by the defendant was, at most, evidence of negligence only, and afforded no ground for recovery for injury to a trespasser. The train by which the intestate was killed was running on time, and at its usual speed, as for two years or more it had been run, and as, to the knowledge of the deceased, it had been run for six weeks or more before the date of the accident. He probably had no knowledge of the ordinance, and certainly neither counted, nor had the right to count, upon the train being run in accordance with its requirement. The judgment below is reversed, and the cause remanded, with directions to grant a new trial.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

CHESAPEAKE & OHIO RAILWAY COMPANY, *Plff. in Err.*,
v.

Ethel M. KING.

(99 Fed. Rep. 251.)

1. If a passenger alights by direction or implied invitation of the carrier at a place where, in order to leave the carrier's premises, it is necessary to cross the carrier's track, there is an implied agreement that in using that mode of egress trains will

not be so operated as to make the exit unnecessarily dangerous.

2. A passenger alighting from a train at a place where he must cross a track to reach the public highway may, in the absence of warning, presume that trains will not be so operated as to impose on him the same degree of care which he would be obliged to exercise if he were not a passenger.

3. Whether or not a passenger is negligent in failing to look and listen for approaching trains before crossing a track between the place where he alighted from the

NOTE.—For injury to passengers at stations by passing railroad trains, see also *DeKay v. Chicago, M. & St. P. R. Co.* (Minn.) 4 L. R. A. 632; *Philadelphia, W. & B. R. Co. v. Anderson* (Md.) 8 L. R. A. 678; *Atchison, T. & S. F. R. Co. v. Shean* (Colo.) 20 L. R. A. 729; *Southern R. Co. v. Smith* (C. C. A. 5th C.) 40 L. R. A. 746; *Young v. New York, N. H. & H. R. Co.* (Mass.) 41 L. R. A. 193; and *Atlantic City R. Co. v. Goodin* (N. J.) 45 L. R. A. 671.

train and the public highway is a question for the jury.

(January 22, 1900.)

ERROR to the Circuit Court of the United States for the District of Kentucky to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

Before *Lurton* and *Day*, Circuit Judges, and *Thompson*, District Judge.

Statement by *Lurton*, Circuit Judge:

Only the facts essential to the consideration of the single question upon which a reversal is sought need be stated. The plaintiff below, a young woman, sustained very serious injuries by collision with a railroad train while crossing a railway track which intervened between the station of the company at Central City, West Virginia, and the nearest public highway or street connecting the village and station. She had taken passage at Ashland, Kentucky, upon an accommodation train, for Central City, a station east of Ashland. Between Central City and Ashland the tracks are double, and about 7 feet apart. The track next the station is used only by east-bound trains, while the other, or northern, track is used only by trains going in the opposite direction. The village of Central City lies wholly north of the railroad tracks, while the station or depot is on the opposite or south side of the railroad. The streets of the town running at right angles with the railroad do not cross its tracks, but extend from them south to the Ohio river. This station house is situated between two streets extending from the railroad to the town, and is about 100 feet from Fourteenth street, which is the nearest of them. Fourteenth street is therefore the one used chiefly, if not altogether, by the travel between the depot and the town, and has a pavement or sidewalk only on its western side. The station consists of three connected rooms—a waiting room, a ticket office, and a freight room—extending along the track east and west for a distance of 50 feet. In front of this station is a wooden platform about 6 feet wide. Between this platform and the nearest track is a cinder path, also about 6 feet wide, which extends west beyond the station to a point 7 feet west of the eastern line of Fourteenth street. Persons going from the town to the station and from the station to the town were accustomed to cross the tracks at any point between the station and Fourteenth street, and this mode of going to and from the station, which was only 100 feet east of Fourteenth street, was well known to the railroad company, and was unobjected to. The plaintiff's train stopped as usual in front of the station, and she alighted, as was customary, on the cinder path next the station platform. Following this path to the rear of her train, which had come from the west, she crossed the most southerly track immediately behind the standing train, and diagonally in the direc-

tion of Fourteenth street, and continued this diagonal course across the space between the two tracks. This diagonal direction threw her back partly towards the direction from which a freight train was approaching. Just as she was crossing the second track, she was struck and seriously injured by a train rapidly passing in a direction opposite to that from which her own train had come. This train approached the station with all the usual and proper signals, and her danger was not observed until too late to avert the accident. The evidence made it clear that she could not have seen the train until after she came out from behind the standing train, and there was also evidence tending to show that the noise made by the standing engine, through escaping steam, was likely to deaden the effect of the signals given by the approaching train, as well as the noise made by its travel. Plaintiff testified that she neither heard nor saw the train which collided with her, and that she was looking from the time she started across these tracks. But it is clear that she did not look in the direction from which the colliding train approached, for it was broad daylight, and after she came out from behind the standing train the approach of a train on the other track from the east could have been seen for half a mile, if she had looked in that direction. There was a rule of the company that all "trains approaching a station where a passenger train is receiving or discharging passengers must be stopped before reaching the passenger train." There was evidence tending strongly to show that on this occasion this rule was not observed by the train which collided with the plaintiff, and that it passed the standing train, from which plaintiff alighted, while it was still receiving and discharging passengers, at a speed of from 10 to 12 miles per hour. At the conclusion of all the evidence the defendant below asked for a peremptory instruction against the plaintiff upon the ground of her contributory negligence. This was overruled, and is the principal error now assigned. The court submitted the case to the jury upon the theory that the plaintiff was still a passenger while making her egress from the station over the premises of the company to the nearest public highway, and therefore entitled to a reasonably safe way of exit, and only required to exercise ordinary care in avoiding danger from the movements of trains over tracks which she was obliged to cross in order to make her way to the public street. The charge of the court in respect to the continuance of the relation of a passenger, after safely alighting at the station, and the degree of care incident to such continued relation, was also excepted to, and presents the same question which arose upon the incontestable facts of the case by the motion for a peremptory instruction.

Messrs. Simral & Galvin, with *Messrs. Wadsworth & Cochran*, for plaintiff in error:

The question of care at railway crossings, as affecting the traveler, is no longer, as a

rule, a question for the jury. The *quantum* of care is exactly prescribed as matter of law.

In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track.

Beach, Contrib. Neg. 2d ed. pp. 180, 181; *Schofield v. Chicago, M. & St. P. R. Co.* 8 Fed. Rep. 488, 114 U. S. 615, 29 L. ed. 224, 5 Sup. Ct. Rep. 1125; *Tucker v. Duncan*, 4 Woods, 652, 9 Fed. Rep. 867; *Horn v. Baltimore & O. R. Co.* 6 U. S. App. 381, 54 Fed. Rep. 301, 4 C. C. A. 346; *Northern P. R. Co. v. Peterson*, 12 U. S. App. 254, 55 Fed. Rep. 940, 5 C. C. A. 338; *Atchison, T. & S. F. R. Co. v. McClurg*, 19 U. S. App. 346, 59 Fed. Rep. 860, 8 C. C. A. 322; *Blount v. Grand Trunk R. Co.* 21 U. S. App. 129, 61 Fed. Rep. 375, 9 C. C. A. 526; *Chicago, R. I. & P. R. Co. v. Sharp*, 27 U. S. App. 334, 63 Fed. Rep. 532, 11 C. C. A. 337; *Northern P. R. Co. v. Austin*, 24 U. S. App. 336, 64 Fed. Rep. 211, 12 C. C. A. 97; *Cincinnati, N. O. & T. P. R. Co. v. Farra*, 31 U. S. App. 306, 66 Fed. Rep. 496, 13 C. C. A. 602; *McGhee v. Kennedy*, 31 U. S. App. 366, 66 Fed. Rep. 503, 13 C. C. A. 608; *Philadelphia & R. R. Co. v. Peebles*, 28 U. S. App. 405, 67 Fed. Rep. 591, 14 C. C. A. 555; *New York, N. H. & H. R. Co. v. Blessing*, 35 U. S. App. 208, 67 Fed. Rep. 277, 14 C. C. A. 394; *Chicago & N. W. R. Co. v. Tripkosh*, 32 U. S. App. 168, 406, 67 Fed. Rep. 665, 14 C. C. A. 615; *Lynch v. Northern P. R. Co.* 29 U. S. App. 664, 69 Fed. Rep. 86, 16 C. C. A. 151; *Reynolds v. Great Northern R. Co.* 32 U. S. App. 577, 29 L. R. A. 695, 69 Fed. Rep. 808, 16 C. C. A. 435; *Texas & P. R. Co. v. Spalding*, 30 U. S. App. 698, 72 Fed. Rep. 152, 18 C. C. A. 496; *Canadian P. R. Co. v. Clark*, 38 U. S. App. 573, 73 Fed. Rep. 76, 74 Fed. Rep. 362, 20 C. C. A. 447; *Pyle v. Clark*, 49 U. S. App. 260, 75 Fed. Rep. 644, 79 Fed. Rep. 744, 25 C. C. A. 190; *St. Louis & S. F. R. Co. v. Barker*, 40 U. S. App. 739, 77 Fed. Rep. 810, 23 C. C. A. 475; *Grand Trunk R. Co. v. Cobleigh*, 51 U. S. App. 15, 78 Fed. Rep. 784, 24 C. C. A. 342; *Chicago, R. I. & P. R. Co. v. Pounds*, 49 U. S. App. 476, 82 Fed. Rep. 217, 27 C. C. A. 112; *Chesapeake & O. R. Co. v. Steele*, 54 U. S. App. 550, 84 Fed. Rep. 93, 29 C. C. A. 81; *Continental Improv. Co. v. Stead*, 95 U. S. 161, 24 L. ed. 403; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697, 24 L. ed. 542; *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; *Baltimore & O. R. Co. v. Griffith*, 159 U. S. 603, 40 L. ed. 274, 16 Sup. Ct. Rep. 105; *Texas & P. R. Co. v. Cody*, 166 U. S. 606, 41 L. ed. 1132, 17 Sup. Ct. Rep. 703; *Northern P. R. Co. v. Freeman*, 174 U. S. 379, 43 L. ed. 1014, 19 Sup. Ct. Rep. 763.

A foot passenger is held to a more vigilant exercise of his senses of sight and hearing at a railway crossing than a vehicle traveler, and in cases where he is the plaintiff emphasis is put upon the fact that he was on foot.

Bannister v. Lake Shore & M. S. R. Co. 113 Mich. 530, 71 N. W. 861.
40 L. R. A.

When the crossing is especially dangerous because of obstruction to view and obstacle to hearing, it is the duty of the traveler to stop before attempting to cross.

Tucker v. Duncan, 4 Woods, 652, 9 Fed. Rep. 867; *Chicago, R. I. & P. R. Co. v. Sharp*, 27 U. S. App. 334, 63 Fed. Rep. 532, 11 C. C. A. 337; *Northern P. R. Co. v. Austin*, 24 U. S. App. 336, 64 Fed. Rep. 211, 12 C. C. A. 97; *Cincinnati, N. O. & T. P. R. Co. v. Farra*, 31 U. S. App. 306, 66 Fed. Rep. 496, 13 C. C. A. 602; *Canadian P. R. Co. v. Clark*, 38 U. S. App. 573, 73 Fed. Rep. 76, 74 Fed. Rep. 362, 20 C. C. A. 447; *St. Louis & S. F. R. Co. v. Barker*, 40 U. S. App. 739, 77 Fed. Rep. 810, 23 C. C. A. 475; *Chesapeake & O. R. Co. v. Steele*, 54 U. S. App. 550, 84 Fed. Rep. 93, 29 C. C. A. 81.

It is specially required that the highway traveler shall stop before attempting to cross where the obstruction to sight and hearing is temporary and will soon be removed.

Heaney v. Long Island R. Co. 112 N. Y. 122, 19 N. E. 422; *Whalen v. New York O. & H. R. Co.* 40 N. Y. S. R. 566, 15 N. Y. Supp. 941; *Foran v. New York O. & H. R. Co.* 64 Hun, 510, 19 N. Y. Supp. 417; *McOrory v. Chicago, M. & St. P. R. Co.* 31 Fed. Rep. 531; *Marty v. Chicago, St. P. M. & O. R. Co.* 38 Minn. 108, 35 N. W. 670; *Oleson v. Lake Shore & M. S. R. Co.* 143 Ind. 405, 32 L. R. A. 149, 42 N. E. 736; *West Jersey R. Co. v. Ewan*, 55 N. J. L. 574, 27 Atl. 1064; *Pennsylvania R. Co. v. Pfuehl*, 60 N. J. L. 278, 37 Atl. 1100.

A highway traveler is highly negligent if he unnecessarily goes behind an obstruction and from thence immediately onto the track in front of an engine without looking.

Kilbride v. New York C. & H. R. R. Co. 17 App. Div. 177, 45 N. Y. Supp. 302; *Missouri P. R. Co. v. Mosley*, 12 U. S. App. 601, 57 Fed. Rep. 921, 6 C. C. A. 641.

The reason why the person crossing in passenger-crossing cases is not bound to look and listen while crossing does not lie in the fact that he has a right to cross; or in the fact that the railroad company owes him the positive duty of exercising care to prevent harm to him while crossing; or in the fact that it has invited him to cross, and assured him that he would be safe in crossing, because the same fact in highway-crossing cases does not have a similar effect.

The highway traveler is just as much entitled to the exercise of the care due him, and has as much right to expect that it will be exercised, as the passenger is entitled to the exercise of the care due him, and has the right to expect that it will be exercised.

That from which the invitation and assurance are implied is different in the two classes of cases. In highway-crossing cases they are implied from an omission—a failure to lower the gates or to give the proper signals.

In passenger-crossing cases they are implied from an act or acts performed under certain conditions.

The true explanation of the difference between the two classes of cases, as to the care required to be exercised by the person cross-

ing the railroad while in the act of so doing, lies in the fact that when the passenger is in the act of crossing between station and train there is a constructive bailment. In highway-crossing cases no such relation exists actually or constructively.

Because the passenger, while crossing the railroad is in the constructive care of the railroad company, and the highway traveler is not, the railroad company is bound to exercise towards the passenger the utmost care, and towards the highway traveler only ordinary care, and because of this same thing the passenger is not bound to look or listen, and the highway traveler is bound so to do.

In all the passenger-crossing cases the passenger was in the act of crossing from the station to the train, or *vice versa*, and was, therefore, in the constructive care of the railroad company.

Warren v. Fitchburg R. Co. 8 Allen, 227, 85 Am. Dec. 700; *Klein v. Jewett*, 26 N. J. Eq. 474, 27 N. J. Eq. 550; *Terry v. Jewett*, 78 N. Y. 338; *Brassell v. New York C. & H. R. R. Co.* 84 N. Y. 241; *Baltimore & O. R. Co. v. Statc ex rel. Hauer*, 60 Md. 449; *Philadelphia, W. & B. R. Co. v. Anderson*, 72 Md. 519, 8 L. R. A. 673, 20 Atl. 2; *St. Louis & S. W. R. Co. v. Johnson*, 59 Ark. 122, 26 S. W. 593; *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713; *Warner v. Baltimore & O. R. Co.* 168 U. S. 339, 42 L. ed. 491, 18 Sup. Ct. Rep. 68; *Atchison, T. & S. F. R. Co. v. Shean*, 18 Colo. 368, 20 L. R. A. 729, 33 Pac. 108; *DeKay v. Chicago, M. & St. P. R. Co.* 41 Minn. 178, 4 L. R. A. 632, 43 N. W. 182; *Chaffee v. Old Colony R. Co.* 17 R. I. 658, 24 Atl. 141.

In no possible sense can it be said that plaintiff was in the care or under the charge or control of defendant when she was struck by its freight train. All care, charge, and control of her person ceased when she alighted on the cinder walk, clear of the cars and tracks.

The passenger does not remain in the constructive care of the railroad company at any moment of time after he has safely alighted from the train, clear of the cars and any intervening tracks between him and the station.

The rule imposing upon the carrier of passengers the highest degree of care has this limitation. It applies only to those means and measures of safety which the passenger of necessity must trust wholly to the carrier.

Thomp. Carr. § 209; *Dodge v. Boston & B. S. S. Co.* 148 Mass. 207, 2 L. R. A. 83, 19 N. E. 373; *Alabama G. S. R. Co. v. Coggins*, 60 U. S. App. 140, 88 Fed. Rep. 455, 32 C. C. A. 1; *Kelly v. Manhattan R. Co.* 112 N. Y. 443, 3 L. R. A. 74, 20 N. E. 383; *Louisville R. Co. v. Park*, 96 Ky. 580, 29 S. W. 455; *Wood v. Pennsylvania R. Co.* 177 Pa. 306, 35 L. R. A. 199, 35 Atl. 699; *Conroy v. Chicago, St. P. M. & O. R. Co.* 96 Wis. 243, 38 L. R. A. 419, 70 N. W. 486; *Kirby v. Delaware & H. Canal Co.* 20 App. Div. 473, 46 N. Y. Supp. 777; *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E. 874; *Texas & P. R. Co.* 49 L. R. A.

v. Miller, 79 Tex. 78, 11 L. R. A. 395, 15 S. W. 264; *Hutchinson*, Carr. 2d ed. § 521A.

There was nothing in the case which could be construed into an invitation to plaintiff to cross when and where she attempted to do so.

Because it permitted persons to pass there, it could not be said that it invited them so to do—particularly in the face of the invitation to follow the cinder walk.

Heiss v. Chicago, R. I. & P. R. Co. 103 Iowa, 590, 72 N. W. 787; *Connolly v. New York & N. E. R. Co.* 158 Mass. 8, 32 N. E. 937.

The inference is conclusive that either she did not look or that she looked, and, seeing the train, tried to beat it across.

Northern P. R. Co. v. Freeman, 174 U. S. 379, 43 L. ed. 1014, 19 Sup. Ct. Rep. 703; *Arts v. Chicago, R. I. & P. R. Co.* 34 Iowa, 153; *Payne v. Chicago & A. R. Co.* 136 Mo. 562, 38 S. W. 308; *Pennsylvania R. Co. v. Pfuell*, 60 N. J. L. 278, 37 Atl. 1100.

To attempt to cross the railroad tracks in a state of "self-absorption" is "gross negligence."

Blount v. Grand Trunk R. Co. 22 U. S. App. 129, 61 Fed. Rep. 375, 9 C. C. A. 520; *Winslow v. Boston & M. R. Co.* 165 Mass. 264, 42 N. E. 1133; *Bancroft v. Boston & W. R. Corp.* 97 Mass. 275.

Even where the passenger alights on the opposite side from the regular station, and is injured while crossing the track on that side and between him and a point outside of all tracks, the space between the two tracks may be such that the passenger may be considered, when he has reached it and before he attempts to cross the other track, as having safely alighted, and therefore bound to look and listen before attempting to cross.

Connolly v. New York & N. E. R. Co. 158 Mass. 8, 32 N. E. 937.

On petition for rehearing.

An intending passenger while going to and in the depot waiting for the arrival of his train, or a departing passenger while in or leaving the depot after having alighted from the train, is not, in fact, in charge of the railway company while so doing. The care due from such a company to such party under such circumstances is not of as high a degree as when the party is aboard the train or embarking on it or alighting from it.

4 Elliott, Railroads, § 1590.

Mr. D. W. Steele, Jr., for defendant in error:

One has a right to make use of the customary mode of alighting from a train of cars and of reaching his home.

Chicago, M. & St. P. R. Co. v. Lowell, 151 U. S. 209, 38 L. ed. 131, 14 Sup. Ct. Rep. 281.

Defendant in error was entitled to the care and protection of the railway company from the time she alighted at the depot until she had a reasonable time to get away by a clear and safe way from the depot and out of reach of danger.

Warner v. Baltimore & O. R. Co. 168 U. S. 339, 42 L. ed. 491, 18 Sup. Ct. Rep. 68; *Terry v. Jewett*, 78 N. Y. 344; *Graven v.*

MacLeod, 92 Fed. Rep. 846, 35 C. C. A. 47; *Burnham v. Wabash Western R. Co.* 91 Mich. 523, 52 N. W. 14; *Pennsylvania Co. v. Roy*, 102 U. S. 451, 28 L. ed. 141; *Burbank v. Illinois C. R. Co.* 42 La. Ann. 1156, 11 L. R. A. 720, 8 So. 580; *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 60 N. E. 713.

The passenger, in attempting to pass from the depot to the cars, in the absence of all warning of danger, had a right to regard herself in a place of safety, where she might safely give her whole attention to the business in hand, and not bound to be on the lookout for extraordinary perils, created by the gross mismanagement of the persons in charge of the railway.

Beach, Contrib. Neg. 3d ed. § 144; *Whitaker's Smith*, Neg. ed. 1896, p. 389; 2 *Shearm. & Redf. Neg.* 5th ed. § 516; *Gleeson v. Virginia Midland R. Co.* 140 U. S. 435, 35 L. ed. 458, 11 Sup. Ct. Rep. 859.

Lorton, Circuit Judge, delivered the opinion of the court:

This case must turn here, as it did below, upon the single question as to whether the defendant in error, at the time she was injured, stood in the relation of a passenger to the railroad company. The insistence of counsel for the company is that when Miss King alighted from the train on the cinder path, between her train and the depot platform, she was in a place of safety, and the relation of carrier and passenger at an end. It is true that when upon the cinder path there was no obstacle between her and the depot platform. But can it be said that she was clear of train and tracks when it was necessary to cross two tracks before she could get off of the company's premises and upon the public highway? The cinder path was on the company's right of way. She might have pursued that path until she reached a point opposite Fourteenth street, and then crossed. That was doubtless her safer course, for it would have given her a clear view of both tracks. But the evidence tended to show that passengers alighting where she did more usually crossed the tracks immediately in front of the depot, or crossed them obliquely in the direction of the head of Fourteenth street, and that any of these ways of going from the station were equally approved by the company. The question as to whether the company had provided a particular way of egress from its premises, or acquiesced in the crossing of its tracks at any point between the station and the head of the public street, was a question of fact submitted to the jury. If it was equally open to her to cross diagonally to Fourteenth street as she did, the question is whether the company was under any obligation to her to so operate its trains that that way off of the company's premises should not be unnecessarily dangerous. If, while making her way from the station to the public street, she was constructively still a passenger, then the company did come under a higher obligation to provide a reasonably safe mode of exit than if she was a mere traveler crossing at a public highway or else-

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where by license of the company. Did the relation of passenger and carrier continue while making her way across these tracks, or did it terminate when she alighted upon a path between which and the public street these tracks intervened? Upon this subject the learned circuit judge instructed the jury as follows: "But the defendant railway company owes more to a passenger than merely to provide a place to alight. It must provide a place reasonably adapted for alighting on its own grounds, from which there is access to some public highway. While passengers are upon its premises, using that convenient means of access which the company furnishes for passengers to alight and reach the highway, they continue passengers, provided they obey the rules of the company, and use that means of access to the highway from the place of alighting in the manner that the company intends and gives them reason to believe they are to use it." Upon the subject of the duty of the passenger to use the way of egress from its premises provided for that purpose, the court said: "Now, if you find that there was a way provided along the track running down to a place opposite Fourteenth street, and that that was the way which the company intended that their passengers should go, and that this crossing of the track where she did cross it was not with the permission of the company, then the company is not responsible for the accident which occurred by reason of her going a different way from that which was provided; because, you will observe, if she had gone down on the south side of the track to Fourteenth street she would have avoided the danger of crossing the track just behind a train in such a way that she could not have seen the train coming on the other track; but, if the company permitted another way, so that it was well recognized as the way for the passengers to leave the station, by crossing the track directly back of the train, and not going clear down to a point opposite Fourteenth street, then you would be justified in finding that this plaintiff was using a way which the company intended she should use, and was a passenger." On the same subject the court said: "Now, if you find that the company permitted the way to be used which was used by the plaintiff in reaching Fourteenth street, then I charge you that she was a passenger, and entitled to that care from the company which passengers under the law have a right to expect. That care is much higher than the care due to a mere traveler crossing the tracks, or to a trespasser on the track." In respect to the alleged contributory negligence of the defendant in error, the court said: "Now, was she negligent? Did she do something in crossing that track that a reasonably prudent person would not have done, and which, if she had not done, she would not have been injured? If so, she cannot recover. Of course, you would not have reached this point in the case without finding that she was a passenger. As a passenger she had a right to expect that the company would look after her welfare more

than if she were a mere traveler, and so you must consider that relation that she bore to the company in determining whether she was guilty of negligence. How far she ought to have relied on the company to prevent her injury in this case is for you to determine. Of course, she cannot rely absolutely on that, otherwise she might thus just blindfold her eyes, and wander about there on the passageway provided for her without any regard whatever to whether she would be injured or not; but, on the other hand, it is an element which you are to consider that she had a right to put some reliance on the care of the company. The ordinary rule of a traveler crossing the track is that he must look and listen. That rule, in the case of a passenger crossing the track under these circumstances, is modified by the reliance which he or she is entitled to put upon the care the company will exercise to save him or her from injury. It is for you to judge how much she ought to have relied upon that in this case. If you find that she relied too much on it, and that she ought to have used her senses more, and that, if she had, she would have avoided the injury, then she cannot recover here."

This was a clear and sound exposition of the law relating to the facts of this case, and is fully supported by *Chicago, M. & St. P. R. Co. v. Lovell*, 151 U. S. 209, 38 L. ed. 131, 14 Sup. Ct. Rep. 281; *Warner v. Baltimore & O. R. Co.* 168 U. S. 339, 42 L. ed. 491, 18 Sup. Ct. Rep. 68; *Graven v. MacLeod*, 92 Fed. Rep. 846, 35 C. C. A. 47; *Alabama G. S. R. Co. v. Coggins*, 60 U. S. App. 140, 88 Fed. Rep. 455, 32 C. C. A. 1; *Brassell v. New York C. & H. R. R. Co.* 84 N. Y. 241; *Philadelphia, W. & B. R. Co. v. Anderson*, 72 Md. 519, 8 L. R. A. 673, 20 Atl. 2; *St. Louis & S. W. R. Co. v. Johnson*, 59 Ark. 122, 26 S. W. 593; *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713; and *Burnham v. Wabash Western R. Co.* 91 Mich. 523, 52 N. W. 14. The case is not distinguishable on principle and is clearly analogous in its facts to that of *Graven v. MacLeod*, decided by this court, and cited above. In that case, Graven, after alighting in safety upon a cinder path between two tracks, left that place of safety, and crossed the track intervening between that place and the street, which crossed both tracks some distance to the right of his point of alighting. It is true that when he had thus alighted he was not clear of train and track, because one track intervened between him and the public highway. Neither was the defendant in error clear of train and track, for two tracks intervened between her and the only highway by which she could leave the premises. If counsel for plaintiff in error is right in construing the *Graven Case* as one in which the facts showed that the "act of alighting was incomplete" until Graven reached the outside of the other track, and was clear of it, then the same condition existed in respect to the defendant in error. If a passenger alights by direction of the company, or by its implied invitation, at a place where, in order to leave the premises of the company it is necessary to cross

an intervening track, there is an implied agreement that in using that mode of egress from the premises its trains shall not be so operated as to make the exit unnecessarily dangerous. This is the doctrine of the *Lowell* and *Warner Cases*, cited above, and is the principle which governed the *Graven Case*, and which was so well expressed in the charge of the circuit judge below. A passenger alighting under such conditions may, in the absence of circumstances of warning, be justified in presuming that the trains of the company will not be so operated as to impose on him the same high degree of care which he would be obliged to exercise if he were not a passenger. Neither is this reliance upon the care of the company dependent wholly upon a knowledge of a rule forbidding trains to pass another while receiving or discharging passengers. That rule is but an expression of that degree of care which a passenger would have a right to expect from a railroad company under such conditions. In *Terry v. Jewett*, 78 N. Y. 338-344, it was said that "it may be assumed that a railroad corporation, in the exercise of ordinary care, so regulates the running of its trains that the road is free from interruption or obstruction where passenger trains stop at a station to receive and deliver passengers. Any other system would be dangerous to human life, and impose great risks upon those who might have occasion to travel on the railroad."

This language was quoted and approved in *Warner v. Baltimore & O. R. Co.* cited above, where it was said, in speaking of the implied invitation extended by a situation such as that shown in this case, that "the railroad, under such circumstances, in giving the invitation, must necessarily be presumed to have taken into view the state of mind and of conduct which would be engendered by the invitation; and the passenger, on the other hand, would have a right to presume that in giving the invitation the railroad itself had arranged for the operation of its trains with proper care."

The failure to look and listen before crossing a railway track is negligence *per se* in a traveler at a highway. *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697, 24 L. ed. 542; *Schofield v. Chicago, M. & St. P. R. Co.* 114 U. S. 615, 29 L. ed. 224, 5 Sup. Ct. Rep. 1125; *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; *Baltimore & O. R. Co. v. Griffith*, 159 U. S. 603, 40 L. ed. 274, 16 Sup. Ct. Rep. 105; *Texas & P. R. Co. v. Cody*, 166 U. S. 608, 41 L. ed. 1132, 17 Sup. Ct. Rep. 703; *Northern P. R. Co. v. Freeman*, 174 U. S. 379, 43 L. ed. 1014, 19 Sup. Ct. Rep. 763; *Blount v. Grand Trunk R. Co.* 22 U. S. App. 129, 61 Fed. Rep. 375, 9 C. C. A. 526; *Cincinnati, N. O. & T. P. R. Co. v. Farra*, 31 U. S. App. 306, 66 Fed. Rep. 496, 13 C. C. A. 602. But there is a difference in the degree of care and caution demanded from a traveler crossing a railway at a public crossing and that demanded from a passenger in crossing tracks which inter-

vene between the usual place of alighting from cars and the public highway. In the latter case the company should furnish the passenger with reasonable and adequate protection against accident in the exercise of the privilege of a safe exit from its premises. But such a passenger, in either going to or crossing from the cars, is not absolved from the duty of exercising care and caution in avoiding danger according to the circumstances. The failure of a passenger to look

or listen under such circumstances may or may not be negligence, according to the peculiar facts, and is, as held in the cases of *Warner v. Baltimore & O. R. Co.* and *Graven v. MacLeod*, cited above, ordinarily a question of fact for the jury.

It was not error to refuse the peremptory instruction asked by the plaintiff in error, and the judgment must be affirmed.

Rehearing denied.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

Henry SMITH, *Plff. in Err.*,
v.

J. G. DAY *et al.*

(100 Fed. Rep. 244.)

1. A passenger who goes upon a boat at a wharf and sits down and goes to sleep in the cabin, knowing that blasting is being done by contractors near by, assumes, as against such contractors, all risks necessarily incident to such work, if prosecuted with skill and reasonable care.
2. The contributory negligence of a person who goes upon a boat at a wharf and goes to sleep in the cabin, knowing that contractors are blasting near by, is a question for the jury.
3. Evidence that a navigation company had an agreement with contractors who were blasting near a wharf, under which it used the wharf at its own peril, is inadmissible in an action against the contractors by a person who was injured by the blasting while he was a passenger on a boat at the wharf.

(February 5, 1900.)

ERROR to the Circuit Court of the United States for the District of Oregon to review a judgment in favor of defendants in an action brought to recover damages for personal injuries alleged to have resulted from defendants' negligence. *Reversed.*

Before McKenna, Circuit Justice, and Ross and Morrow, Circuit Judges.

The facts are stated in the opinion.

Messrs. G. W. Allen and A. S. Bennett, for plaintiff in error:

Even if the state railroad commission, in operating this portage, was licensee of the government, that could not possibly make the degree of care incumbent upon the defendants towards the passengers any less; but as long as the government permitted the state railroad commission to pass across this portage for the purpose of carrying passengers, the presence of the passengers was lawful, and the defendants, knowing their presence there, must use just as much care to prevent injury, so far as any affirmative ac-

tion upon their part is concerned, as though they were passing across as a matter of absolute, irrevocable right.

Patterson, Railway Accident Law, § 187; *Connell v. Southern R. Co.* 63 U. S. App. 429, 91 Fed. Rep. 466, 33 C. C. A. 633; *Ca-hill v. Chicago, M. & St. P. R. Co.* 46 U. S. App. 85, 74 Fed. Rep. 285, 20 C. C. A. 184; *Adams v. Southern R. Co.* 52 U. S. App. 433, 84 Fed. Rep. 596, 28 C. C. A. 494; *Smith v. Pittsburg & W. R. Co.* 90 Fed. Rep. 783; *Texas & P. R. Co. v. Wagley*, 63 U. S. App. 728, 91 Fed. Rep. 860, 34 C. C. A. 114; *Webb v. Portland & K. R. Co.* 57 Me. 117; *Booth-by v. Boston & M. R. Co.* 90 Me. 313, 38 Atl. 155; *Clampit v. Chicago, St. P. & K. C. R. Co.* 84 Iowa, 71, 60 N. W. 673; *Seymour v. Central Vermont R. Co.* 69 Vt. 555, 38 Atl. 236; *Davis v. Chicago & N. W. R. Co.* 58 Wis. 646, 46 Am. Rep. 667, 17 N. W. 406; *Hansen v. Southern P. R. Co.* 105 Cal. 379, 38 Pac. 957; *Harriman v. Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11, 12 N. E. 451; *Illinois C. R. Co. v. Dick*, 91 Ky. 434, 15 S. W. 665; *Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb. 90, 56 N. W. 796, 57 N. W. 522; *Virginia Midland R. Co. v. White*, 84 Va. 498, 5 S. E. 573; *LeMay v. Missouri P. R. Co.* 105 Mo. 361, 16 S. W. 1049; *Troy v. Cape Fear & Y. Valley R. Co.* 99 N. C. 298, 8 S. E. 77; *Swift v. Staten Island Rapid Transit R. Co.* 123 N. Y. 645, 25 N. E. 378; *Taylor v. Delaware & H. Canal Co.* 113 Pa. 162, 8 Atl. 43.

The owner or possessor of premises must, in the operation of his work, observe the same care towards the licensee as he would towards a person there of absolute right.

Gallagher v. Humphrey, 6 L. T. N. S. 684; *Connell v. Southern R. Co.* 63 U. S. App. 429, 91 Fed. Rep. 466, 33 C. C. A. 633; *Webb v. Portland & K. R. Co.* 57 Me. 117; *Seymour v. Central Vermont R. Co.* 69 Vt. 555, 38 Atl. 236; *Swift v. Staten Island Rapid Transit R. Co.* 123 N. Y. 645, 25 N. E. 378; *Clampit v. Chicago, St. P. & K. C. R. Co.* 84 Iowa, 71, 50 N. W. 673.

If a party may relieve himself from the exercise of any measure of care and prudence, or the adoption of any safeguards or protection on the ground that if he takes such precautions he will not have time to comply with his contract, a contractor cannot avoid all liability simply by accepting a contract to do a given work under such cir-

NOTE.—As to liability for negligence of independent contractor in blasting, see note to *Hawver v. Whalen* (Ohio) 14 L. R. A. on page 830; also *Berg v. Parsons* (N. Y.) 41 L. R. A. 391.

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cumstances and within such time that it is impossible to perform the terms of his contract, and at the same time prosecute the work with a cautious and prudent regard for the rights of others.

Beauchamp v. Saginaw Min. Co. 50 Mich. 163, 45 Am. Rep. 30, 15 N. W. 65; *Eaton v. Cripps*, 94 Iowa, 176, 62 N. W. 687; *Roth v. Union Depot Co.* 13 Wash. 525, 31 L. R. A. 855, 43 Pac. 644, 44 Pac. 253; *Mather v. Rillston*, 156 U. S. 391, 39 L. ed. 464, 15 Sup. Ct. Rep. 464.

There was absolutely no evidence of contributory negligence on the part of the plaintiff, and therefore this question should not have been submitted to the jury.

2 Thompson, Trials, § 2315, p. 1668; *Winters v. Hannibal & St. J. R. Co.* 39 Mo. 468.

Messrs. Dolph, Mallory, Simon, & Gearin and Stott, Boise, & Stout, for defendants in error:

This plaintiff, from the time he entered the reservation at the upper cascades, was a mere naked licensee.

Licensees do not stand in the same position, and are not entitled to the same rights, as persons on the premises by virtue of some right or invitation which brings them there.

Berlin Mills Co. v. Oroteau, 50 U. S. App. 419, 88 Fed. Rep. 862; *June v. Boston & A. R. Co.* 153 Mass. 82, 26 N. E. 238; *Stevens v. Nichols*, 155 Mass. 475, 15 L. R. A. 459, 29 N. E. 1150; *Reardon v. Thompson*, 149 Mass. 267, 21 N. E. 369; *Vanderbeck v. Hendry*, 34 N. J. L. 472; *Redigan v. Boston & M. R. Co.* 155 Mass. 47, 18 L. R. A. 276, 28 N. E. 1133; *Sterger v. Van Sicken*, 132 N. Y. 505, 16 L. R. A. 640, 30 N. E. 987; *Cusick v. Adams*, 115 N. Y. 59, 21 N. E. 726; *Walsh v. Fitchburg R. Co.* 145 N. Y. 306, 27 L. R. A. 724, 39 N. E. 1068.

The licensor owes to the mere licensee no duty except that of abstaining from any positive wrongful act which may result in his injury, and the licensee takes all risks as to the safe condition of the premises upon which he enters.

Warruff v. Bowen, 136 Ind. 431, 22 L. R. A. 198, 34 N. E. 1117; *Gillis v. Pennsylvania R. Co.* 59 Pa. 141, 98 Am. Dec. 317; *Illinois O. R. Co. v. Godfrey*, 71 Ill. 507, 22 Am. Rep. 112; *Fitzpatrick v. Cumberland Glass Mfg. Co.* 61 N. J. L. 378, 39 Atl. 675; *Brehmer v. Lyman*, 71 Vt. 98, 42 Atl. 613; *Metcalf v. Cunard S. S. Co.* 147 Mass. 66, 16 N. E. 701; *Beehler v. Daniels*, 18 R. I. 563, 27 L. R. A. 512, 29 Atl. 6; *Ritz v. Wheeling*, 45 W. Va. 262, 43 L. R. A. 148, 31 S. E. 993.

Ross, Circuit Judge, delivered the opinion of the court:

At the time of the injury for which the plaintiff in error brought this action, the defendants J. G. & I. N. Day were engaged, as contractors for the United States, in making rock excavations for the locks then in course of construction at the point on the Columbia river known as the "Cascade Locks." Their work was being carried on within the boundaries of the tract of land that had been theretofore acquired by the

government by condemnation proceedings for the purposes of the work then under construction. Across this tract Congress had, by joint resolution, authorized the state of Oregon to construct, maintain, and operate a portage railroad, and to use in the construction of the same, and in the operation thereof, the government roads upon the land, provided that such occupation and use should not interfere with the government works at the Cascades, and should be under such restrictions and regulations as the secretary of war should prescribe. This grant the state of Oregon exercised and enjoyed by building a portage railway, and operating the same, through its state railway commission, for the transfer, in part, of passengers from the boat plying on the river above and below the locks. The railroad so constructed had afterwards to be given up by the state railway commission, after which the commission was allowed by the United States engineer in charge of the government work, and by the contractors Day, to use the tracks which were built by the government for use during the construction of the work, and which tracks were turned over to the defendants Day, when they took charge of it. Upon the execution of the contract between the government and the defendants Day, they were put in possession of the government property, and they had been engaged in the prosecution of the work for several years when the accident complained of occurred. They had a large force of men employed, and their practice was to fire off blasts at the noon hour, after the workmen had left their work for dinner, and in the evening, after the time arrived for stopping work for the day. The blasting at the point in question could only be done at the low stage of the water of the river, which continued only from the early part of November to the early part of January. At the time of the accident the plaintiff was a passenger of the Dalles, Portland, & Astoria Navigation Company, en route from The Dalles to Portland. Upon arriving at the upper lock he went, with other passengers, by means of the portage railway, to the lower wharf on the government reserve, near which point the work of blasting was being done. Upon reaching the lower wharf he went on board the boat of the navigation company, which lay alongside. When he got to the boat he heard blasting, and understood that it was being carried on. He went upon the boat, and was occupied for about fifteen minutes in playing a game of cards, after which he talked to the steward of the boat for a few minutes, and then sat down in the forward cabin and went to sleep. While sitting there in that condition he was struck by a rock thrown by one of the blasts, which broke through the upper deck of the boat, resulting in his serious injury. The negligence alleged against the defendants Day, in the complaint, is their failure to give notice or warning to the plaintiff and others that they were about to do the blasting that inflicted the injury, and were negligent in setting off the blast at the time they did,

within such close proximity to the boat on which the plaintiff, with others, was a passenger. The blast that caused the injury was fired shortly after noon. The boat on which the plaintiff went as a passenger lay alongside of a floating wharf, and at a distance variously estimated by the witnesses at from 150 to 300 feet from the point where the blasting was being done. The boat sometimes arrived at the floating wharf before and sometimes after 12 o'clock, and was accustomed to lay there for periods ranging from forty-one minutes to two hours and fifty-one minutes. While several witnesses on the part of the plaintiff, who were upon the boat at the time of the accident, testified that they heard no warning of the blast given, there was testimony on the part of the defendants tending to show that warning was given by crying the word "Fire," which could have been and was heard by those on the boat who gave any attention to their surroundings; and the plaintiff himself testified, among other things, as follows: "That he came from The Dalles to the locks on the Regulator; that Mr. Mosher and Mr. Young and Mr. Kelly and other persons were with him; that when he got to Cascade Locks he got on the portage railway, and rode on the train down to the lower wharf, and then got on from there onto The Dalles City; that he went right along with the other passengers. Q. Well, when you got down to The Dalles City, go on and tell the jury just what happened. A. There was about twenty-five or thirty passengers going up the stream, and I was going down; and the time of the hubbub of the people getting off the boat—There was blasting at that time, so I understood. I heard some noise, and went in and sat down, and the people went up the river, and, after the passengers going up stream had got off the boat, we sat down and played a game of cards,—played a game of Pedro for about fifteen minutes; and then I went and sat down on the seat, and went to talking to the steward for a few minutes, and then I sat down in this kind of a seat, and the boat was rocking. It rocked me into a kind of dozing sleep, and the rock struck me on the head. I never knew what struck me."

We agree with the learned judge of the court below where he said, in ruling upon the plaintiff's motion for a new trial (86 Fed. Rep. 62), that "the plaintiff and his fellow passengers went upon the premises where the blasting was being done with their eyes open. Their right there, whether it was a right by sufferance or license, implied or otherwise, was subordinate to the right of the defendants to prosecute the work in 49 L. R. A.

which they were engaged. These passengers assumed all risks necessarily incident to such work prosecuted with skill and reasonable care,—such care as is usually employed under like circumstances. They had a right to expect, and are presumed to have relied upon, this degree of care."

We also agree, contrary to the contention of the plaintiff in error, that the facts and circumstances of the case were such as to make it proper for the court below to submit to the jury the question of contributory negligence on the part of the plaintiff; and, in the main, we think the instructions given by the court below to the jury were quite as favorable to the plaintiff as they should have been, and in one respect perhaps too much so, namely, in submitting to the jury the question as to whether the defendants were in duty bound to cover their blasts, or to await the departure of the boat before firing them. But there was one error committed in the trial, for which we feel bound to reverse the judgment. Against the objection of the plaintiff, one of the defendants Day, was permitted to testify to an agreement had between the defendants and the navigation company, by which that company used the wharf at which the plaintiff's injury occurred at its own peril; and the court below refused to instruct the jury, as requested by the plaintiff, that, if there was an arrangement between the navigation company and the defendants by which the former was permitted to use the landing where the accident occurred at its peril, this would not bind the plaintiff. That the plaintiff's rights were entirely unaffected by any contract or understanding between the defendants and the navigation company is very clear. *Little v. Hackett*, 116 U. S. 366, 29 L. ed. 652, 6 Sup. Ct. Rep. 361, and cases there cited. The refusal to give the instruction requested by the plaintiff, in view of the admission, over the objection of the plaintiff, of the testimony on the part of the defendants in respect to the arrangement between the defendants and the navigation company, constituted, in our opinion, error which was not overcome by any other instruction given by the court. The presumption of error arising from the erroneous admission of that testimony on the part of the defendants is strengthened by the refusal of the court to give the instruction requested by the plaintiff to which reference has been made.

For this error the judgment must be reversed, and the cause remanded to the court below for a new trial. It is so ordered.

KENTUCKY COURT OF APPEALS.

Perry GASTINEAU, Appt.,
v.
COMMONWEALTH of Kentucky.

(.....Ky.....)

A municipal ordinance making it a misdemeanor for a woman to go into any building where liquor is sold, or stand within 50 feet of such building, is void as an unnecessary interference with individual liberty.

(May 15, 1900.)

APPEAL by defendant from a judgment of the Circuit Court for Bell County convicting him of violating an ordinance forbidding the permitting of women to enter or loiter near a place where liquor is sold. *Reversed.*

NOTE.—Constitutionality of discrimination against women in police regulations.

- I. In granting licenses to sell liquors.
- II. In excluding women from employments and places of business.
- III. In restricting freedom, society, or right to live in locality.

The right to make police regulations which affect women only, or which discriminate against women by being more severe and burdensome, is one that has not been much discussed by the courts.

There are many ordinances aimed at the prevention of immorality, which apply to women only, but their constitutionality has rarely been attacked. They have usually been assumed to be valid; and when their validity has been tested it has usually been on some other ground than that of discrimination between the sexes.

But there are some ordinances and statutes which have been assailed on the ground that they make an unconstitutional discrimination against women. These fall into three classes, as shown by the headings above.

I. In granting licenses to sell liquors.

A discrimination against women in statutes providing for licenses to sell intoxicating liquors is doubtless based on the theory that there are reasons for excluding women from such occupations which do not apply to men. Whether such discrimination could be upheld, except when it is part of a police regulation, or not, it is plain that the sale of intoxicants is subject to such regulation, and that the immoral tendencies of a mingling of men and women in drinking places which have been clearly recognized by the courts, make abundant reason for prohibiting it.

A statute restricting the right to licenses for the sale of intoxicating liquors to male inhabitants of the state is upheld in *Welsh v. State*, 126 Ind. 71, 9 L. R. A. 664, against the contention that it discriminates against citizens of other states, but the effect of the discrimination against women is not discussed.

Discrimination against women by limiting to males the right to take out licenses for the sale of intoxicants is held, in *Blair v. Kilpatrick*, 40 Ind. 312, not to be in violation of the guaranties of the state Constitution respecting the equality of privileges and immunities of citizens. 49 L. R. A.

The facts are stated in the opinion.
Mr. G. W. Saulsberry for appellant.
Messrs. F. D. Goodwin and T. G. Anderson for the Commonwealth.

Guffy, J., delivered the opinion of the court:

The sole question presented for decision is whether or not the following ordinances are valid or constitutional. The appellant, having been convicted for a violation thereof, prosecuted an appeal to the circuit court, and, the circuit court having adjudged the ordinances valid, and rendered a judgment for costs against the appellant, he prosecutes an appeal from so much of the judgment as holds said ordinance to be valid. The ordinances read as follows: "Be it ordained by the board of council of the city of

zens, notwithstanding the fact that women are citizens, since the right to sell intoxicants is not one of the privileges and immunities of citizens.

The validity of a statutory provision restricting licenses for the sale of liquors to male inhabitants of the state is also sustained in *Woodford v. Hamilton*, 189 Ind. 481, 39 N. E. 47, in an action against a woman engaged in the retail liquor business to recover the price of intoxicating liquors sold to her. Recovery was denied on the ground that she could not lawfully engage in the business, and her contract for the purchase of the liquors, being unlawful, could not be enforced against her by the seller, who knew that she was engaged in an unlawful business.

Discrimination against women and nonresidents by an ordinance providing for the granting of licenses to sell intoxicating liquors is held, in *Wagner v. Garrett*, 118 Ind. 114, 20 N. E. 706, to be an objection against the validity of the ordinance which cannot be urged by a male citizen. This is in accordance with the principle that the invasion of the rights of a certain class of persons can be complained of only by those who are injured by it.

That the right to sell intoxicating liquors is not one of the privileges and immunities of citizens of the United States is fully established by the Supreme Court of the United States in *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Glozza v. Tierman*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721.

That it is not one of the equal privileges and immunities of the citizens of a state is also established, in effect, by the numerous decisions which uphold license laws. The universal agreement in holding that the sale of intoxicants is a business that is subject to the police power is sufficient reason for refusing to permit all citizens to engage in it.

As to the validity of a statute denying a saloon license, or fixing higher rate in case women are employed there, see *Foster v. Police Comrs.* 102 Cal. 483, 37 Pac. 763, and *Ex parte Felchlin*, 96 Cal. 360, 31 Pac. 224, under II. *infra*.

II. In excluding women from employments and places of business.

Most of the cases respecting the exclusion of women from employments by police regulations

Middlesboro, Bell county, Ky.: (1) That it shall be unlawful for any woman to go in and out of any building where a saloon is kept offering for sale any spirituous, vinous, and malt liquors, or to frequent, loaf, or stand around said building within fifty feet thereof. (2) That it shall be unlawful for any saloon keeper or his clerk or employees to allow or permit any woman or women to come in or out of his building where spirituous, vinous, and malt liquors are sold or offered for sale, and it shall be the duty of said saloon keeper, clerk, or employees to immediately notify the officers that the first section of this ordinance had been violated, giving the name and color of the offender. (3) Any woman violating section No. 1 of this ordinance shall be guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than \$1.00 nor more than

\$10.00 or confined in the city jail not less than ten days nor more than thirty days, or both, at the discretion of the court. (4) Any saloon keeper, clerk, or employee of the saloon keeper violating section No. 2 of this ordinance shall be guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than \$5.00 nor more than \$10.00 for the first offense, and for the second offense it shall be good grounds for the revocation of said saloon keeper's license."

It is contended for appellee that the sole object of the ordinance is to regulate and control the sale of liquors by reason of the fact that very disreputable, low, and vile women congregate in and about saloons and places where liquor is sold, thereby causing affrays, fights, murder, and other crimes. It is claimed that under subsection 27 of § 59 of the Constitution the city council had au-

relate to their employment in places where intoxicating liquors are sold. The only difficulty that the courts have found in upholding provisions of this kind has arisen under the California Constitution, which provides that no person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession. The statutes and ordinances on this subject, while aimed at the same result, are somewhat different in their form and effect. Some of them prohibit the grant of a license to a person employing female waiters or assistants, or impose a higher license upon such persons, or prohibit the sale of liquors where women are employed, while others directly prohibit the employment of women at such places.

A statute making it unlawful to sell intoxicating liquors "in any room, hall, or other place where women or minors are employed, or are allowed to assemble for the purposes of the business therein carried on," was held valid in *State ex rel. Marion v. Reynolds* (1894) 14 Mont. 383, 36 Pac. 449. The contention that it was unconstitutional because it prohibited women from engaging in a lawful employment was rejected on the ground that the statute did not prohibit their employment, but did prohibit all persons from selling intoxicating liquors in a place where they were employed or assembled for the purposes of the business. The court said: "There appears to be wisdom and propriety in this provision as a police regulation, and we fail to find in it any infringement of any provision of our Constitution. The California court in cases cited on this point had under consideration constitutional provisions which are not found in the Constitution which also appear to have been greatly modified by revision of the California Constitution since the cases relied on were decided."

An ordinance prohibiting the sale of liquors or wines in dance cellars or other places where musical and theatrical entertainments are given, and where females attend as waitresses, is held, in *Ex parte Hayes*, 98 Cal. 556, 20 L. R. A. 701, 33 Pac. 337, to be within the general grant of power to make local, police, sanitary, and other regulations not in conflict with general laws, and not to be in conflict with the constitutional provision that no person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession. As to this constitutional provision the court says: "This section does not, in our opinion, operate as a limitation upon the power

of the state or its municipalities to prescribe the conditions upon which the business of retailing intoxicating liquors shall be permitted to be carried on, or in regulating the manner in which such business shall be conducted."

An ordinance fixing the amount of a saloon license at a higher rate where females are employed is upheld in *Ex parte Feichlin*, 96 Cal. 360, 31 Pac. 224, against the contention that it violates Cal. Const. art. 20, § 18, providing: "No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession." The court declared that such an ordinance was not open to any of the objections made in the case of *Re McGuire* (1881) 57 Cal. 604, 40 Am. Rep. 125, *infra*.

An ordinance which forbids the granting of a liquor license to any person employing females to wait on customers in carrying on the business of selling intoxicating liquors is held valid, also, in *Foster v. Police Comrs.* 102 Cal. 483, 37 Pac. 763, following *Ex parte Hayes*. The contention that the ordinance made an illegal discrimination was answered by saying that it "affects all persons of certain classes without discrimination, and as to them acts uniformly."

An ordinance making it unlawful to employ any girl or woman other than the wife of the proprietor in any "room or place wherein ale, beer, porter, wine, or liquors are sold," was held valid in *Bergman v. Cleveland*, 39 Ohio St. 651, in denial of the contention that it violated the Fourteenth Amendment of the Federal Constitution. It was held to be within the power given by statute to "regulate" places where intoxicants are sold. In this case the question of discrimination against women was not expressly discussed.

An ordinance making it unlawful for any female to be, after 12 o'clock at night, in any public drinking saloon, beer cellar, or billiard room where intoxicating liquors are sold or given away to be drunk on the premises is sustained in *Ex parte Smith* (1869) 38 Cal. 702, where it was attacked on the ground that it violated constitutional provisions that "every law of a general nature shall have a uniform operation." The purpose of the ordinance was deemed to be to prevent the vicious and immoral tendency of the presence of females at such times and places, and the court held that the constitutional provision "was not intended to overturn the laws of nature or disturb the relations of cause and effect, or obliterate distinctions where from the very nature and necessity

thority to enact the ordinances in question. It is insisted for appellant that in any event, the ordinance is too sweeping in its nature, and subjects every woman who may chance to be walking along the street and meet a friend, and stop within 50 feet of a saloon, or should go into a hotel where liquor is sold, to arrest and punishment. It seems to us that the ordinance in question is unreasonable, and an unnecessary interference with individual liberty, and tends to subject the vendor of liquors as well as citizens to unreasonable prosecutions. If the ordinance only included the persons mentioned in appellee's brief, we are not prepared to say that it would be invalid. But it might be that very good women would, for proper and legal purposes, find it necessary to go into a building where liquor was sold, or stop for a reasonable time within 50 feet

of same; and, besides, we know of no rule of law which prohibits a well-behaved woman, for a lawful purpose, and in a lawful manner, from going into or near a saloon. It may be taken for granted that it is not often that such would be the case, but the ordinances in question make no exceptions. If the citizens of Middlesboro choose to have saloons established where liquor is sold, it follows that all orderly and well-behaved persons have a right in an orderly manner, and for a lawful purpose, to visit such saloons.

For the reasons indicated, *the judgment appealed from is reversed*, and cause remanded, with directions to the court below to adjudge the ordinances in question invalid and unconstitutional, and for proceedings consistent herewith.

of things distinctions must exist." The court added: "It was not intended that all differences founded upon class or sex should be ignored."

The provision of Cal. Const. art. 20, § 18, that "no person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession," was held, in *Re Maguire* (1881) 57 Cal. 604, 40 Am. Rep. 125, to be violated by an ordinance making it a misdemeanor for a female to wait or in any manner attend on any person in any dance cellar, bar room, or in any place where malt, vinous, or spirituous liquors are used or sold. A woman arrested for violating the ordinance by waiting on persons in a bar room was discharged on habeas corpus. The court said: "The words employed in this ordinance incapacitate a woman from following the business for which the petitioner was fined, and disable her from doing so. This being so, she is disqualified by the ordinance under consideration from pursuing a business lawful for men. We are compelled to adopt this or admit that, while the legislature cannot disqualify a person on account of sex from following a lawful business by direct enactment, it may by indirection accomplish the same end, by forbidding under a penalty the prosecution of such business." The contention that the regulation was not made on account of sex, but because such employment of a woman is of a vicious tendency and hurtful to sound public morality, was made unsuccessfully. The court admitted that the object and design of the ordinance might be to prevent immorality, but said: "This object is aimed to be accomplished by an ordinance which precludes a woman from a lawful business," and that the preclusion and disqualification are on account of sex. For that reason the ordinance was held to be a clear violation of the Constitution. Two judges dissented, and one who concurred was unwilling to say that no discrimination could be made between men and women on account of sex in such regulations. He said: "I am not prepared to say, however, that the supervisors cannot, by proper legislation, prevent females from pursuing avocations which, although permissible to men, involve a propinquity of the sexes under such circumstances as may lead directly to immoral results, or to the desecration of the prudent reserve between members of the opposite sexes which it is the province of wise legislation to encourage." He contended that the prevention of such results is a proper exercise of the police power of the state, and that, when a man or woman is prohibited by such legislation

from pursuing any lawful business, vocation, or profession, this is not on account of sex, but because of the immorality or indecency that would result. As an illustration, he suggested that a law prohibiting men from being employed as attendants at a bathing establishment to which women alone had admission, or prohibiting women from being attendants at public baths which were frequented by men only, would not be unconstitutional as prohibiting a vocation "on account of sex." His contention was summed up in general form as follows: "The Constitution does not, in my view, deny the power to enact such legislation as may prevent the intrusion of men into the conjoint pursuit with women of occupations which considerations of decency and morality require shall be carried on by the latter separately, and *vice versa*." He agreed that the ordinance was void in this case, but put his agreement on the ground that the ordinance was unreasonable, ambiguous, and not of uniform operation because of certain exceptions or exemptions that it contained. The court in this case made no reference to that of *Ex parte Smith* (1869) 38 Cal. 702, in which a similar ordinance was held valid under a constitutional provision requiring that "every law of a general nature shall have a uniform operation."

The court in *Re Maguire* declared that the Constitution did not preclude legislation to prevent practices hurtful to public morality, but merely directed that a law framed to accomplish that object by affecting or operating upon lawful callings shall affect both sexes alike.

If a reasonable police regulation for the prevention of immorality cannot be made without restricting the occupations of one of the sexes, it would not be within the spirit at least of this constitutional provision. The test of a violation of that provision might reasonably be held to be whether the restriction of an occupation was merely "on account of sex," or was on account of the immorality that would result if the restriction were not made.

The purpose of the California Constitution in providing that no person shall be disqualified on account of sex from engaging in any business was doubtless to secure equality of opportunity to both sexes. It does not seem probable that in the adoption of this provision there was any thought of prohibiting reasonable police regulations, even if their effect must be to limit in some degree the occupations of one sex or the other.

A statute providing that "no female person shall be employed in any capacity in any saloon, beer hall, bar room, theater, or place of

Joseph HECHINGER, *Appt.*,
 v.
 City of MAYSVILLE.
 (.....Ky.....)

An ordinance making it unlawful for any person to associate, escort, converse, or loiter with any female known as a common prostitute, either by day or by night, upon any of the streets or alleys of the city, except her husband, father, brother, or other male relative, is invalid, as there can be no good reason in exempting any other male relative than the husband, father, or brother from its provisions or for failing to give her mother and sister the same privilege allowed to the father or brother, while any person should be allowed to converse with her long enough to transact any necessary and legitimate business.

(June 20, 1900.)

APPPEAL by defendant from a judgment of the Circuit Court for Mason County convicting him of violating a city ordinance

amusement where intoxicating liquors are sold as a beverage," and providing for the punishment of any woman thus engaged and of the person employing her, is held constitutional in *State v. Consadine*, 16 Wash. 358, 47 Pac. 755. The claim that a woman's liberty to contract is abridged by the statute is answered by saying that liberty to contract was always limited to lawful contracts, and did not extend to contracts against public policy or good morals. The statute in question is said to have been evidently intended by the legislature for the maintenance of good morals and the prevention of a nuisance. It is also said that "the legislature is the supreme authority, within constitutional limitations, to determine what is and what is not an immoral business or a nuisance; and, when it has so determined, its enactment is valid unless the legislative act is clearly partial, arbitrary, and oppressive." The statute in question was held to extend to all female persons employed in the specified business, and not to be in violation of the guaranties of the state and Federal Constitutions against depriving a person of life, liberty, or property without due process of law, or denying the equal privileges or immunities of citizens.

A statute prohibiting the employment of any female person in any capacity in any saloon, beer hall, bar room, theater, or place of amusement where intoxicating liquors are sold as a beverage was sustained in *Re Consadine*, 83 Fed. Rep. 157, against the contention that it was in violation of the Fourteenth Amendment to the Federal Constitution as an abridgement of the privileges and immunities of citizens, or a denial of the equal protection of the laws. The court said: "The intent of the legislature is manifest to check the tendency towards immorality of the association of the sexes in places of resort where intoxicating beverages are sold, and where the worst passions are aroused." The statute is declared to be general in its scope, applying equally to all persons similarly situated, and not, therefore, in any sense partial or arbitrary, or enacted to do injury or work injustice. The statute is therefore held to be clearly within the police power of the state.

A statute prohibiting the employment or exhibition of girls under fourteen years of age as dancers, or in theatrical exhibitions, was sustained in *People v. Ewer*, 141 N. Y. 120, 25 L. R. A. 794, 36 N. E. 4, as an exercise of the 49 L. R. A.

which he claimed to be illegal and void. *Reversed.*

The facts are stated in the opinion.

Mr. J. N. Kehoe for appellant.

Mr. Thomas M. Wood for appellee.

Guffy, J., delivered the opinion of the court:

The sole question presented for decision is the validity or constitutionality of the following ordinance, being an ordinance of the city of Maysville, a fourth-class city. The ordinance reads as follows: "Be it ordained by the board of council of the city of Maysville that it shall be unlawful for person or persons other than the husband, father, brother, or male relative, to associate, escort, converse, or loiter with any female known as a common prostitute, either by day or by night, upon any of the streets or alleys of the city of Maysville, and any person or persons other than the said husband, father, brother, or other male relative, so offending shall, upon conviction thereof, be-

power of the state as *parens patrie* to protect the physical, mental, and moral welfare of children. The court said: "The inalienable right of the child or adult to pursue a trade is indisputable; but it must be, not only one which is lawful, but which as to the child of immature years the state or sovereign, as *parens patrie*, recognizes as proper and safe." The ground of attack upon this statute was that it was an unreasonable interference with the right of the child to earn a livelihood. The discrimination between the sexes was not discussed, though it is made by the statute.

The right of any citizen to engage in any ordinary occupation not needing any police regulation or any special permit or license must certainly be one of the "equal privileges and immunities" which many state Constitutions guarantee to their citizens, whether it is within the scope of the Federal Constitution or not.

Under such a provision in a state Constitution, it would be quite clearly beyond the power of the legislature to prohibit women from engaging in the ordinary occupations in which multitudes of them are now engaged. Being unquestionably citizens, their "equal privileges and immunities" must certainly extend to the right to earn a livelihood by any ordinary, lawful occupation. When excluded from any profession or occupation it must be because of reasons which are not equally applicable to men. When that is the case there is, of course, a proper basis for classification by which men may be included in one class and women in another.

The doctrine that classification to relieve a statute from the reach of the equality clause of the Fourteenth Amendment must be based upon some reasonable ground, some difference which bears just and proper relation to the attempted classification, and must not be a mere arbitrary selection, is declared in *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, and in many other cases.

Classification based upon reasonable differences between the classes created is never regarded as a violation of the constitutional guaranties of equal privileges and immunities. Classification is unconstitutional only when it is arbitrary and not based upon any essential differences. The classification of citizens into the two great classes of men and women is

fore the police court in said city, be fined not less than \$5.00 nor more than \$20.00." The appellant was fined under the ordinance in question, and prosecuted an appeal to the circuit court for the purpose of testing the validity of the ordinance, as provided by law. The circuit court adjudged the ordinance valid, and to reverse that judgment this appeal is prosecuted.

We have carefully considered the very able briefs filed by counsel for appellant and appellee. In the main, the arguments are sound; but the question is whether the authorities cited by either counsel sustain his contention. Manifestly, the ordinance was intended to accomplish a proper and laudable object. But it seems to us that it is not properly guarded. It will be seen that, in addition to the husband, father, or brother, any male relative may escort, converse, loiter, or associate with the objectionable character mentioned. There can be no good reason in exempting any male relative from the operation of the ordinance except a husband, father, or brother. It would also seem that a mother or sister should be allowed the

same privilege as allowed to the father or brother. Any person should be allowed to converse with such a female long enough to transact any necessary and legitimate business, and no one should be punished for a violation of an ordinance such as the one under consideration unless the party so offending had knowledge or information of the character of the disreputable person with whom he was associating. We are, however, inclined to the opinion that under the ordinance in question no person could be legally fined unless he had knowledge or information of the disreputable character of such female. We think the ordinance as it stands is invalid, but one conforming to the views herein indicated would be clearly within the police power of the city council, and would be a proper and commendable exercise of the police power.

For the reasons indicated, *the judgment is reversed*, and cause remanded, with directions to the court below to enter a judgment adjudging the ordinance in question invalid, and for proceedings consistent herewith.

made by nature, and its recognition by law does not seem to be unreasonable, or to constitute any unjust discrimination when it is made only in respect to matters in which the sex of the individual is a material factor. In police regulations to prevent disorder and sexual immorality it can hardly be wrong for the legislators to take into account the facts of common knowledge respecting the differences between the relations of men and women to the evil to be remedied or prevented, but restricting women from common and lawful occupations which need no police regulations would certainly seem to deny them the equal privileges and immunities of citizens which are guaranteed by many state Constitutions, and also deprive them of liberty without due process of law.

III. In restricting freedom, society, or right to live in locality.

Most of the cases under this division have not discussed the question of discrimination against women, but have turned upon the right to personal liberty, which would have been involved in the same way if the police regulations had been applicable both to men and to women. Nevertheless, there was an actual discrimination made by the police regulations, and the question of the constitutionality of such discrimination might have been raised and decided.

A statute conferring upon a private corporation the power to receive and retain inebriate women in custody when they voluntarily surrender themselves is held, in *People ex rel. Ordway v. St. Saviour's Sanitarium*, 34 App. Div. 363, 56 N. Y. Supp. 431, to constitute no justification for the detention against her will of an inebriate woman who had voluntarily surrendered herself to the institution. Such detention is held to be in violation of the constitutional guaranties of due process of law. No question was raised, however, in this case as to any discrimination between women and men, although the statutory provision in question was by its terms applicable only to inebriate women.

A statute authorizing "dependent girls" to be sent to an industrial school was held in *Re Ferrier*, 103 Ill. 367, 42 Am. Rep. 10, to consti-

tute no infringement of personal liberty. No question of discrimination against girls was made. Possibly the greater danger to girls might justify more stringent regulations for them than would be necessary for boys.

An ordinance providing for the punishment of "all women of disreputable character, commonly known as street walkers," found loitering upon the streets at night, was held, in *Braddy v. Milledgeville*, 74 Ga. 516, 58 Am. Rep. 443, to be a valid regulation for the preservation of public decency, and not subject to objection as class legislation.

An ordinance prohibiting any prostitute from being on the streets or alleys of a city between the hours of seven o'clock P. M. and four o'clock A. M. is upheld in *Dunn v. Com. use of Catlettsburg*, 20 Ky. L. Rep. 1649, 43 L. R. A. 701, 49 S. W. 813, as a valid exercise of the police power under a statute authorizing the city council to pass ordinances, not in conflict with the Constitution or laws of the state or of the United States, for certain purposes, expressly including the purpose "to restrain and punish vagrants, prostitutes, rakes, and whoremongers." Here the court does not go into any discussion of the discrimination between men and women by the ordinances, although, while the statute authorizes ordinances to restrain both sexes, the ordinance itself seems to have been limited to women. The ordinance was attacked on the ground that it was not a valid exercise of the police power, but was an infringement on the constitutional guaranties of life and liberty. But the court said: "Social and conventional rights, however, are subject to such reasonable limitations in their enjoyment as will prevent them from being dangerous and hurtful to the body politic." Also: "We think this is a reasonable restraint, and it does not unreasonably abridge their personal liberty. By the terms of the ordinance they are allowed to go upon the streets if there is a reasonable necessity for it. During the fifteen hours of the twenty-four these habitual offenders against the moral, social, and penal laws are permitted to go wherever they please upon the streets and alleys of the city, which affords them ample opportunity for healthful exercise and of attending to their reasonable wants." The court remarks on the novelty of the case, and says:

"Our attention has not been called to any case involving the exact question involved in this case."

But in the cases following the ordinances went beyond reasonable regulation of conduct, and attempted practically to proscribe, outlaw, or exile all women known to be disreputable.

An ordinance authorized by statute, providing that the mayor might fine all "vagrant, loose, and disorderly persons, lewd women, keepers of bawdy houses, and persons having no visible means of livelihood who may be found within the corporate limits of the town" was upheld in *Shafer v. Mumma*, 17 Md. 381, 79 Am. Dec. 656, as against a prostitute who was not shown to have ever made any disturbance. There was no question of discrimination raised in this case, but the decision turned on the right of the mayor to exercise judicial power.

An ordinance against "knowingly associating with persons having the reputation of being thieves and prostitutes" was considered in *St. Louis v. Fitz*, 53 Mo. 582, where a conviction was reversed on the ground of misleading instructions to the jury, which failed to make it clear that the ordinance did not apply to mere casual association or an association for honest purposes. Without deciding, the court expressed doubt as to the power of the legislature to make such a law. It said: "So long as the power and right of locomotion is conceded, and a citizen has the right of selecting his associates, it is difficult to see how the legislature can interfere upon the mere ground of correcting the morals of the person concerned." One judge, who concurred in the judgment, insisted that the ordinance was absolutely void.

This case of *St. Louis v. Fitz* was overruled by the later decisions reported in *St. Louis v. Roche*, 128 Mo. 541, 31 S. W. 915, and *Ex parte Smith*, 135 Mo. 223, 33 L. R. A. 606, 36 S. W. 628, which held that an ordinance forbidding association with thieves is an unconstitutional invasion of the right of personal liberty.

An ordinance providing for the imposition of a fine upon "any person whose known character is that of a prostitute" was held void in *Buell v. State*, 45 Ark. 336, on the ground that the legislature had not conferred expressly or by implication any authority to enact such an ordinance, but the court proceeded to say: "It may be doubted whether it is competent for the legislature to authorize a town council to proscribe any particular class of people against whom no overt act is charged."

The power of a municipality to make it unlawful for a prostitute to return to that town is denied in *Paralee v. Camden*, 49 Ark. 165, 4 S. W. 654. The court says that the municipality cannot make her mere presence in the town a crime.

An ordinance making it unlawful to rent "any premises or place within the city limits to any prostitute or lewd woman" was held void in *Milliken v. Weatherford*, 54 Tex. 388, 38 Am. Rep. 629. The court said: "That unfortunate and degraded class against whom the ordinance was mainly intended, however far they may have fallen beneath the true mission of women, which it is one of our highest duties to foster and protect in social and domestic life, are still human beings entitled to shelter and the protection of the law; and the council did not have power to so far proscribe them as a class as to make it a penal offense for anyone to rent them a habitation, without regard to its use."

The decisions in these cases fully establish the unconstitutionality of provisions which amount to an outlawry or a denial of the right to life and liberty to any class of women, however abandoned, except so far as it may be in punishment of a specific offense. That is to say, women cannot be denied the right to occupy property and engage in lawful business by reason of any general bad character. But they may be subject to such police regulations as are reasonably necessary.

B. A. R.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

STANDARD LIFE & ACCIDENT INSURANCE COMPANY, *Plff. in Err.*,
v.

Lee THORNTON, Admr., etc., of Stephen P. Locke, Deceased.

(100 Fed. Rep. 582.)

1. The death of a passenger on a sleeping car is not so palpably one of suicide as to compel the jury to reach that conclusion, where he disappeared from the car during the night and was found the next morning, with his overcoat on, on the railroad track, between the rails, face down, with head towards the direction in which the train was going, with his arms stretched above his head and feet between the cross ties, while there was an injury upon his skull, sufficient to produce death, and a small quantity of blood on the cross ties between the rails, although there was evidence that he had, some months before, resigned his

position under charges affecting his character, and some conflict in the evidence as to whether he was despondent or not, but was in good credit and not in danger of want.

2. The presumption against suicide will stand and be decisive of the case until overcome by testimony which shall outweigh the presumption, where a passenger on a sleeping car disappears from it in the night, and is found the next morning dead upon the track, between the rails, with his overcoat on, and the facts exclude every hypothesis except suicide or accident.

3. A temporary occupation of the platform of a car by a passenger for a necessary or proper purpose is not a "riding" thereon, within the meaning of a clause in an accident policy which contains a condition against riding on a car platform.

(March 19, 1900.)

NOTE.—As to presumption in respect to suicide of insured person, see also *Mutual L. Ins. Co. v. Wiswell* (Kan.) 35 L. R. A. 258, and note on page 263; also *Johns v. Northwestern Mut. Relief Asso.* (Wis.) 41 L. R. A. 587, 49 L. R. A.

ERROR to the Circuit Court of the United States for the Western District of Tennessee to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on an accident insurance policy. *Affirmed.*

Before *Lurton* and *Day*, Circuit Judges, and *Clarke*, District Judge.

The facts are stated in the opinion.

Messrs. Watson & Fitzhugh, for plaintiff in error:

The case was palpably for the defendant, for the reason that the conclusion deducible from all the evidence was clear and convincing that the death of the insured was not caused by his being accidentally thrown from a train of cars, but whether his death was accidental or suicidal it was unquestionably caused directly or indirectly while the insured was riding on the platform or steps of a railway car, in violation of the provisions of the contract sued on, and, in either event, defendant was entitled to a peremptory instruction.

Travelers' Ins. Co. v. Mitchell, 47 U. S. App. 260, 78 Fed. Rep. 754, 24 C. C. A. 305; *Travelers' Ins. Co. v. Selden*, 42 U. S. App. 253, 78 Fed. Rep. 285, 24 C. C. A. 92; *Randall v. Baltimore & O. R. Co.* 109 U. S. 473, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 30 L. ed. 1022, 7 Sup. Ct. Rep. 1334; *Sparf v. United States*, 156 U. S. 51, 39 L. ed. 343, 15 Sup. Ct. Rep. 273.

A rebuttable presumption of law being contested by proof of facts which show otherwise, which are not controverted, the presumption loses its value.

Lawson, Presumptive Evidence, 660.

Presumptions must give place when in conflict with clear and convincing proof.

Whitaker v. Morrison, 1 Fla. 29, 44 Am. Dec. 627; *Galpin v. Page*, 18 Wall. 364, 21 L. ed. 962; *Somerville v. Knights Templars & Masons' Life Indemnity Asso.* 11 App. D. C. 417; *Merrett v. Preferred Masonic Mut. Acci. Asso.* 98 Mich. 338, 57 N. W. 169; *Inghram v. National Union*, 103 Iowa, 395, 72 N. W. 559; *Johns v. Northwestern Mut. Relief Asso.* 90 Wis. 332, 41 L. R. A. 587, 63 N. W. 276.

It was physically impossible for the insured to have fallen from any other part of the train, and to have struck his head against a cross-tie, in the very center of the track, on a trestle where his body was found the next morning.

There is no just reason why parties or courts should be ingenious or eager to add to, subtract from, or search out curious and hidden meanings in the plain terms of their compact.

Imperial F. Ins. Co. v. Coos County, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. Rep. 379; *Fred J. Kiesel & Co. v. Sun Ins. Office*, 60 U. S. App. 10, 88 Fed. Rep. 243, 31 C. C. A. 518.

Where the policy contains a proviso excluding liability for injuries or death happening while the insured is standing or riding or being on the platform or, or entering or leaving, a moving steam vehicle, the condition is valid, and protects the insurer in case of accident so happening.

1 Am. & Eng. Enc. Law, 2d ed. p. 312; *Hull v. Equitable Acci. Asso.* 41 Minn. 231, 42 N. W. 936; *Miller v. Travelers' Ins. Co.* 39 Minn. 548, 40 N. W. 839; *Sawtelle v. 49 L. R. A.*

Railway Passenger Assur. Co. 15 Blatchf. 216, Fed. Cas. No. 12,392; *Travelers' Ins. Co. v. Mitchell*, 47 U. S. App. 260, 78 Fed. Rep. 754, 24 C. C. A. 305; *Etna L. Ins. Co. v. Vandecar*, 57 U. S. App. 446, 86 Fed. Rep. 282, 30 C. C. A. 48.

The burden of proof is on the plaintiff to establish, by a preponderance of the evidence, that the death of the insured was caused solely by accidental means, and particularly by his being accidentally thrown from a train of cars, as alleged in the declaration; but in making out his case the plaintiff is entitled to the benefit of the legal presumption against suicide.

This presumption, however, does not relieve the plaintiff of the necessity of proving by a preponderance of the evidence that the death was the result of accidental means, within the terms of the contract; it only assists him to discharge this burden.

5 Am. & Eng. Enc. Law, 2d ed. p. 40; *McGlothter v. Provident Mut. Acci. Co.* 60 U. S. App. 705, 89 Fed. Rep. 685, 32 C. C. A. 320; *Etna L. Ins. Co. v. Vandecar*, 57 U. S. App. 446, 86 Fed. Rep. 282, 30 C. C. A. 48; *Whitlatch v. Fidelity & C. Co.* 149 N. Y. 45, 43 N. E. 405; *Carnes v. Iowa State Traveling Men's Asso.* 106 Iowa, 281, 76 N. W. 683; *Louisville & N. R. Co. v. East Tennessee, V. & G. R. Co.* 22 U. S. App. 102, 60 Fed. Rep. 993, 9 C. C. A. 314; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; *Merrett v. Preferred Masonic Mut. Acci. Asso.* 98 Mich. 338, 57 N. W. 160.

Messrs. William M. Randolph, George Randolph, and Henry F. Dix, for defendant in error:

The case should be left to the jury, unless the conclusion follows, as a matter of law, that no recovery can be had upon any view which can be properly taken of the facts which the evidence tends to establish.

Louisville & N. R. Co. v. Woodson, 134 U. S. 614, 33 L. ed. 1032, 10 Sup. Ct. Rep. 628; *Mylcr v. Standard Life & Acci. Ins. Co.* 63 U. S. App. 352, 92 Fed. Rep. 861, 35 C. C. A. 55; *Travelers' Ins. Co. v. Robbins*, 27 U. S. App. 547, 27 L. R. A. 629, 65 Fed. Rep. 178, 12 C. C. A. 544; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679.

In view of the state of the proof, it was a question of fact peculiarly within the province of the jury to say how the accident happened, and determine the question whether it was suicide or from riding on the platform.

Mallory v. Travelers' Ins. Co. 47 N. Y. 54, 7 Am. Rep. 410; *Anthony v. Mercantile Mut. Acci. Asso.* 162 Mass. 355, 26 L. R. A. 406, 38 N. E. 973; *Badenfeld v. Massachusetts Mut. Acci. Asso.* 154 Mass. 77, 13 L. R. A. 293, 27 N. E. 769; *Freeman v. Travelers' Ins. Co.* 144 Mass. 573, 12 N. E. 372; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; *Manufacturers' Acci. Indemnity Co. v. Dorgan*, 16 U. S. App. 290, 22 L. R. A. 620, 58 Fed. Rep. 945, 7 C. C. A. 581; *Accident Ins. Co. v. Bennett*, 90 Tenn. 256, 16 S. W. 723; *Home Benefit Asso. v. Sargent*, 142 U. S. 693, 35 L. ed.

1163, 12 Sup. Ct. Rep. 352; *Leman v. Manhattan L. Ins. Co.* 46 La. Ann. 1189, 24 L. R. A. 589, 15 So. 388; *Meadows v. Pacific Mut. L. Ins. Co.* 129 Mo. 76, 31 S. W. 578.

The defenses of exceptions in the policy were set up in special pleas, and the burden of proof was on plaintiff in error to prove the truth of the facts set up.

Travellers' Ins. Co. v. McConkey, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; *Home Benefit Assn. v. Sargent*, 142 U. S. 691, 35 L. ed. 1160, 12 Sup. Ct. Rep. 332; *Travelers' Ins. Co. v. Mitchell*, 47 U. S. App. 260, 78 Fed. Rep. 754, 24 C. C. A. 305; *Freeman v. Travelers' Ins. Co.* 144 Mass. 572, 12 N. E. 372; *Badenfeld v. Massachusetts Mut. Acci. Assn.* 154 Mass. 77, 13 L. R. A. 263, 27 N. E. 769; *Anthony v. Mercantile Mut. Acci. Assn.* 162 Mass. 354, 26 L. R. A. 406, 38 N. E. 973; *Cronkhite v. Travelers' Ins. Co.* 75 Wis. 116, 43 N. W. 731; *Coburn v. Travelers' Ins. Co.* 145 Mass. 227, 13 N. E. 604; *Piedmont & A. L. Ins. Co. v. Ewing*, 92 U. S. 377, 23 L. ed. 610; 2 Biddle, Ins. ¶¶ 1310-1315; *Standard Life & Acci. Ins. Co. v. Jones*, 94 Ala. 434, 10 So. 530; *May, Ins.* 2d ed. ¶¶ 589, 591; *Bliss, L. Ins.* 1st ed. § 374.

Before the court can give a peremptory instruction it must have tangible facts which are undisputed from which the conclusion claimed follows as a matter of law.

1 Greenl. Ev. §§ 44, 48, 49; *Mylar v. Standard Life & Acci. Ins. Co.* 63 U. S. App. 352, 92 Fed. Rep. 861, 35 C. C. A. 55; *Travelers' Ins. Co. v. Robbins*, 27 U. S. App. 547, 27 L. R. A. 629, 65 Fed. Rep. 178, 12 C. C. A. 544; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; *Louisville & N. R. Co. v. Woodson*, 134 U. S. 614, 33 L. ed. 1032, 10 Sup. Ct. Rep. 628.

It was against permanent occupancy of the platform for the purpose of travel that the provision in the policy was inserted, and it did not refer to that necessary occupancy of the platform which is only temporary in its character.

Berliner v. Travelers' Ins. Co. 121 Cal. 453, 41 L. R. A. 467, 53 Pac. 918; *Hull v. Equitable Acci. Assn.* 41 Minn. 232, 42 N. W. 936; *Anthony v. Mercantile Mut. Acci. Assn.* 162 Mass. 354, 26 L. R. A. 406, 38 N. E. 973; *Savotelle v. Railway Pass. Assur. Co.* 15 Blatchf. 216, Fed. Cas. No. 12,392.

Exceptions of this kind are to be most strongly construed against the insurer and liberally in favor of the insured.

May, Ins. 3d ed. § 175; *Travellers' Ins. Co. v. McConkey*, 127 U. S. 666, 32 L. ed. 310, 8 Sup. Ct. Rep. 1360; *American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552.

Where the terms of a policy permit of more than one construction, that will be adopted which supports its validity.

Berliner v. Travelers' Ins. Co. 121 Cal. 453, 41 L. R. A. 467, 53 Pac. 918; *Darrow v. Family Fund Soc.* 116 N. Y. 537, 6 L. R. A. 495, 22 N. E. 1093; *Accident Ins. Co. v. Crandal*, 120 U. S. 527, 30 L. ed. 740, 7 Sup. Ct. Rep. 685; *Equitable Acci. Ins. Co. v. Osborn*, 90 Ala. 201, 13 L. R. A. 267, 9 So. 869; *Lowenstein v. Fidelity & C. Co.* 88 Fed. 49 L. R. A.

Rep. 474; *Berger v. Pacific Mut. L. Ins. Co.* 88 Fed. Rep. 241; *Commercial Travelers' Mut. Acci. Assn. v. Fulton*, 45 U. S. App. 578, 79 Fed. Rep. 423, 24 C. C. A. 654; *DeLoy v. Travelers' Ins. Co.* 171 Pa. 1, 32 Atl. 1108; *London & L. F. Ins. Co. v. Fischer*, 92 Fed. Rep. 500, 34 C. C. A. 503.

It is not necessary for the plaintiff to show how the accident happened, nor to prove that it was not suicide.

Travellers' Ins. Co. v. McConkey, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; *Mallory v. Travelers' Ins. Co.* 47 N. Y. 52, 7 Am. Rep. 410; *Manufacturers' Acci. Indemnity Co. v. Dorgan*, 16 U. S. App. 290, 22 L. R. A. 620, 58 Fed. Rep. 945, 7 C. C. A. 581; *Accident Ins. Co. v. Bennett*, 90 Tenn. 256, 16 S. W. 723; *Home Benefit Assn. v. Sargent*, 142 U. S. 693, 35 L. ed. 1163, 12 Sup. Ct. Rep. 332; *Leman v. Manhattan L. Ins. Co.* 46 La. Ann. 1189, 24 L. R. A. 589, 15 So. 388; *Meadows v. Pacific Mut. L. Ins. Co.* 129 Mo. 76, 31 S. W. 578; *Piedmont & A. L. Ins. Co. v. Ewing*, 92 U. S. 377, 23 L. ed. 610; *Freeman v. Travelers' Ins. Co.* 144 Mass. 572, 12 N. E. 372; *Coburn v. Travelers' Ins. Co.* 145 Mass. 226, 13 N. E. 604; *Badenfeld v. Massachusetts Mut. Acci. Assn.* 154 Mass. 77, 13 L. R. A. 263, 27 N. E. 769; *Anthony v. Mercantile Mut. Acci. Assn.* 162 Mass. 354, 26 L. R. A. 406, 38 N. E. 973; *Cronkhite v. Travelers' Ins. Co.* 75 Wis. 116, 43 N. W. 731.

The burden of proof was upon the plaintiff in error to show that Locke committed suicide, or that the accident happened while he was riding upon the platform or steps of a railway train.

Home Benefit Assn. v. Sargent, 142 U. S. 691, 35 L. ed. 1160, 8 Sup. Ct. Rep. 1360; *Travellers' Ins. Co. v. McConkey*, 127 U. S. 663, 32 L. ed. 309, 8 Sup. Ct. Rep. 1360; *Travelers' Ins. Co. v. Mitchell*, 47 U. S. App. 260, 78 Fed. Rep. 754, 24 C. C. A. 305; *Freeman v. Travelers' Ins. Co.* 144 Mass. 573, 12 N. E. 372; *Badenfeld v. Massachusetts Mut. Acci. Assn.* 154 Mass. 77, 13 L. R. A. 263, 27 N. E. 769; *Anthony v. Mercantile Mut. Acci. Assn.* 162 Mass. 355, 26 L. R. A. 406, 38 N. E. 973; *Piedmont & A. L. Ins. Co. v. Ewing*, 92 U. S. 377, 23 L. ed. 610; *Coburn v. Travelers' Ins. Co.* 145 Mass. 227, 13 N. E. 604; *Chattanooga Cotton Oil Co. v. Shamblin*, 101 Tenn. 263, 47 S. W. 496; *Cronkhite v. Travelers' Ins. Co.* 75 Wis. 116, 43 N. W. 731; 2 Biddle, Ins. ¶¶ 1310-1315; *Sutherland v. Standard Life & Acci. Ins. Co.* 37 Iowa, 505, 54 N. W. 453; *Standard Life & Acci. Ins. Co. v. Jones*, 94 Ala. 434, 10 So. 530; *Redman v. Fina Ins. Co.* 49 Wis. 431, 4 N. W. 591; *Cassacia v. Phoenix Ins. Co.* 28 Cal. 628; *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9, 81 Am. Dec. 521; *May, Ins.* 2d ed. ¶¶ 589, 591; *Bliss, L. Ins.* 1st ed. §§ 374 et seq.

The presumption is always against suicide and in favor of accident.

This presumption always arises when there is uncertainty as to how death happened.

If the proof is evenly balanced so that it is impossible to tell whether the death was the result of accident or suicide, the pre-

sumption that it was not suicide steps in and is controlling.

Continental Ins. Co. v. Delpeuch, 82 Pa. 235; 2 Wharton, Ev. § 1247; 1 Rice, Ev. p. 75, subs. E; *Travellers' Ins. Co. v. McConkey*, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; *Mallory v. Travelers' Ins. Co.* 47 N. Y. 52, 7 Am. Rep. 410; *Accident Ins. Co. v. Bennett*, 90 Tenn. 256, 16 S. W. 723; *Leman v. Manhattan L. Ins. Co.* 46 La. Ann. 1189, 24 L. R. A. 589, 15 So. 388.

Day, Circuit Judge, delivered the opinion of the court:

This is an action to recover on a contract of accident insurance evidenced by a ticket issued to Stephen P. Locke on the 28th day of December, 1897. The insurance was in the sum of \$3,000, against immediate, continuous, or entire disability or death caused by bodily injuries inflicted solely by external, violent, and accidental means. Certain agreements and conditions are attached to the contract as conditions of the insurance, —among others, that the contract did not cover disappearance nor suicide, sane or insane; nor death nor disability resulting wholly or partly, directly or indirectly, from certain causes, conditions, and actions, —among others, voluntary and unnecessary exposure to danger, entering or trying to enter or leave a moving conveyance using steam as a motor, or while riding on the platform or steps of any railway car. The declaration was in the usual form, averring the issue of the accident ticket containing the terms above set forth; that complainant had kept and complied with the conditions and terms of the contract; and that on the 29th day of December, about 4 A. M., traveling as a passenger, in the regular and usual way, on a car attached to a train of cars passing along the railroad of the company known as the Kansas City, Memphis, & Birmingham Railroad Company, from the city of Memphis, in the state of Tennessee, to the town of Jasper, in the state of Alabama, and, at a point near the said town of Jasper, Locke was externally, violently, and accidentally thrown from the said train of cars, and thereby instantly killed. The answer, after pleading the general issue, sets up certain special pleas, in which it is averred: First. That the insured was not accidentally thrown from a train of cars, and that his injuries and death were not accidental. Second. That the contract expressly provided that it did not cover, and should not be enforceable in the event said Locke should commit, suicide, sane or insane; and avers that said Locke did commit suicide on the 29th day of December, 1897, by voluntarily, and with intent to destroy his life, jumping or falling off a train of cars of the Kansas City, Memphis, & Birmingham Railroad Company, he being then a passenger on said train, and said train at the time running at a high rate of speed. Third. That, in violation of the terms of said contract, said plaintiff's intestate came to his death in consequence of riding on the platform or steps of said train. Said train was at the time running at a high

rate of speed between the city of Memphis and Jasper. Avers that the injuries were caused wholly or partly, directly or indirectly, while the said Locke was riding on the platform or steps of said railway car in express violation of the conditions of the contract. Fourth. Avers that said Locke came to his death because of a violation of the conditions of said contract, providing for no liability in case the assured should voluntarily and unnecessarily expose himself to danger. A replication was filed, taking issue on these several pleas, and the case went to trial to a jury, resulting in a recovery upon the policy.

Upon conclusion of the evidence a motion was made by the defendant to arrest the case from the jury, and to direct a verdict in favor of the defendant. The court, however, submitted the case to the jury, and afterwards overruled the motion for a new trial. In this court, upon this branch of the case, the only proper inquiry is, Should the court have directed a verdict? The practice in this respect is too well settled to need extended discussion. It was held in the case of *Travelers' Ins. Co. v. Mitchell*, 47 U. S. App. 260, 78 Fed. Rep. 754, 24 C. C. A. 305, in which the opinion was written by Mr. Justice Harlan, that "the jury should be permitted to return a verdict according to its own views of the facts, unless, upon a survey of the whole evidence, and giving effect to every inference to be fairly or reasonably drawn from it, the case is palpably for the party asking a peremptory instruction. . . . On the other hand, a case cannot properly be withdrawn from the consideration of the jury simply because, in the judgment of the court, there is a preponderance of evidence in favor of the party asking a peremptory instruction."

The learned justice cites with approbation the opinion of Judge Lurton upon the same subject in the case of *Mount Adams & E. P. Inolined R. Co. v. Lourey*, 43 U. S. App. 408, 74 Fed. Rep. 463, 20 C. C. A. 596.

How stands the present case? Was it palpably with the defendant, and could the jury fairly draw no other inference from the testimony than that the decedent came to his death with suicidal intent? A careful examination of the facts disclosed in the record convinces us that, giving effect to the presumption of law against self-destruction, the case was not so palpably one of suicide as to justify this court in interfering with the action of the court below. The exact manner of decedent's death is left in great doubt from the testimony. Locke was a man about fifty years of age, of good character and habits, in good health, and with a family to whom he was devoted. It appears that upon the evening in question he remarked to a friend that he was going to Jasper, Alabama, to get some money, and took passage from his home, the city of Memphis, to Jasper; purchasing before starting the accident ticket now sued upon, and one in the Travellers' Insurance Company for \$6,000, both of which he mailed to his wife.

This, however, appears to have been in accordance with his custom, as the testimony shows that he had been in the habit of buying such tickets and mailing them to his wife. Taking passage about 9 o'clock P. M., he went aboard the sleeping car, in which he had purchased a lower berth. He sat in the smoking room, conversing, until nearly 11 o'clock. About this time he went to his berth. The conductor of the Pullman testifies that about 12 o'clock he came in contact with the feet of a man sitting on the berth supposed to be occupied by Mr. Locke. It does appear that his berth was only occupied by lying down thereon. The porter had been instructed to call Mr. Locke before the train reached Jasper, and after it left Carbonhill. The train was due at Jasper at 4:02 A. M., and at Carbonhill at 3:25 A. M. The train was on time, running at about the rate of 32 miles an hour; and, after it left Carbonhill, the porter having ascertained that no one was in the berth assigned to Locke, a search was made for the missing passenger. The passengers and Pullman conductors and porter made a pretty thorough search of the car and train. There is some conflict in the proof as to whether they looked upon the rear platform, but it appears that Locke might have been seen, had he been on the platform at the time of the search. The search failed to discover his presence, and at Jasper the conductor reported to the master of transportation at Birmingham the loss of a passenger. The car upon which Locke took passage was supplied with vestibule appliances, and with a gate something over 3 feet high, and which the testimony tends to show was fastened when the car left Memphis, and was found secure when the car reached Birmingham. On the early morning after Locke had started upon his journey, his body was found on a trestle of the railroad $3\frac{1}{2}$ miles from Jasper. It was lying upon the cross-ties, between the rails of the track, with head towards Jasper, face down, arms stretched above head, and feet between the cross-ties. Near the top, in the back part of the head, was a cut, and on one of the cross-ties between the rails there was a small quantity of blood. The body had on the overcoat, as Locke had when last seen before he went to his berth in the sleeper. Upon examination it was found that his right arm was broken at the elbow, and that several ribs were broken, and it is testified that the injury upon the skull was sufficient to produce death. It seems that Locke had had some difficulty with the Cole Manufacturing Company in the July preceding the accident. He had long been connected with that company, and in July of 1897 a charge was made before the board of directors which Mr. Locke regarded as affecting his character, and which caused him to immediately tender his resignation, which was as promptly accepted. He did not have other employment up to the time of his decease, and had been engaged in the attempt to organize another company, but had not succeeded in doing so. There is a difference in the testimony of witnesses as to whether

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he was despondent or not, but the weight of the evidence is that he was not. While out of employment he was in good credit, and not in danger of immediate want. He is said to have been a man of unusual business qualifications, reticent about his affairs, and having no very close or confidential relations with others. Just how he came by his death is a matter of conjecture. On the one hand, it is argued that he could not have severed connection with the car except at the rear platform, where the vestibule doors would have prevented his getting off the train, except by throwing himself over the iron gate. On the other hand, it is claimed that he may have been thrown from the train, either from this car or from some of the connecting day coaches, which were not provided with vestibules, or may have gone to the rear platform of the train, to ascertain how far he was from his station, and have been suddenly thrown against the rear gate, which, if not fastened, would have given away. These are matters of conjecture. It is very probable that he left the train from the rear in some way. There is nothing in the testimony to warrant the court, in our judgment,—even the trial court,—in interfering with the conclusion reached by the jury. They may well have reached the determination that the testimony did not warrant the inference of suicide, and, though unable to find exactly the manner in which decedent was taken off, the facts could have been reconciled with the theory of accident more readily than that of suicide, giving the plaintiff the benefit of the presumption against self-destruction. The case, however, was sufficiently close to require at the hands of the court careful instruction to the jury as to the proper rules of law in weighing the testimony.

It is argued that the court erred in charging the jury that the burden of proof was upon the defendant to establish by the weight of the testimony that the decedent came to his death with suicidal intent. It is claimed that death by suicide is not within the terms of the policy considered without the exception subsequently incorporated into it; that, while there might be a presumption that the decedent did not commit suicide, still this does not place the burden of proof to establish suicide upon the defendant, but, giving the plaintiff the benefit of that presumption, the burden is still with him to make out a death within the terms of the policy. This position is not wanting in authority for its support. We think, however, that the question is settled for this court by the decision of the Supreme Court of the United States in the case of *Travellers' Ins. Co. v. McConkey*, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360. In that case, as in this, the action was upon an accident policy, so far as the present question is concerned, like the one under consideration, and containing the same provision of nonliability in case of death by suicide. The answer set up the general issue, and alleged that the death was caused by suicide, and by intentional injury inflicted either by the insured or other persons. At the trial the court

charged the jury that evidence of the fact that the insured was found dead during the life of the policy, from a pistol shot, was sufficient evidence that the insured met death by external and violent means, and said: "It is manifest that self-destruction cannot be presumed. So strong is the instinctive love of life in the human breast, and so uniform the efforts of men to preserve their existence, that suicide cannot be presumed. The plaintiff is therefore entitled to recover unless the defendant has by competent evidence overcome this presumption, and satisfied the jury by a preponderance of evidence that the injuries which caused the death of the insured were intentional on his part."

Again, the court below in that case charged: "The burden of proving this allegation by a preponderance of evidence rests on the defendant. The presumption is that the death was not voluntary, and the defendant, in order to sustain the issue of suicide on his part, must overcome this presumption, and satisfy the jury that the death was voluntary."

This charge, approved by the Supreme Court, clearly told the jury that the burden of proof was upon the defendant to make out a case of suicide. Applying the principle of that case to the one at bar, we think it was sufficient for the plaintiff, in the first instance, to establish the death of Locke by external, violent, and accidental means. As Mr. Justice Harlan said, the principal facts to be established were external violence and accidental means producing death. The burden of proof was upon the plaintiff below to establish these facts.

The learned judge in the present case charged the jury that: "The plaintiff, by the very terms of the contract, must prove by a preponderance of the proof, three things: (1) That death was by external means; (2) that it was violent; (3) that it was accidental. He assumed the burden of proving these three things by bringing the suit, and the burden of proving them has stayed with him, and is with him now, and continues always with him until you end the case by your verdict. That the death was external and violent seems to be admitted, but that it was accidental is denied. Therefore the plaintiff must prove it, and, unless you believe on the whole proof that it was accidental, he cannot recover."

And again: "If the jury believe from the evidence that Stephen P. Locke was a passenger on the train of cars of the Kansas City, Memphis, & Birmingham Railroad company leaving Memphis about 9 P. M. on the 28th day of December, 1897, and scheduled in the regular time-table of the company to arrive at Jasper, Alabama, about 4:02 A. M. of December 29, 1897, and that the train traveled on time, and that his dead body was found next morning, about 7 A. M., lying upon the cross-ties, with his head to the east and his feet to the west, between the rails of the same railroad, upon or near the west end of a trestle constructed in part of sawed square cross-ties, with sharp edges,

extending over a common road about 3½ or 4 miles west from Jasper, Alabama; that the night was cold, and frost had settled around the body when discovered; that when found he was lying upon his face; that there was a cut or fracture in the rear part of his head or skull, sufficient of itself to produce death; that when found both arms and several ribs were broken; that there was a pool of blood on the ground under or near where the body was found, and the mark or evidence of hair and blood on the sharp edge of one of the cross-ties of the trestle corresponding to the wound on the head,—then these facts, if proven, in the absence of proof to the contrary sufficient to overcome them, authorize the jury to find that the said Stephen P. Locke, within the twenty-four hours covered by the contract contained in the ticket of insurance sued on, came to his death by external, violent, and accidental means, within the contract, and authorize a verdict for the plaintiff on that issue."

We think this charge was correct. The death, under such circumstances, was by violent and external means, and the facts exclude every hypothesis except suicide or accident. This charge was in accordance with the decision of the Supreme Court of the United States, above quoted. As is well said in *Mallory v. Travelers' Ins. Co.* 47 N. Y. 52, 54, 7 Am. Rep. 410, quoted by Mr. Justice Harlan in *McConkey Case*, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360: "The presumption is against the latter [suicide]. It is contrary to the general conduct of mankind. It shows gross moral turpitude in a sane person."

This presumption must stand in the case, and be decisive of it, until overcome by testimony which shall outweigh the presumption. It casts upon the defendant who claims that the death was intentional the burden of establishing it by a preponderance of testimony. Upon this subject the court charged the jury, in substance, that the burden of proving that he died by suicide was on the defendant, and, if the testimony was so evenly balanced that the jury could not decide by a preponderance of testimony, the plaintiff must recover.

It is also provided in the policy that it shall not cover death resulting wholly or partly, directly or indirectly, from certain causes, conditions, and acts,—among others, from injuries resulting from riding on the platform or steps of a railway car. It is claimed in this case that the proof was that Locke was riding on the rear platform of the sleeping car, and that his death was a result thereof. This policy was likely drawn, having in view riding on platforms of cars not protected by doors such as are now in use on vestibule trains. It is not necessary, however, to decide whether this clause would have effect, as regards such inclosed platforms. Assuming that there was some testimony to show that Locke, just before meeting a violent death, was riding on the platform, and that this risk was not assumed by the defendant, it might also be inferred that he was there for a temporary purpose. In

view of the testimony, and the conflicting inferences which might be drawn therefrom, it became necessary to charge the jury upon this point, and the court said: "What is meant by the phrase 'while riding on the platform or steps of any railway car?' The very literalism of the words would cover every possible injury or death which did not take place wholly inside the car, and away from any platform or steps, while the car is in motion. It seems to be conceded, however, by the defendant's counsel, that it was not intended to have this rigid meaning, when they admitted in argument that it permitted a passenger to pass across a platform from one car to another. But in the special requests that have been made for instruction since the argument concluded, and especially by request 22, it is now claimed that 'riding on the platform or steps of a railway car' means that, 'if any injury or death results to the insured while he is on a platform of any railway car, the company is not liable.' The court does not think that the phrase could have been intended to bear that construction, and defendant's request 22 is therefore refused. We have the authority of several cases used in the argument that the phrase 'standing, being, or riding on a platform or steps,' which is obviously a broader phrase than 'riding on the platform or steps,' will not be so rigidly construed as defendant's request 22 would construe the language under consideration. Because, says Judge Wallace, 'these words do not fairly refer to a transitory occupation of the platform.' *Sawtelle v. Railway Pass. Assur. Co.* 15 Blatchf. 216, Fed. Cas. No. 12,392. Nor would being on the platform, for relief, when one was suffering from car sickness or nausea, be held to be 'a voluntary exposure to unnecessary danger,' or 'riding on a platform,' as held in *Marr v. Travelers' Ins. Co.* 30 Fed. Rep. 321. These are examples of cases construing this phrase, which seem to establish the principle of reasonable interpretation that, although the insurance company has ample power to make its contract what it pleases, in the absence of express and ambiguous words, it will not be understood to have forbidden that temporary, transitory, and necessary occupation of the platforms which a traveler must risk in the use of the cars and trains, for the convenient prosecution of his journey. He may not occupy the platforms or steps for the purposes of 'riding' on the train as one would occupy a seat, or as one might occupy by standing in the aisles on the inside of the car for riding on the train; but for any necessary purpose, certainly, and for any reasonably convenient purpose, probably, which only required a momentary or temporary or transitory 'being' or 'standing' or 'riding' on the platform or steps, the traveler may be on the platform without violating this condition in the policy. For example, if one standing on a platform, waiting to enter the door while the crowd before him were entering and being seated, as might be the case in a rush for the dining car,—to use a suggestion made by one of the jurors

to counsel in progress of the argument,—should be injured or killed, it could hardly be said that this condition of the policy was violated because he was literally riding on the platform. Or, if one, having to look out for himself, should momentarily step to the platform to see if he had reached his station, could it be said that he was riding on the platform? These would be necessary purposes, in any fair sense of the words 'riding on the platform.' It would be mere literalism to hold such a temporary occupation to be 'riding on the platform,' although it is not impossible that such a situation might be covered by a prohibition from 'standing' or 'being' on a platform, as in the Minnesota case it was held that a waiting on the platform until the train should stop was within the broader phrase. I am not willing to say to you that any temporary occupation of the platform for the simple convenience of the traveler would be permitted by the condition of this policy, or that the liability of the company would exist where the injury or death took place during such convenient occupation of the platform; but, without the least hesitation, the court may say to you that any necessary occupation of the platform which is temporary in its character, and does not amount to that more permanent occupation which might just as well be had inside the car as on the platform, so far as the traveler's convenience is concerned, would not be within the prohibition. The rule of law is that such an ambiguous expression as 'riding on the platform' or 'steps' will be construed most liberally for the holder of the ticket, and against the insurance company. Wherefore the word 'riding' must be limited to its ordinary sense of a more permanent occupation than merely standing or being on the platform for a temporary, but a necessary, purpose. And it is worth observation that, in the immediately succeeding prohibition about the right of way, the word 'being' is used in the phraseology as above quoted, thus, 'while walking or being in the right of way, etc. This shows that the company, while drafting the conditions, was careful of its phraseology; and inasmuch as the familiar expression in similar policies theretofore existing used the language 'standing, being, or riding,' there is some significance in the omission of the words 'standing or being,' in favor of the interpretation the court is now giving to the word 'riding.' I conclude the subject of the interpretation of the conditions about riding on the platform by saying to you: If you believe from all the testimony in this case that immediately before and at the moment Locke's body, designedly or undesignedly, left the train, he was occupying the platform, in the sense of 'riding' on it, as above defined, his administrator cannot recover; but if you believe from all the evidence that at that moment he was upon the platform temporarily only, and for any necessary purpose, and not sufficiently prolonged in the occupancy to amount to 'riding' on it, such temporary occupancy would not be within the prohibition of the policy."

We perceive no error in this charge. Applied to the testimony in this case, the jury should have found for the defendant, had they reached the conclusion that the deceased was occupying the platform for the purpose of riding thereon, but that a temporary occupation of the platform, for a necessary or proper purpose, did not mean riding upon it in the sense of the policy. We think this is the true rule. We think the charge in this respect was as liberal as the defendant could properly require.

Various exceptions are taken to certain phraseology in the charge, which we do not consider it necessary to review. The defendant, to have avoided a recovery in this case, in the light of the testimony, must have established either that death was the result of suicidal intent of the decedent at the time of his injury, or was the result of riding on the platform in violation of the terms of the policy. We do not discover any testimony in the case tending to show that he voluntarily exposed himself to any known danger, unless it was in his occupation of the platform. The charge is unusually ample, and we think the questions involved were submitted to the jury in accordance with the rules of law.

Finding no error in the record, *the judgment is affirmed*, with costs.

TRAVELERS' INSURANCE COMPANY,
Plff. in Err.,

v.

Mayor of JOHNSON CITY.

(99 Fed. Rep. 663.)

An action for money had and received will not lie against a municipality in favor of a bona fide purchaser of its bonds issued without authority to a railroad corporation of another state in payment of a stock subscription which it had no power to make, although the proceeds of the bonds were used in constructing tracks and depot in the municipality, and it has received the stock certificates, while it might have issued such bonds to a domestic corporation in payment of a subscription to stock.

(February 12, 1900.)

ERROR to the Circuit Court of the United States for the Eastern District of Tennessee to review a judgment in favor of defendant in an action to recover the amount which plaintiff had paid for bonds issued by defendant. *Affirmed.*

Before Taft, Lurton, and Day, Circuit Judges.

Statement by Taft, Circuit Judge:

This was a suit at law by the Travelers' Insurance Company to recover from the mayor and aldermen of Johnson City \$50,000

NOTE.—For implied agreement to pay for benefits received, see also Cincinnati, S. & C. R. Co. v. Bensley (C. C. A. 6th C.) 19 L. R. A. 796, and Parsley v. Third M. E. Church (N. Y.) 30 L. R. A. 574.

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and interest from January 5, 1892, as money had and received to the use of the defendants. The case made in the declaration was: That under the act of the general assembly of the state of Tennessee, providing: "That any county, incorporated city, or town, may become a stockholder in any railroad company incorporated under the general laws of this state, to an amount not exceeding, in the aggregate, one tenth of its taxable property, by complying with the requirements of this act" (Laws 1887, chap. 3, § 1), and which provided in its 12th section: "That when such subscription shall become due and payable, as provided in section eleven of this act, the county, or city, or town making the subscription shall make and execute its coupon bonds for the amount of such subscription, payable not more than twenty years after date, and bearing interest at such rate as may be agreed upon, not exceeding six per cent per annum, payable semi-annually, and deliver the same to the railroad company, provided, that such county, city, or town may pay such subscription in cash at maturity, if it shall so elect,"—the Charleston, Cincinnati, & Chicago Railroad Company, on December 30, 1890, applied to the defendant in error to subscribe \$75,000 to the capital stock of said railroad company, the subscription to be paid in the coupon bonds of the defendant. That an election was held on January 30, 1890, pursuant to law, and under orders of the mayor and board of aldermen. That the sheriff made his return, showing that more than three fourths of the electors voting voted for the subscription, and that thereupon the defendant made the subscription accordingly, and resolved that it be paid in coupon bonds of the town. That the bonds issued were in the form following:

State of Tennessee, County of Washington,
Corporation of Johnson City:

Know all men by these presents, that the corporation of Johnson City, in the county of Washington, state of Tennessee, acknowledges itself indebted and firmly bound to the Charleston, Cincinnati, & Chicago Railroad Company, or bearer, in the sum of one thousand dollars, lawful money of the United States of America, and for value received hereby promises to pay to said company, or bearer, the sum of one thousand dollars at the National Bank of Deposit in the city of New York, state of New York, in twenty years after date, with interest thereon from date hereof at the rate of six per cent per annum, payable semiannually, on the first days of May and November in each and every year, on presentation and delivery of coupons hereto annexed, and duly signed by the recorder of Johnson City; for the performance of all which the taxable property of said Johnson City is irrevocably pledged, pursuant to an act of the general assembly of the state of Tennessee, entitled 'An Act to Enable the Counties and Incorporated Cities and Towns to Subscribe to the Capital Stock of Any Railroad Company Incorporated under the General Laws of This Stat'

in the Mode Prescribed Therein, and to Provide for the Payment of Such Subscriptions, approved February 17, 1887, and also an act passed February 28, 1887, approved March 2, 1887, authorizing Johnson City to issue bonds to an amount not exceeding seventy-five thousand dollars. This bond is one of a series of seventy-five bonds of like tenor, date, and amount herewith, issued by virtue of said above-named statutes, and in issuing same all of the provisions and requirements of each of said statutes have been strictly fulfilled and complied with. In witness whereof the mayor and the recorder of the corporation of Johnson City, Tennessee, have hereunto signed their names, and the same has been countersigned by the board of trustees of the sinking fund of said town, at said Johnson City, on the first day of May, A. D. 1890.

_____,
Mayor.

_____,
Recorder.

_____,
_____,
_____,
Board of Trustees of the Sinking Fund.

That by the contract of subscription the bonds were to be deposited in the First National Bank in escrow, to be delivered to the railroad company, or its order, upon presentation of a certificate signed by the mayor of the city and the chief engineer of the railroad company. That the three conditions of the subscription, which were the delivery of the stock, the construction of the railroad, and the erection of a railway station, had been complied with. That the railroad and station were completed, and the stock issued in accordance with the contract, and the bonds were delivered to the railroad company upon proper certificate. That the stock issued to the amount of \$75,000 has ever since been held by the defendants. That, soon after the delivery of the bonds by the city to the railroad company, the same were put by the railroad company upon the market for sale, and the plaintiff, relying upon the representations made on the face of the bonds that all the requirements of law had been strictly complied with in their issue, purchased \$50,000 of the bonds, and paid \$50,000 in lawful money for the same without notice of any infirmity in the bonds.

The declaration further shows that, after paying the interest coupons on these bonds for several years, the defendants filed a bill in the chancery court of Washington county, Tennessee, against the railroad company and the plaintiffs and others, in which it sought to have the bonds declared void on the various grounds therein set up; that upon a final hearing of the cause the chancellor entered a decree, on March 13, 1895, adjudging the bonds to be void in the hands of bona fide purchasers, upon the ground that the Charleston, Cincinnati, & Chicago Railroad Company was not a corporation under the laws of the state of Tennessee, but was a South Carolina corporation; and that \$75,-

000 exceeded one tenth of the taxable property of Johnson City, in violation of the terms of said statutes authorizing the subscription. On appeal this was affirmed by the court of chancery appeals. Plaintiff then appealed to the supreme court of Tennessee, which also affirmed the decree of the chancellor (100 Tenn. 138, 44 S. W. 670), adjudging that said bonds were invalid and void upon the grounds stated, and enjoining their collection. The declaration avers further that the corporation to which this subscription was made was a Tennessee corporation, and not a corporation of South Carolina; that in fact there were two corporations, and that the application made by the railroad company for the subscription was made in the name of the Tennessee corporation. The bill further avers that the defendants were estopped by their recitals to deny that this was a Tennessee corporation, or that the statutory limit of indebtedness had been exceeded. The prayer of the bill is for the amount paid by plaintiff for the bonds, on the ground that the defendants have received this amount in value to their benefit. The declaration was demurred to on the ground that it did not state a cause of action, and the demurrer was sustained. The plaintiff not wishing to plead further, judgment was entered for the defendants, and that judgment is now here for review.

Mr. T. S. Webb for plaintiff in error.

Mr. Isaac Harr for defendant in error.

Taft, Circuit Judge, delivered the opinion of the court:

The averments of the declaration that the railroad company whose stock was subscribed for by the defendants was a Tennessee corporation, and that the plaintiff was a bona fide purchaser for value, without notice of any infirmity in the bonds, and that the defendants were estopped by the recitals in their bonds from denying that the railroad company was a Tennessee corporation, lend no legal force to it, in the face of its other averments, which show that those very questions of fact and law were decided adversely to the plaintiff in an action to which the plaintiff and defendants were adversary parties, and in which the question of the validity of these bonds was the sole matter at issue. The question for our consideration here is, therefore, whether one who, for full value, purchases in the market negotiable bonds payable to bearer, and undorsed, issued by a municipal corporation to a railroad company of another state, to whom it has no power to issue the bonds, in payment of a subscription to the company's stock to which it has no power to make a subscription, after the railroad has been built, and the depot has been constructed on the company's ground, and the certificates for the stock subscribed for have been delivered to the municipal corporation, all in accordance with the condition of the subscription agreement, may recover from the municipal corporation the money paid by it in open market for the bonds, on the ground that that

amount has been expended in conferring upon the city the benefit of the railroad and the depot and the stock, when it further appears that the corporation has power to make subscriptions for the stock of a domestic corporation, and to pay for the same in its bonds. We think the question must be answered in the negative. The cause of action is for money had and received to the use of the city. Such an action is based, not on an express or implied contract, but upon an obligation which the law supplies from the circumstances, because, *ex æquo et bono*, the defendant should pay for the benefit which he has derived at the expense of the plaintiff. It is an obligation which the law supplies, because, otherwise, it would result in the unjust enrichment of the defendant at the cost of the plaintiff. It is an obligation which arises only when the defendant has received money or property from the plaintiff and appropriated the same to his own use, either when he might have elected not to take it, or, having the power to do so, might return the benefit thus conferred to the plaintiff, and fails to do so. In this case the three benefits conferred on the plaintiff are: (1) The issuing of the stock; (2) the construction of the railroad; and (3) the building of the depot. As to the first, it has been conclusively adjudged by the supreme court of Tennessee in the case of *Johnson City v. Charleston, C. & C. R. Co.* 100 Tenn. 138, 44 S. W. 670, in which the plaintiff and the defendants were adversary parties, that the city had no power to subscribe to the stock of the railroad company. This being so, the city did not become a stockholder in the railroad company, and did not receive the benefit of the stock purporting to be issued. The contract of subscription was utterly void, and the certificate was but waste paper. It imposed no obligation upon the railroad company or its stockholders; it conferred no benefit upon the city. The case of *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831, leaves no doubt on this point. There a national bank, without power to do so under the national banking laws, purchased stock in a savings bank of the state of California. It was held that, in the absence of power to own the stock, the national bank did not become a stockholder, and was not liable to pay the assessment upon the stock for the benefit of creditors, although in that case it had received, and had not returned, dividends issued to it as a stockholder. The other benefits said to have been conferred upon the city were the construction of the railroad and the building of the depot. As the railroad and the depot were constructed on the land of the railroad company, they did not go into the possession of the city as its property. Had the railroad company, without any subscription by the city, built its railroad through the city, and erected its station there, it certainly could not be claimed that this would have given the railroad company a right of action against the city for the value of the benefits conferred on the city by such construction, however

great those benefits might have been in adding to the prosperity of the city and its inhabitants. In the absence of an express agreement to pay for such a benefit, no tacit agreement to do so can be inferred. Where the conferring of the benefits was induced by an express agreement which is void, the law will not supply an obligation to pay on the ground of unjust enrichment as a quasi contract, unless, in the absence of the express agreement, a real, but tacit, contract could have been inferred from the circumstances. The benefit indirectly conferred on one man's property by the improvement of the land of another is not an unjust enrichment of the other. Hence, *ex æquo et bono*, no obligation in law to pay for it arises. The case in hand is not distinguishable in principle from that of *Cincinnati, S. & C. R. Co. v. Bensley*, 6 U. S. App. 115, 19 L. R. A. 796, 2 C. C. A. 480, 51 Fed. Rep. 738, decided by this court, in which Mr. Justice Brown delivered the opinion. In that case the owners of lots in Chicago in close proximity to the lot on which it was proposed to construct the Chicago Board of Trade Building entered into a written contract with the owner of the lot by which they agreed that, if he would sell the lot to the board of trade at a low price, so as to induce the board of trade to buy it, and if the board of trade should construct its building thereon within a certain time, they would pay the owner of the lot, each of them, a certain sum of money. The owner of the lot accordingly sold it to the board of trade at the price named in the agreement, but the building was not constructed within the time fixed by the agreement. Suit was brought by the owner to recover from the contractors the amounts stipulated to be paid in the contract after the building had been constructed. The court held that time was of the essence of the contract, and was made a condition precedent to the obligation to pay, and that, therefore, no recovery could be had under the contract. The plaintiff then sought to recover on a *quantum valebat*, and it was held that the benefit conferred was not one which created an obligation on the part of the lot owners to pay, even though it appeared that, owing to the erection of the Board of Trade Building, they had been enabled to sell their land at a largely increased price. The court said: "Had the defendant received a benefit from the performance of this contract to which he would not have been entitled had the contract not been made, the result might have been different, but, as a matter of fact, it received no benefit from the erection of this building, which did not accrue to other owners of neighboring property who did not sign the contract or subscribe in aid of the purchase of the lot, and as to such persons it would not be claimed that a liability arises. Its acquiescence in the completion of the building is immaterial, since it had no right to interfere. It is, then, only upon the basis of the special contract to pay that an action will lie, and this contract not having been

performed by the plaintiff, there can be no recovery."

Mr. Justice Brown mentioned, as a most satisfactory case upon this point, *Memphis, K. & C. R. Co. v. Thompson*, 24 Kan. 170, and said:

"This was an action upon certain bonds issued by the city of Parsons in aid of the construction of the plaintiff's road, and subject to a condition that the plaintiff should 'have its road constructed and in operation on or before the 1st day of July, 1878.' It was held that time was of the essence of this contract, and that the failure of the plaintiff to complete the road by the day named was fatal to a recovery, notwithstanding the road was completed shortly after that, and the city received the benefit of it. In delivering the opinion of the court, Mr. Justice Brewer, now of the Supreme Court of the United States, observed: 'Nor is this a case of part performance by one party and the acceptance by the other of the proceeds of such performance. The work done by the company was upon its own grounds. It owns the road absolutely and entirely. It has parted with nothing which the city has received. The city has accepted and appropriated none of its labor and none of its materials. It has received the benefit of the work in no other sense than every individual in the community, and in no other way than of one person receiving benefit from his neighbor's improvement of his own property.'"

While these were cases in which the plaintiff failed to recover on the express contract, not because it was *ultra vires* and void, but because the plaintiff failed to comply with a condition precedent in such contract, the principle upon which they were placed is entirely applicable to the case at bar. This is made apparent by the language of Mr. Justice Jackson in delivering the opinion in *Hedges v. Dixon County*, 150 U. S. 182-186, 37 L. ed. 1044, 1046, 14 Sup. Ct. Rep. 71. There a county had issued bonds in aid of a railroad in excess of its authority, and the holders of the bonds filed a bill in which they asked from the court the relief of cutting down the obligation of the bonds proportionately so as to bring it within the lawful amount. The Supreme Court held that the relief could not be granted, and, referring to the cases of *Louisiana v. Wood*, 102 U. S. 294, 26 L. ed. 153, and *Read v. Plattsmouth*, 107 U. S. 568, 27 L. ed. 414, 2 Sup. Ct. Rep. 208, in which it had been permitted to bondholders of bonds issued without authority to recover from the municipal corporation issuing the bonds the amount of money received by it and expended by it for lawful purposes as money had and received to its use, the court said: "The circumstances and conditions which gave the holders of the bonds an equitable right in those cases to recover from the municipality the money which the bonds represented do not exist in the case under consideration, where the county received no part of the proceeds of the bonds, and no direct money benefit, but merely derived an incidental advantage arising

from the construction of the railroad, upon which advantage it would be impossible for the court to place a pecuniary estimate, or to say that it would be equal to such portion of the bonds in question as the county could lawfully have issued."

For these reasons we think that there is no ground upon which to base a recovery for money had and received to the use of Johnson City.

The cases relied upon by the plaintiff are *Read v. Plattsmouth*, 107 U. S. 568, 27 L. ed. 414, 2 Sup. Ct. Rep. 208; *Chapman v. Douglas County*, 107 U. S. 348, 27 L. ed. 378, 2 Sup. Ct. Rep. 62; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. Rep. 442; *Louisiana v. Wood*, 102 U. S. 294, 26 L. ed. 153; *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. ed. 659. It is contended that they sustain the view that money paid for the benefit of the city on the faith of the issue of invalid bonds may be recovered in an action for money had and received. It will be found that, in every case cited but one, the city or county or municipal corporation which issued the bonds received the money or labor or material furnished, and that it was expended in improving the property of the city or other corporation in a manner in which the city had power to improve its own property. In *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. ed. 659, the benefit conferred upon the city was the building of sidewalks, which the city had the right to build and pay for, but which, it was found, it had no right to pay by issuing bonds. In *Louisiana v. Wood* the money received for the bonds was used partly by the city in payment and redemption of matured bonds and coupons and warrants of the city, lawfully issued, and part of it was deposited in the city treasury. In *Parkersburg v. Brown*, which is the exception, the money which was received for the bonds was used to purchase land and to erect a manufacturing establishment, the operation of which it was supposed would benefit the city. The bonds were declared void for want of power in the city to aid private manufacturing establishments. The relief granted by the court was, not to hold the city as for money had and received, but to follow the property into which the money had been put, and to sell the property, and distribute the net proceeds thereof to those with whose money the property had been purchased and improved. In *Chapman v. Douglas County*, 107 U. S. 348, 27 L. ed. 378, 2 Sup. Ct. Rep. 62, a county in Nebraska bought land upon which to erect a poor house and farm and in payment therefor issued notes for four equal annual instalments of the purchase price, and gave a mortgage to secure the payment of the notes. It was decided by the supreme court of the state that the county could not bind itself to pay the purchase money by notes, or to secure it by mortgage upon the property, but its power was limited to a payment in cash, and the levy of an annual tax to create a fund wherewith to pay the residue. It was held that, the contract being unauthorized only so far as it related to the

time and mode of paying the purchase money, and the title to the land having passed by the conveyance, the county held the title as trustee for the benefit of the vendor, and that, unless the sum due on the purchase money was paid within a reasonable time, the county might be required to execute a deed releasing to the vendor all the title acquired under his deed. In *Read v. Plattsmouth* the money paid for the bonds was used by the city of Plattsmouth in the construction of a high-school building. The power of the city to issue bonds to build a high school was questioned, and by a subsequent act the bonds issued were validated by the legislature. At the time the bonds were issued it could not lawfully issue them in the amount in which they were issued. It was held that the city, having taken the money and put it into a schoolhouse, which

it owned, was bound by the force of the transaction to repay to the purchaser of its void bonds the consideration received and used by it, or its lawful equivalent, and that, therefore, the enabling act validating the bonds only recognized an existing moral and legal obligation, and was valid. It thus appears that in each of the cases, except *Parkersburg v. Brown*, the benefit received by the municipal corporation was money paid to it or property delivered into its actual possession under such circumstances that, had no express contract been attempted, a tacit contract might have been inferred. In *Parkersburg v. Brown* the money paid was followed, as in *rem*, into the thing bought with it.

It follows that the judgment of the court was correct, and it must be affirmed, with costs.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

MUTUAL LIFE INSURANCE COMPANY, *Plff. in Err.,*

v.

George E. HILL *et al.*

(97 Fed. Rep. 263, 38 C. C. A. 159.)

1. The United States courts take judicial notice of all the public statutes of the several states.
2. Permitting a recovery in an action upon a policy of insurance on the ground that there had been no forfeiture for failure to pay premiums because the requisite statutory notice of their accrual had not been given, which fact does not appear in the complaint, does not contravene the rule against departure in pleading, since forfeiture is a matter of defense which the plaintiff is not bound to anticipate.
3. Notice of accrual of premium as required by N. Y. Laws 1877, chap. 321, is necessary to a forfeiture of a policy for nonpayment of premium, in the absence of which forfeiture cannot be effected by agreement of the parties.
4. Beneficiaries of a life-insurance policy, subject to the operation of the New

NOTE.—The decision in the above case was reversed by the Supreme Court of the United States on writ of certiorari in 178 U. S. 347, 44 L. ed. —, 20 Sup. Ct. Rep. 914, without deciding whether the laws of New York governed or not in respect to the necessity of giving notice before forfeiting the policy for nonpayment of premium. The decision is based on the fact that both parties, with knowledge of all the facts, had agreed to abandon the contract.

For a case similar to this, see *Mutual L. Ins. Co. v. Dingley* (C. C. A. 9th C.) *post*, 132.

For necessity of notice before forfeiting an insurance policy, see also *Baxter v. Brooklyn L. Ins. Co.* (N. Y.) 7 L. R. A. 293; *Eury v. Standard Life & Acci. Ins. Co.* (Tenn.) 10 L. R. A. 534; *Heinlein v. Imperial L. Ins. Co.* (Mich.) 25 L. R. A. 627; *Buchanan v. Supreme Conclave Improved Order of Heptasoph* (Pa.) 34 L. R. A. 436; and *Rosenplanter v. Provident Sav. Life Assur. Soc.* (C. C. A. 6th C.) 46 L. R. A. 473.

49 L. R. A.

York laws requiring notice of accrual of premium before forfeiture for nonpayment, will not be bound, in the absence of such notice, by statements of the insured to the company, that he cannot pay premiums, and that the company may consider the policy forfeited.

(October 2, 1899.)

ERROR to the Circuit Court of the United States for the Northern Division of the District of Washington to review a judgment in favor of plaintiffs in an action brought to recover an amount alleged to be due on a life-insurance policy. *Affirmed.*

Before *Gilbert* and *Ross*, Circuit Judges, and *Hawley*, District Judge.

Statement by *Hawley*, District Judge:

This action was brought by the children of George Dana Hill, in their own name where of age, and by their guardian where under age, to recover the amount of a policy of insurance upon the life of their deceased father. The amended complaint alleged that on April 29, 1886, in consideration of the sum of \$814 paid by George Dana Hill, the insurance company (plaintiff in error herein) made and delivered to him, in the city of New York, a policy upon his life; the insurance to be paid to his wife, if living at his death, or, in case of her death before that time, to their children. This policy of insurance is set forth in the complaint, and reads as follows: "In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay at its home office, in the city of New York, unto Ellen Kellogg Hill, wife of George Dana Hill, of Seattle, in the county of King, Washington territory, for her sole use, if living, in conformity with the statute, and, if not living, to such of the children of their bodies as shall be living at the death of the said wife, or to their guardian, for their use, twenty thousand (\$20,-

000), upon acceptance of satisfactory proofs at its said office of the death of the said George Dana Hill during the continuance of this policy, upon the following condition, and subject to the provisions, requirements, and benefits stated on the back of this policy, which are hereby referred to and made part hereof. The annual premium of eight hundred and fourteen dollars (\$814) shall be paid in advance on the delivery of this policy, and thereafter to the company, at its home office, in the city of New York, on the twenty-ninth day of April in every year during the continuance of this contract.

... "Upon the back of this policy are provisions to the effect that, while the payments are due and payable at the home office, they will be accepted elsewhere, when made in exchange for the company's properly signed receipt, that notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and that any further notice required by any statute is expressly waived. It is alleged in the complaint that the application for insurance contained the following agreement: "It is agreed that there shall be no contract of insurance until a policy shall have been delivered and issued by said company, and the first premium thereon paid, while the person proposed for insurance is in the same condition of health described in this application." It is further alleged in the complaint: "That on the 23d day of December, 1890, the defendant was notified of the death of said George Dana Hill, and requested to furnish plaintiffs necessary blanks, in order that plaintiffs might furnish proofs of death as required by the rules and regulations of defendant company; that on the 3d day of February, 1891, said defendant, in reply thereto, informed and declared to said plaintiffs that said contract or policy of insurance above set forth had been forfeited by the nonpayment of a premium; that said defendant thereby waived the right to claim any other, or any, proofs of the death of said George Dana Hill: that said George Dana Hill during his lifetime duly performed all the conditions of said contract necessary by him to be performed; that the defendant has wholly failed to pay to plaintiffs said policy of insurance, or said sum of twenty thousand dollars (\$20,000), or any part thereof."

The answer to the amended complaint admits the issuance of the policy, but denies that it was delivered in the city of New York, or any place outside of the state of Washington. It denies all allegations of performance of the conditions of the contract on the part of the insured. Three affirmative defenses are pleaded to the amended complaint. The first alleges that the insurance company was transacting its business, at the time the policy was issued, in the state of Washington, having its principal office at Seattle, in said state; that it had complied with the laws of the state relative to foreign corporations transacting business in it; that before the time of and subsequent to the taking out of the insurance,

George Dana Hill was a citizen and resident of the territory and state of Washington; that at Seattle he made his application for the insurance; that this application was transmitted to the agent of the insurance company at San Francisco, and by him to the insurance company in the city of New York; that the insurance company, pursuant to the application, made the policy mentioned in the amended complaint, and sent it to the agent at San Francisco, who afterwards transmitted it to the agent in Seattle, and that there the first premium was paid, and the policy delivered to the insured; that there became due on the policy April 29, 1887, a premium of \$814, which has never been paid, but both the insured and the beneficiary refused to make payment of any part of it, and from that time forth until the death of the insured nothing whatever had been paid on account of any of the premiums; that the policy became void upon such default and refusal. The second affirmative defense alleged that at a time more than one year from the time of the issuance of the policy mentioned in the complaint, and during the lifetime of the said George Dana Hill, it was mutually agreed between the defendant and the said George Dana Hill that the said contract of insurance should be waived, abandoned, and rescinded, and the said George Dana Hill and the defendant then by mutual consent waived, abandoned, and rescinded the same accordingly, and all their mutual rights and obligations therein and thereunder. The third affirmative defense, after stating the provisions of the contract, alleged that the plaintiffs and each of them should be and are estopped from and should not be permitted to allege or prove that defendant did not mail, or cause to be mailed, or otherwise give to said George Dana Hill, a notice stating the amount of premium due on said policy on April 29, 1887, or at any other time, with the place where the same should be paid, the person to whom the same is payable, and stating that, unless the premium then due should be paid to the company or its agents within thirty days after the mailing of such notice, the policy and all payments made thereon should become forfeited, or any other notice prescribed by any statute or statutes of the state of New York, or any other notice than that hereinafter mentioned, for that shortly prior to and after and on said 29th day of April, 1887, said defendant, in writing, and also personally, notified and informed the said George Dana Hill, at said city of Seattle, that the premium of \$814 necessary to be paid on said policy for the continuance of this policy of insurance was due and payable; that said defendant duly demanded payment of said premium in said sum, and at the same time and place tendered the receipt of the defendant therefor, duly signed by its president and secretary; that the said Hill, being fully so informed and advised in the premises, refused to make payment of this premium, or any part thereof, and then and there, intending and for the purpose of inducing the defendant to rely upon the

same, informed the defendant that he, the said George Dana Hill, was unable to pay such premium, and did not intend to make payment thereof, or of any premium thereafter to accrue on said policy of insurance, but, on the contrary, he intended to allow the said policy to lapse and become forfeited for want of payment of said premium, or any future premium accruing on said policy; that the said defendant, then and there and ever since, relying upon the said representation and conduct on part of the said George Dana Hill, was thereby induced to, and did, declare the said policy and contract of insurance forfeited and abandoned; and that, in good faith relying upon said conduct and representations on the part of the said George Dana Hill, defendant was induced to, and did, fail and abstain from giving or mailing any notice, whether prescribed by statute or otherwise, to the said George Dana Hill, or to any person interested in said policy, concerning the payment of any premium thereon.

A demurrer was interposed to each of these defenses on the ground that each of them failed to state facts sufficient to constitute a defense to plaintiffs' amended complaint. Upon argument, each of these demurrers was sustained, and exceptions taken by the defendant. The plaintiff in error elected to stand upon its pleadings, and declined to plead further. Thereupon the defendants in error moved the court for judgment, and the court granted the motion, against the exceptions of the plaintiff in error, and rendered a judgment against the insurance company for \$24,086.61, with interest from the date of the judgment, and costs.

The statute of New York regulating the forfeitures of life insurance policies, as amended May 23, 1877, provides as follows:

"Sec. 1. No life insurance company doing business in the state of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of nonpayment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known postoffice address, postage paid by the company, or by an agent of such company, or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company or to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by

such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Provided, however, that a notice stating when the premium will fall due and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for.

"Sec. 2. The affidavit of anyone authorized by section one to mail such notice, that the same was duly addressed to the person whose life is assured by the policy, or to the assignee of the policy, if notice of the assignment has been given to the company, in pursuance of said section, shall be presumptive evidence of such notice having been given." Laws 1877, chap. 321.

Messrs. Struve, Allen, Hughes, & McMicken and Strudwick & Peters, with **Mr. Edward Lyman Short**, for plaintiff in error:

The wording of the statute is in harmony with its obvious intent to limit its application to the state of New York.

It is not within the competency of the legislature of the state to enact rules of evidence for another state or government.

Wharton, Conf. L. 2d ed. § 752; 2 Parsons, Contr. 7th ed. p. 718.

The law is a local regulation confined to business transacted in the state of New York, and the notice prescribed does not apply, except to parties within the state of New York.

Rosenplaenter v. Provident Sav. Life Assur. Soc. 91 Fed. Rep. 728.

The failure and refusal of the insured to pay premiums defeated the policy.

Equitable Life Assur. Soc. v. Clements, 140 U. S. 226, sub nom. *Equitable Life Assur. Soc. v. Pettus*, 35 L. ed. 497, 11 Sup. Ct. Rep. 822; *Equitable Life Assur. Soc. v. Nixon*, 48 U. S. App. 482, 81 Fed. Rep. 796, 26 C. C. A. 620; *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51, 27 L. ed. 648, 2 Sup. Ct. Rep. 236; *Ewell v. Daggs*, 108 U. S. 143, 27 L. ed. 682, 2 Sup. Ct. Rep. 408; *Gross v. United States Mortg. Co.* 108 U. S. 477, 27 L. ed. 795, 2 Sup. Ct. Rep. 940.

The policy against fraud and misrepresentation, and against rewarding parties for their own demerits and delinquencies, is the policy of the common law, operative wherever rules of good conscience are enforced, and whenever courts of justice close their doors against parties who seek to take advantage of their own wrong.

The policy of the state of New York cannot be transported to the courts of Washir

ton to override a policy so universal and controlling.

Jones v. Alliance Mut. F. Ins. Co. 174 Pa. 438, 34 Atl. 198.

Although the notice may not have been in accordance with the requirements of the statute of New York, when it was actually brought home to the insured, and accepted for all the purposes for which the statutory notice could be given, and when it is conceded he received the information, not only of the due date of the premium, but of its amount, and in addition declared himself possessed of all the knowledge the statute could impart, and stated further that he not only was not able, but that he was unwilling, either to pay the due premium or any subsequent premiums, and that it was his fixed purpose to end the policy, then neither he nor any legal representative should be heard, in a court of justice, to say that an insufficient notice had been given, or that there was a lack of statutory compliance in the notice.

Johnson v. Oppenheim, 55 N. Y. 280; *Bryant v. Goodnow*, 5 Pick. 228; *Farlow v. Ellis*, 156 Gray, 231; *Weymouth v. Gorham*, 22 Me. 385; *York v. Penobscot*, 2 Me. 1.

The case stands baldly and singly upon a contract.

The allegation of performance of the condition was directly put in issue.

Loud v. Pomona Land & Water Co. 153 U. S. 564, 38 L. ed. 822, 14 Sup. Ct. Rep. 928; *Phillips & C. Constr. Co. v. Seymour*, 91 U. S. 646, 23 L. ed. 341; 4 Joyce, Ins. § 3674; *Perry v. Phoenix Assur. Co.* 8 Fed. Rep. 643; *Edgerly v. Farmers' Ins. Co.* 43 Iowa, 587; *Thompson v. Knickerbocker L. Ins. Co.* 104 U. S. 252, 26 L. ed. 765; *Hartford Life Annuity Ins. Co. v. Unsell*, 144 U. S. 439, 36 L. ed. 496, 12 Sup. Ct. Rep. 671.

Had noncompliance with the statute of New York on the part of plaintiff in error been relied upon as an excuse for nonperformance of the conditions of the contract on the part of the deceased, then defendants in error were required to plead the statute of New York, and noncompliance with its provisions on the part of the insurance company.

Oakley v. Morton, 11 N. Y. 25, 62 Am. Dec. 49; *Hudson v. McCartney*, 33 Wis. 331; *Lumbert v. Palmer*, 29 Iowa, 104; *Woolsey v. Williams*, 34 Iowa, 413; *Hand v. National Live-Stock Ins. Co.* 57 Minn. 519, 59 N. W. 538; *Evans v. Queen Ins. Co.* 5 Ind. App. 198, 31 N. E. 843; *Trainor v. Worman*, 34 Minn. 237, 25 N. W. 401; *Mosness v. German-American Ins. Co.* 50 Minn. 341, 52 N. W. 932; *East Texas F. Ins. Co. v. Brown*, 82 Tex. 631, 18 S. W. 713.

Where one seeks to maintain a right under the statute, his pleading must state specifically every requisite to enable the court to charge, whether he has a cause of action, or has any under the statute.

Austin v. Goodrich, 49 N. Y. 266; *Churchill v. Onderdonk*, 59 N. Y. 134; *Chicago & V. F. R. Co. v. Sturgis*, 44 Mich. 538, 7 N. W. 213.

A fatal departure from law to law was 49 L. R. A.

made in rendering the judgment sought to be reviewed, because there are no pleadings for such a judgment to be based upon.

Rosenplauter v. Provident Sav. Life Assur. Soc. 91 Fed. Rep. 728; *Union P. R. Co. v. Wyler*, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877.

Mr. Eben Smith, with Mr. Stanton Warburton, for defendants in error.

Hawley, District Judge, delivered the opinion of the court:

This action was brought upon a policy of insurance issued by the plaintiff in error, April 29, 1886, insuring the life of George Dana Hill for \$20,000, upon which the first annual premium of \$814 was paid when the policy was delivered. No other premiums were ever paid or tendered upon this policy. No notice was ever given by the insurance company to the insured as required by the laws of the state of New York to the effect, among other things, that, unless the said premium or interest due on said policy shall be paid the company within thirty days after the mailing of such notice, "the said policy and all payments thereon will become forfeited and void." On December 4, 1890, George Dana Hill died. His surviving beneficiaries under the policy are defendants in error. Judgment was entered in their favor upon the pleadings on January 18, 1899, for \$24,086.61, with interest and costs. The policy of insurance, and all the circumstances in relation thereto and in connection therewith, and all the facts concerning the action of the court in sustaining the demurrer of the defendants in error and ordering judgment, are set forth in the statement of the case. There is no controversy as to the facts. The determination of the case rests solely upon the principles of law that are to be applied to the facts. These are important, and deserving of careful, painstaking, and deliberate consideration.

It is contended by the plaintiff in error that the court erred in holding that the contract is to be governed by the statute of the state of New York. This question is not a new one in this court. It has been twice before presented, discussed, considered, and decided. *Equitable Life Assur. Soc. v. Nixon*, 48 U. S. App. 482, 81 Fed. Rep. 796, 26 C. C. A. 620; *Equitable Life Assur. Soc. v. Redding*, 48 U. S. App. 565, 83 Fed. Rep. 85, 27 C. C. A. 404. After due deliberation upon the facts, and careful examination of the authorities, this court arrived at the conclusion that the contract there in question—which, in so far as the legal principles are involved, cannot be distinguished from the facts of this case—was a New York contract; citing in support thereof *Wagman v. Southard*, 10 Wheat. 48, 6 L. ed. 264; *Pritchard v. Norton*, 106 U. S. 124, 136, 141, 27 L. ed. 104, 108, 110, 1 Sup. Ct. Rep. 102; *Central Nat. Bank v. Hume*, 128 U. S. 195, 206, 32 L. ed. 370, 375, 9 Sup. Ct. Rep. 41; *Coghlan v. South Carolina R. Co.* 142 U. S. 101, 109, 35 L. ed. 951, 954, 12 Sup. Ct. Rep. 150; *Hall v. Cordell*, 142 U. S. 116, 120, 35 L. ed. 956, 959, 12 Sup. Ct. Rep. 154.

In *Equitable Life Assur. Soc. v. Nixon*, as in this case, it was contended that the statement made by the insured, when requested to pay the premium due upon the policy, that he did not intend to keep the policy in force, amounted in law to a waiver on the part of both the insured and the company, of the notice required to be given by the statute of New York. Replying to this contention, the court said: "That the statute of New York prescribes the condition upon which a policy may be forfeited for the non-payment of a premium. The statute is mandatory, and controls the contract. Its provisions are not subject to be set aside or waived either by the company or by the insured, or by both together. *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, 233, *subnom. Equitable Life Assur. Soc. v. Pettus*, 35 L. ed. 497, 500, 11 Sup. Ct. Rep. 822; *Rae v. National L. Ins. Co.* 20 U. S. App. 410, 60 Fed. Rep. 690, 9 C. C. A. 215; *Griffith v. New York L. Ins. Co.* 101 Cal. 627, 36 Pac. 117; *Warner v. National Life Asso.* 100 Mich. 157, 58 N. W. 667."

Entertaining no doubt of the correctness of the conclusions therein reached, we respectfully decline to further discuss the same identical questions. It is enough to say that we adhere to the views therein expressed.

It is next contended by the plaintiff in error that the judgment of the circuit court should be reversed because it is rendered, not upon the cause of action alleged in the amended complaint, but upon a cause of action entirely different, in its scope, effect, and meaning, from the one alleged in the complaint; that, in point of fact, the right of the plaintiffs in the action to recover must be determined by the allegations of their complaint; that courts should not permit them to allege one ground of recovery in their complaint, and then afterwards to rely upon another ground; that to permit such a course constitutes a departure not recognized by the law; that it is equally a departure where the plaintiffs bring an action relying upon the common or general law, and then attempt to recover by virtue of a statute; that the one is a departure from fact to fact, the other a departure from law to law. To quote from counsel's brief: "A party who pleads a specific contract, and performance on his part of its conditions, as his right to recover, is not permitted, after performance has been controverted, to confess his noncompliance, and shift his right of recovery to an unpleaded statute of a foreign state, and assert noncompliance with its provisions on the part of defendant, and adopt the defendant's noncompliance with the unpleaded statute as his own excuse for noncompliance with the conditions of the contract alleged in his complaint. The right of action alleged and abandoned is the act of the party; that not alleged, but relied upon, is the act of the legislature of New York. With performance of the conditions alleged, the right of action is perfect, regardless of the New York statute. Without performance of the conditions alleged, there is no
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right of action whatever, unless it can be established through the statute of New York. If the statute of New York, instead of performance of the conditions of the contract by defendant in error, affords the ground of recovery, then pleading of the statute is indispensable."

In line with this contention, it is also argued by the plaintiff in error that the defendants in error were not entitled to judgment after the demurrer had been sustained to the affirmative answers and defenses, because issue was joined upon the allegations of performance of the conditions precedent on the part of the insured, entitling defendants in error to a recovery. Of course, the complaint should allege the actual performance of every condition precedent to the plaintiff's right of property. The rights of the parties must be determined upon the facts which are put in issue by the pleadings. There is always a departure when a party quits or departs from the case which he first made, and has recourse to another, and the court is not justified in rendering judgment in favor of a plaintiff not warranted by the facts set forth in his pleadings. The general principles of law contended for by counsel are undoubtedly correct. But, in so far as it is sought to apply them to the case in hand, it becomes our duty to carefully consider the allegations of the complaint, and therefrom, in connection with the affirmative defenses set up in the answer, determine whether or not the court erred in rendering judgment upon the pleadings.

In the first place, the cases cited and relied upon by the plaintiff in error are clearly distinguishable in their facts from the case at bar, in this: that the plaintiffs' right of recovery therein rested solely upon another separate and distinct cause of action from the one stated in their complaint. In the present case the right of the defendants in error to recover is based exclusively upon the contract set out in their complaint, to wit, the policy of insurance. The cause of action set out in the complaint was based upon the identical facts upon which the court gave judgment. There was, therefore, no departure in this case either from fact to fact, or from law to law, and hence the principle contended for has no application to this case. There was no necessity for the defendants in error to plead the statute of New York. The United States courts take judicial notice of all the public statutes of the several states. Moreover, the question of forfeiture was solely a matter of defense. It is not considered good pleading to anticipate matters of defense.

In the second place, the complaint did not allege that the insured had, during his lifetime, complied with each and every covenant on his part to be performed. The allegation is "that said George Dana Hill during his lifetime duly performed all the conditions of said contract necessary by him to be performed." The natural effect and legal conclusion to be drawn from this averment are that he had only done those things which he was required to do in order to keep

the policy alive, of binding force and effect, and to show that it was an existing, valid contract at the time of Hill's death, and that he had not during his lifetime done any act, or failed to perform any act, that forfeited his rights under said policy, or which would in any manner deprive the beneficiaries of their rights thereunder. There is no allegation in the complaint that the insured paid any other than the first premium. The position taken by the defendants in error was that it was only necessary for them to show this fact in order to entitle them to recover. They never made any departure from this position. They never claimed that they had any right to recover upon any other ground. They recovered upon that ground alone. This was their first, last, and only contention.

The affirmative matters alleged in the answer constituted no defense to the cause of action alleged in the complaint. The contract of insurance became complete upon the payment of the first premium. It was kept alive by the provisions of the statute of New York, because the contingency of forfeiture, as therein provided for, had not happened. The contract is to be read in the light of the statute, the same as if the statute had literally been incorporated in the policy. It was not essential to the right of recovery herein that the defendants in error should have paid, or tendered payment of, the premiums due on the policy before commencing the action. When Hill died the relation of debtor and creditors existed between the insurance company and the beneficiaries named in the policy. The unpaid premiums, with legal interest from the date they became payable, constituted a claim on behalf of the insurance company to be deducted when the company paid the amount due on the policy; thus leaving it in precisely the same situation in which it would have been if the premiums had been paid when they became due. The complaint stated a good and complete cause of action. There could not be any forfeiture of the policy unless the insurance company in its answer alleged, and, if a trial was had, proved, nonpayment of a premium due, after regular service of the notice of nonpayment as required by the statute. *Carter v. Brooklyn L. Ins. Co.* 110 N. Y. 16, 17 N. E. 396; *Phelan v. Northwestern Mut. L. Ins. Co.* 113 N. Y. 147, 20 N. E. 827; *Baxter v. Brooklyn L. Ins. Co.* 119 N. Y. 450, 7 L. R. A. 293, 23 N. E. 1048; *De Frece v. National L. Ins. Co.* 136 N. Y. 144, 32 N. E. 556; *Griesemer v. Mutual L. Ins. Co.* 10 Wash. 203, 38 Pac. 1031; *Griffith v. New York L. Ins. Co.* 101 Cal. 627, 642, 36 Pac. 113; *Osborne v. Home Ins. Co.* 123 Cal. 610, 56 Pac. 616; *Rae v. National L. Ins. Co.* 20 U. S. App. 410, 60 Fed. Rep. 690, 692, 9 C. C. A. 215; *Mullen v. Mutual L. Ins. Co.* 89 Tex. 259, 34 S. W. 605.

The plea of estoppel, as set forth in the third affirmative defense, is but another name for waiver. There is no question concerning the plea of estoppel that can be distinguished from the question as to the plea of waiver. As the parties could not waive

the requirements of the statute as to the manner in which the policy could be forfeited, how could the beneficiaries, who had vested rights therein, be divested of such rights, except in the manner provided by law? They certainly could not be bound by any declarations which their father may have made in his lifetime to any agent or officer of the insurance company as to his inability to pay the premium then due upon the policy, or that he did not intend to pay that or any future premium, or that the insurance company might consider the policy forfeited without giving the notice specified in the statute. To so hold would entirely abrogate the provisions of the statute and of the policy. As was said by the court in *Baxter v. Brooklyn L. Ins. Co.*: "When the provisions of this statute are adopted in a contract of insurance, for the purpose of modifying the forfeiture clause and the other strict conditions contained therein, then the clause and these conditions should be so construed as to give to the assured the full benefit contemplated, without altering any other provision of the policy, if this can be done without violating any rule of law."

The judgment of the Circuit Court is affirmed, with costs.

MUTUAL LIFE INSURANCE COMPANY of New York, *Plff. in Err.*,

Frank E. DINGLEY, Admr., etc., of Walter
Frederick Dingley, Deceased.

(100 Fed. Rep. 408.)

1. A general denial by an insurer that the insured has performed all or any of the conditions of his contract, when coupled with a specific averment of particulars in which he has failed to perform, will not permit proof of failure in other particulars.
2. A Federal court in which an action is brought will take judicial notice of all the statutes of the several states of the Union.
3. A judgment sustaining a cause of action on an insurance policy does not depart from the cause of action pleaded because it holds that there has not been any forfeiture of the policy by nonpayment of premiums for the reason that the insurer has not given notices required by a statute, although that statute is not pleaded by either party.
4. Policies of insurance made and executed in New York, reciting that they are payable there, and that premiums are to be paid there, and containing a waiver of the service of notices required by statute, which reference is to a New York statute, are to be governed by the laws of that state, where the applications therefor recite that they are subject to the laws of New York, although they are made in another state where the applicant resides, and where the policies are delivered to him by an agent of the insurer upon payment of premiums.

NOTE.—As to necessity of notice of nonpayment of premium, see preceding case of *Mutual L. Ins. Co. v. Hill* (C. C. A. 9th C.) *ante*, 127, and other cases cited in footnote thereto.

5. Oral statements by an insured, recognizing the forfeiture of his policies, and refusing to continue them, when made without any consideration, will not be sufficient to annul the express provisions of a statute prohibiting a forfeiture for nonpayment of premiums without the giving of specified notice.
6. An equitable estoppel to assert a claim on an insurance policy will not arise from the default of the assured in the payment of premiums, or his acquiescence in the claim that the policy had lapsed, when the relation of the parties had not been changed thereby, and the insurer had not done or refrained from doing any act to its injury, in reliance thereon.
7. Policies issued and delivered by a New York company in another state are subject to the terms of N. Y. Laws 1892, chap. 690, § 92, providing that "no life insurance company doing business in this state" shall declare a policy forfeited without having given prescribed notice.

(February 5, 1900.)

ERROR to the Circuit Court of the United States for the Northern Division of the District of Washington to review a judgment in favor of plaintiff in an action brought to recover the amounts alleged to be due on certain policies of life insurance. *Affirmed.*

Before *Gilbert, Ross, and Morrow*, Circuit Judges.

Statement by Gilbert, Circuit Judge:

This writ of error is brought to review the decision of the circuit court in rendering judgment for the defendant in error upon the pleadings filed in an action at law to recover upon four several policies of life insurance. The complaint alleged: That the Mutual Life Insurance Company of New York, the defendant in the action, is a corporation organized under the laws of the state of New York, and has its home office in the city of New York. That on May 24, 1892, it issued to plaintiff's intestate three several policies of insurance, the first and second of which were for \$10,000 each, and the third for \$5,000, upon each of which policies there was paid the premium for the first fifteen months, and that on November 7, 1892, it issued a fourth policy for \$50,000, upon which one year's premium was paid. The form of the policy in each case is the same, and is set forth in the complaint in full. It is recited therein that it is issued in consideration of the application therefor, which is made a part of the contract. It promises to pay at the home office of the company, in the city of New York, the amount of insurance covered thereby, upon acceptance of satisfactory proofs at the home office of the death of the insured. It provides that the annual premium shall be paid to the company at its home office, in the city of New York, on August 24th in every year, for twenty years. It contains the recital that the company has caused the policy to be executed at its office, in the city of New York, state of New York. Concerning the payment of premiums, there are also the following provisions: "Each premium

is payable at the office of the company, in the city of New York. Notice that each payment is due at the date named in the policy is given and accepted by the delivery and acceptance of the policy, and any further notice required by any statute is expressly waived." The complaint further alleges the death of the insured at Seattle on November 12, 1896, the appointment of the plaintiff as the administrator of his estate, and that on May 28, 1897, the defendant in error furnished due proofs of the death of the insured, which were accepted by the company as satisfactory; and it contains the allegation that the insured and the administrator "each duly performed all conditions of said policy on their part." To this complaint the insurance company made answer, admitting the allegations of the complaint as to its creation under the laws of New York, the location of its principal place of business in that state, the execution of the policies and the payment of premiums, but alleged that the policies were delivered in the city of Seattle, and not in the city of New York. It admitted the making and acceptance of satisfactory proofs of death of the insured, but denied the performance of the conditions of the policy on the part of the defendant in error or his intestate. It set up an affirmative defense, alleging: That its chief office for the transaction of business in the state of Washington was in the city of Seattle. That the applications were signed at Seattle, and were a part of the policy and of the contract of insurance. That the application recited the stipulation that the policy should not take effect until the first premium should have been paid and the policy delivered. That the agent of plaintiff in error in Seattle transmitted said application to the general agent in San Francisco, by whom it was transmitted to the insurance company in New York. That the insurance company executed its policies, and transmitted the same to its general agent in San Francisco, who transmitted the same to its agent in Seattle, to be there delivered upon the payment of the first premium, and that there the insured paid the first premium and received the policies. That it was provided in said policies that "each premium is due and payable at the home office of the company, in the city of New York, but will be accepted elsewhere, when duly paid in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy. Any further notice required by any statute is thereby expressly waived." That from the date of said policies to the time of his death the insured resided in Seattle, and transacted business there, and was a man of general information and experience in business affairs. That he knew and was fully informed of the date when the second annual premiums on said policies became due, in the year 1893, and the amounts thereof, and that with full knowledge of the premises he did elect to make and did make

further payment thereon, and elected to allow, and allowed, the said policies to lapse and become void for want of payment of premiums, because he did not further desire to continue said insurance, and that from that time he knew that the insurance company had written off said policy from its books, and treated the same as lapsed. That until the time of his death the insured elected to make no further payment of premium or premiums. That by reason of said facts his administrator is estopped to assert that the policies are existing contracts. By stipulation, the several applications were made part of the pleadings. The defendant in error filed a demurrer to each of the affirmative defenses, for want of facts sufficient to constitute a defense, and filed a general demurrer to the answer as a whole. The demurrers were sustained. The plaintiff in error declining to amend its answer or plead further, judgment was rendered for the defendant in error for the sum of \$71,954.15, with interest and costs.

Messrs. Struve, Allen, Hughes, & McMicken, and Strudwick & Peters, with Mr. Edward Lyman Short, for plaintiff in error:

The judgment herein should be reversed because it is rendered, not upon the cause of action alleged in the complaint, but upon one not alleged and which differs essentially therefrom.

Saunders, Pl. & Ev. pp. 806, 807; Stephen, Pl. pp. 412, 413; Gould, Pl. pp. 423, 424; *Clark v. Sherman*, 5 Wash. 681, 32 Pac. 771; *Union P. R. Co. v. Wyler*, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877; *Chicago & N. E. R. Co. v. Sturgis*, 44 Mich. 538, 7 N. W. 213.

The wording of the statute is in harmony with its obvious intent to limit its application to the state of New York.

Wharton, Conf. L. 2d ed. § 752; 2 Parsons, Contr. 7th ed. 718; *Rosenplaenter v. Provident Sav. Life Assur. Soc.* 91 Fed. Rep. 728.

The failure and refusal of the insured to pay premiums defeated the policy.

Equitable Life Assur. Soc. v. Clements, 140 U. S. 226, sub nom. *Equitable Life Assur. Soc. v. Pettus*, 35 L. ed. 497, 11 Sup. Ct. Rep. 822; *Equitable Life Assur. Soc. v. Nixon*, 48 U. S. App. 482, 81 Fed. Rep. 796, 26 C. C. A. 620; *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51, 27 L. ed. 648, 2 Sup. Ct. Rep. 236; *Excell v. Daggs*, 108 U. S. 143, 27 L. ed. 682, 2 Sup. Ct. Rep. 408; *Gross v. United States Mortg. Co.* 108 U. S. 477, 27 L. ed. 795, 2 Sup. Ct. Rep. 940.

Defendant in error was not entitled to judgment because issue was joined upon the allegations of performance of the conditions precedent on the part of the insured entitling defendant in error to a recovery.

Loud v. Pomona Land & Water Co. 153 U. S. 564, 38 L. ed. 822, 14 Sup. Ct. Rep. 928; *Phillips & C. Constr. Co. v. Seymour*, 91 U. S. 646, 23 L. ed. 341; 4 Joyce, Ins. § 3674; *Perry v. Phoenix Assur. Co.* 8 Fed. Rep. 643; *Edgerly v. Farmers' Ins. Co.* 43 Iowa, 587; 49 L. R. A.

Thompson v. Knickerbocker L. Ins. Co. 104 U. S. 252, 26 L. ed. 765; *Hartford Life & Annuity Ins. Co. v. Unsell*, 144 U. S. 439, 36 L. ed. 496, 12 Sup. Ct. Rep. 671.

Had noncompliance with the statute of New York on the part of plaintiff in error been relied upon as an excuse for nonperformance of the conditions of the contract on the part of the deceased, then defendant in error was required to plead the statute of New York and noncompliance with its provisions on the part of the insurance company.

Oakley v. Morton, 11 N. Y. 25, 52 Am. Rep. 49; *Hudson v. McCartney*, 33 Wis. 331; *Lumbert v. Palmer*, 29 Iowa, 104; *Woolsey v. Williams*, 34 Iowa, 413; *Hand v. National Live-Stock Ins. Co.* 57 Minn. 519, 59 N. W. 538; *Evans v. Queen Ins. Co.* 5 Ind. App. 198, 31 N. E. 843; *Trainor v. Worman*, 34 Minn. 237, 25 N. W. 401; *Mosness v. German-American Ins. Co.* 50 Minn. 341, 52 N. W. 932; *East Texas F. Ins. Co. v. Brown*, 82 Tex. 631, 18 S. W. 713; *Austin v. Goodrich*, 49 N. Y. 266; *Churchill v. Onderdonk*, 59 N. Y. 134; *Chicago & N. E. R. Co. v. Sturgis*, 44 Mich. 538, 7 N. W. 213.

Messrs. Preston, Carr, & Gilman, McCutcheon & Gilham, and Stanton Warburton, for defendant in error:

The mere general denial of a general statement that plaintiff's husband in his lifetime fully complied with all the requirements and performed all the conditions of his contract with the defendant raises no issue, and according to the rules of pleading all the facts well pleaded in the complaint are admitted.

Selby v. Mutual L. Ins. Co. 67 Fed. Rep. 490; *Kahnweiler v. Phoenix Ins. Co.* 32 U. S. App. 230, 67 Fed. Rep. 483, 14 C. C. A. 485; *Philip Schneider Breuwing Co. v. American Ice Mach. Co.* 40 U. S. App. 382, 77 Fed. Rep. 138, 23 C. C. A. 89; *Preston v. Roberts*, 12 Bush, 570.

There can be no doubt from the reading of the application, prepared in its own interest by the company, that it was the company's intention to bring the contract under the laws of the state of New York.

Equitable Life Assur. Soc. v. Nixon, 48 U. S. App. 482, 81 Fed. Rep. 796, 26 C. C. A. 620; *Equitable Life Assur. Soc. v. Redding*, 48 U. S. App. 565, 83 Fed. Rep. 85, 27 C. C. A. 404; *Phinney v. Mutual L. Ins. Co.* 67 Fed. Rep. 493; *Coghlan v. South Carolina R. Co.* 142 U. S. 101, 35 L. ed. 951, 12 Sup. Ct. Rep. 150; *Hall v. Cordell*, 142 U. S. 116, 35 L. ed. 956, 12 Sup. Ct. Rep. 154; *Central Nat. Bank v. Hume*, 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. Rep. 41; *Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102; *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; *Penn. Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* 37 U. S. App. 692, 38 L. R. A. 33, 19 C. C. A. 286, 72 Fed. Rep. 413; *Hyde v. Goodnow*, 3 N. Y. 266; *Griffith v. New York L. Ins. Co.* 101 Cal. 627, 36 Pac. 113; *Goodwin v. Provident Sav. Life Assur. Asso.* 97 Iowa, 226, 32 L. R. A. 473, 66 N. W. 157; *Massachusetts Benefit Life*

Asso. v. Hale, 96 Ga. 802, 23 S. E. 849; *Mullen v. Mutual L. Ins. Co.* 89 Tex. 259, 34 S. W. 605; *Union Cent. L. Ins. Co. v. Pollard*, 94 Va. 146, 36 L. R. A. 271, 26 S. E. 422; *Richardson v. Rowland*, 40 Conn. 565; *Bennett v. Eastern Bldg. & L. Asso.* 177 Pa. 233, 34 L. R. A. 595, 35 Atl. 684; *London Assur. Co. v. Companhia De Moagens Do Barreiro*, 167 U. S. 149, 42 L. ed. 113, 17 Sup. Ct. Rep. 785; *Canton Ins. Office v. Woodside*, 61 U. S. App. 214, 90 Fed. Rep. 301, 33 C. C. A. 63; *Griesemer v. Mutual L. Ins. Co.* 10 Wash. 202, 38 Pac. 1034.

Having pleaded a contract of which the general laws of the state of New York were made a part by the terms of the contract, either party to the action was at liberty to claim upon demurrer, or at any other stage in the case, or by any other method, the benefit of any New York statute which was to his advantage.

Merchants' Exch. Bank v. McGraw, 15 U. S. App. 332, 59 Fed. Rep. 972, 8 C. C. A. 420; *Gormley v. Bunyan*, 138 U. S. 623, 34 L. ed. 1086, 11 Sup. Ct. Rep. 453; *Fourth Nat. Bank v. Brooklyn*, 120 U. S. 747, 30 L. ed. 825, 7 Sup. Ct. Rep. 757; *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242; *Lamar v. Micou*, 114 U. S. 218, 29 L. ed. 94, 5 Sup. Ct. Rep. 857; *Junction R. Co. v. Bank of Ashland*, 12 Wall. 226, 20 L. ed. 385; *L'Engle v. Gates*, 74 Fed. Rep. 513; *Baxter v. Brooklyn L. Ins. Co.* 119 N. Y. 450, 7 L. R. A. 293, 23 N. E. 1048; *De Free v. National L. Ins. Co.* 136 N. Y. 144, 32 N. E. 556; *Pennington v. Gibson*, 16 How. 65, 14 L. ed. 847.

The duration and validity of the policy are not dependent upon payment of the premium on the day named in the policy, but upon payment within thirty days after the statutory notice has been mailed; and the condition upon which the policy can be forfeited, or in any way impaired as a subsisting contract of insurance, is a failure on the part of the insured to pay the premium within thirty days after notice; and in the absence of proof on the part of the defendant as to the service of the notice, it is to be taken as true that the notice was not given and no default occurred; and therefore these contracts were valid and subsisting contracts at the time of the death of Dingley.

Equitable Life Assur. Soc. v. Nixon, 48 U. S. App. 482, 81 Fed. Rep. 796, 26 C. C. A. 620; *Equitable Life Assur. Soc. v. Redding*, 48 U. S. App. 565, 83 Fed. Rep. 85, 27 C. C. A. 404; *New York L. Ins. Co. v. Dingley*, 93 Fed. Rep. 153, 35 C. C. A. 245; *Osborne v. Home L. Ins. Co.* 123 Cal. 610, 56 Pac. 616; *Griffith v. New York L. Ins. Co.* 101 Cal. 627, 36 Pac. 113; *Mullen v. Mutual L. Ins. Co.* 89 Tex. 259, 34 S. W. 605; *Warner v. National L. Ins. Co.* 100 Mich. 157, 58 N. W. 667.

An agreement of rescission, like any other agreement, must be based upon a sufficient consideration.

This oral agreement, whereby it is claimed that the statutory notice was waived, can certainly be of no greater force or validity 49 L. R. A.

than the express written waiver contained in the policy itself.

Equitable Life Assur. Soc. v. Nixon, 48 U. S. App. 482, 81 Fed. Rep. 796, 26 C. C. A. 620; *Griffith v. New York L. Ins. Co.* 101 Cal. 627, 36 Pac. 113; *Osborne v. Home L. Ins. Co.* 123 Cal. 610, 56 Pac. 616; *Union Cent. L. Ins. Co. v. Pollard*, 94 Va. 146, 36 L. R. A. 271, 26 S. E. 421; *Fidelity Mut. Life Asso. v. Ficklin*, 74 Md. 172, 21 Atl. 680, on rehearing, 23 Atl. 167; *Herman v. Fidelity Mut. Life Asso.* 151 Pa. 17, 24 Atl. 1064; *Reilly v. Franklin Ins. Co.* 43 Wis. 449, 28 Am. Rep. 552; *Emery v. Piscataqua F. & M. Ins. Co.* 52 Me. 322; *New York L. Ins. Co. v. Smith* (Tex. Civ. App.) 41 S. W. 680; *Wall v. Equitable Life Assur. Soc.* 32 Fed. Rep. 273; *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, sub nom. *Equitable Life Assur. Soc. v. Pettus*, 35 L. ed. 497, 11 Sup. Ct. Rep. 822.

This alleged agreement of forfeiture is void as being beyond the power of the corporation to make.

Griffith v. New York L. Ins. Co. 101 Cal. 627, 36 Pac. 113; *Osborne v. Home L. Ins. Co.* 123 Cal. 610, 56 Pac. 616; *Fidelity Mut. Life Asso. v. Ficklin*, 74 Md. 172, 21 Atl. 680, on rehearing, 23 Atl. 167; *Rue v. Missouri P. R. Co.* 74 Tex. 476, 8 S. W. 533; *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 27 L. ed. 1020, 3 Sup. Ct. Rep. 363; *Kelfe v. Rundle*, 103 U. S. 222, sub nom. *Life Asso. of America v. Rundle*, 26 L. ed. 337; *Hebb v. Kittanning Ins. Co.* 138 Pa. 174, 20 Atl. 837; *Roice v. Brooklyn L. Ins. Co.* 16 Misc. 323, 38 N. Y. Supp. 621.

As this pretended agreement of forfeiture was in contravention of the statute of the state from the law of which the plaintiff in error derives its existence, it is without effect.

Hyde v. Goodnow, 3 N. Y. 266; *Andrews v. Pond*, 13 Pet. 65, 10 L. ed. 61; *Story*, Conf. L. 7th ed. § 224; 3 Am. & Eng. Enc. Law, 1st ed. pp. 555, 556, and cases cited.

The New York statute should not be limited to business done in the state of New York, and to policies issued and delivered in that state to citizens of that state.

Griesemer v. Mutual L. Ins. Co. 10 Wash. 202, 38 Pac. 1034; *Phinney v. Mutual L. Ins. Co.* 67 Fed. Rep. 493; *Hebb v. Kittanning Ins. Co.* 138 Pa. 174, 20 Atl. 837; *Fidelity Mut. Life Asso. v. Ficklin*, 74 Md. 172, 21 Atl. 680; *Manhattan L. Ins. Co. v. Fields* (Tex. Civ. App.) 26 S. W. 280.

Gilbert, Circuit Judge, delivered the opinion of the court:

It is contended that, after the demurrer to the affirmative matter alleged in the answer was sustained, there still remained in the answer a denial of one of the essential averments of the complaint,—a denial of the allegation that the insured had performed the conditions of the contracts. It was a denial in general terms that the insured or the plaintiff duly or at all performed all or any of the conditions in said policies on their part. Whether this general denial standing by itself, and unaided by the fu

ther averments of the answer, would be sufficient to put in issue the allegation of the complaint, it is unnecessary to decide. It was coupled with a specific averment of the particulars where the insurance company claimed that the insured had failed to perform the terms of the contracts. When the defendant in an action thus makes specific the items wherein he contends that the plaintiff has failed to perform, he must in his proof be held to the particular matter so pleaded, and will not be permitted to avail himself of a general denial for the purpose of proving that the plaintiff has failed in some other particular not named. *Philip Schneider Brewing Co. v. American Ice Mach. Co.* 40 U. S. App. 382, 77 Fed. Rep. 138, 143, 23 C. C. A. 89; *Kahnweiler v. Phenix Ins. Co.* 32 U. S. App. 230, 67 Fed. Rep. 483, 485, 14 C. C. A. 485; *Preston v. Roberts*, 12 Bush, 570, 582. The general allegation of performance on the part of the plaintiff, as the same was set forth in the complaint, is permitted under the Washington Code. "In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated, generally, that the party duly performed all the conditions on his part; and, if such allegation be controverted, the party pleading shall be bound to establish on the trial the facts showing such performance." 2 Ballinger's Anno. Codes & Statutes, § 4934. As the insurance company in its denial specified wherein it alleged that the insured had failed to perform, and those matters so alleged were found by the court insufficient to raise an issue, there remained nothing in the answer whereby the averment of the complaint was put in issue.

It is contended that the judgment of the circuit court should be reversed because it is rendered, not upon the cause of action alleged in the complaint, but upon one not alleged and which differs essentially therefrom. It is said that the cause of action set up in the complaint, as to each of the policies sued upon, is based strictly and solely upon the rights created by the execution and delivery of the policies, coupled with the averment that the insured had performed all the conditions thereof; but that the judgment is rendered, not upon the facts so pleaded, but upon a liability created by a statute of the state of New York,—a statute which was not alluded to in the pleadings, and not declared upon in the complaint, as the source of the defendant's liability, and that by virtue of that statute the policies were held to be subsisting contracts, in the face of the admission in the pleadings that the insured never did perform the conditions of the contracts of insurance, but, on the contrary, made default in the payment of premiums which were essential conditions to their subsistence, and for which default the policies, according to their terms, became lapsed. It is argued that in so giving effect to the statute of New York, and so rendering judgment, the court made an unwarranted departure from the causes of action plead-

ed in the complaint. To sustain this contention the plaintiff in error cites *Union P. R. Co. v. Wyler*, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877, a case in which Wyler commenced an action in the state court of Missouri to recover for personal injury suffered while working for the railway company in Kansas, alleging that the injury occurred through the company's negligence in employing a fellow servant who was known to be incompetent. A Kansas statute in force at that time made every railway company liable for injury done an employee in consequence of the negligence of such fellow servant. The case was removed to the circuit court of the United States for the western district of Missouri, and there an amended petition was filed changing the cause of action, alleging the negligence of the plaintiff's fellow servant, and charging that the railway company was liable therefor by virtue of the provisions of the Kansas statute. To the amended petition the railway company pleaded the statute of limitations of Missouri. The court decided that the amended petition set up a different cause of action from that alleged in the original petition, and that the commencement of the new action was to be regarded as dating from the filing of the amended petition. The points which distinguish that case from the case before the court are apparent. The present case was begun in a court of the United States,—a court which takes judicial notice of all the statutes of the several states of the Union. *Gormley v. Bunyan*, 138 U. S. 623, 34 L. ed. 1086, 11 Sup. Ct. Rep. 453; *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242; *Merchants' Exch. Bank v. McGraw*, 15 U. S. App. 332, 59 Fed. Rep. 972, 8 C. C. A. 420. The complaint sets forth causes of action based upon contracts of insurance. It alleges the execution of the contracts, the delivery of the policies to the insured, and the performance by the insured of the conditions thereof. The insurance company made no denial of these allegations except to deny in general terms that the insured had performed the conditions of the contracts. The insurance company then proceeded to set up in its answer its affirmative defenses, one of which was the failure of the insured to pay subsequent premiums which fell due. It alleged that thereby, under the terms of the policies, the contracts of insurance lapsed and became forfeited. To these defenses the defendant in error demurred. The question for the court to determine was whether or not facts were stated which were sufficient to constitute a defense. To the facts so alleged in the answer the court was required to apply the law, which determined the question of their sufficiency, and it was immaterial whether or not the statute of New York was pleaded by either party, since, as we have seen, the court was bound to take judicial notice of it. The statute (N. Y. Laws 1892, chap. 600, § 92) provided as follows: "No Forfeiture of Policy without Notice. No life insurance corporation doing business in this state shall declare forfeited or lapsed

any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term-insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of nonpayment, when due, of any premium, interest, or instalment or any portion thereof, required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, instalment, or portion thereof due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known postoffice address, postage paid by the corporation, or by an officer thereof, or person appointed by it to collect such premium, at least fifteen, and not more than forty-five, days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, instalment, or portion thereof, then due, shall be paid to the corporation, or to a duly appointed agent or person authorized to collect such premium, by or before the day it falls due, the policy and all payments thereon will become forfeited and void, except as to the right to a surrender value, or paid-up policy, as in this chapter provided. If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of anyone authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given."

It will be seen from the terms of the statute that the insurance company could declare the contracts of insurance forfeited for nonpayment of premiums only by giving the notice therein specified. This was an essential ingredient of the defense which it attempted to make. There was no allegation in the answer that the notice had been given. Measured by the statute, the facts pleaded were insufficient to constitute a defense, and the court so decided. The demurrer being sustained, there was no answer to the complaint. The case stood with all the allegations of the complaint admitted to be true, and upon such admission the court properly entered judgment. No question of departure is presented. The complaint was not amended. No change was made in the cause of action. The judgment was rendered upon the facts, which were set forth in the complaint. The defendant in error declared upon a liability created by contract, and alleged performance of the terms of the contract. Upon that declaration, uncontro-

verted, as it was, by the insurance company, the judgment was rendered. He did not allege one cause of action, and sustain his complaint by evidence of a different cause of action. The case was decided upon the pleadings,—upon the untraversed allegations of the complaint. It was no answer to the case made in the complaint to say that the insured had failed to pay premiums, and that thereby his policies were forfeited, for the law attached no such result to that default.

The plaintiff in error contends that the contracts were made and entered into in the state of Washington, and for that reason are not subject to the provisions of the New York statute. It is true that the insured resided in the state of Washington, and there made application for his insurance, but the applications recited that they were made "subject to the charter of the company and the laws of the state of New York." The applications were sent to the office of the company at New York, and there were approved, and there the policies were made out and executed. The policies were then sent to the company's agent at Seattle, where they were delivered to the insured upon the payment of the premiums. Each policy provides in terms, as well as do the applications, that the application is a part of the policy and of the contract of insurance. Each policy also recites that it is payable at the city of New York upon acceptance there of satisfactory proofs of death, that the annual premiums are to be paid there, and that the policy is executed there. The company inserted in the policies a waiver in terms of the service of any notice of the due date of premiums required by statute. That reference must have been to the New York statute, for there was no Washington statute applicable. It is clear that the state of New York was the place of performance of the contracts, and that by the laws of that state the contracts are governed. *Equitable Life Assur. Soc. v. Nixon*, 48 U. S. App. 482, 81 Fed. Rep. 796, 26 C. C. A. 620; *Equitable Life Assur. Soc. v. Redding*, 48 U. S. App. 565, 83 Fed. Rep. 85, 27 C. C. A. 404; *Coghlan v. South Carolina R. Co.* 142 U. S. 101, 35 L. ed. 591, 12 Sup. Ct. Rep. 150; *Hall v. Cordell*, 142 U. S. 116, 35 L. ed. 956, 12 Sup. Ct. Rep. 164; *London Assur. Co. v. Companhia De Moagens Do Barreiro*, 167 U. S. 149, 42 L. ed. 113, 17 Sup. Ct. Rep. 785.

It is contended that the court erred in sustaining the demurrer to the affirmative matter of the answer, which alleged that the insured informed the insurance company that he recognized that the contracts of insurance were lapsed, and that he refused to continue his policies, and that it was then mutually agreed between the contracting parties that the policies were lapsed and terminated. It is not asserted that the contracts of insurance were declared forfeited by an instrument under seal, or that any consideration passed to the insured for the cancellation thereof. The matters so pleaded evidently rested in parol. Such oral statements could be of no more binding ef-

fect than the express written waiver which was contained in the policies. We have already decided that the parties to an insurance contract cannot be permitted by parol agreement to annul the express provisions of the statute (*Equitable Life Assur. Soc. v. Redding*, 48 U. S. App. 565, 83 Fed. Rep. 85, 27 C. C. A. 404; *Equitable Life Assur. Soc. v. Nixon*, 48 U. S. App. 482, 81 Fed. Rep. 796, 26 C. C. A. 620); and further consideration only confirms our conviction of the correctness of that view. In the *Nixon Case* it was said: "The statute of New York prescribes the condition upon which a policy may be forfeited for the nonpayment of a premium. The statute is mandatory, and controls the contract. Its provisions are not subject to be set aside or waived either by the company, or by the insured, or by both together."

Nor can any ground of equitable estoppel arise from the default of the assured in the payment of premiums or any of the facts set forth in the answer. It is not shown that the relation of either party to the contracts was changed, or that the insurance company did, or refrained from doing, any act to its injury in reliance upon such parol statement of the insured.

It is contended, further, that the New York statute is limited in its application to

business done in the state of New York, and applies only to policies issued and delivered in that state to the citizens thereof. The language of the statute is broader than this. It reads: "No life insurance company doing business in the state of New York shall have power," etc. The company was a New York company, doing business in that state, and comes within the precise words of the statute. If it had been the intention to restrict the benefits and protection of the statute to the citizens and residents of the state of New York, it is reasonable to presume that that intention would have been expressed. It must have been known to the lawmakers that certain of the life insurance companies of New York were doing an extensive insurance business with residents of other states. The language of the statute extends to all business done by such companies. Its very terms preclude a narrow construction. *Hebb v. Kittanning Ins. Co.* 138 Pa. 174, 20 Atl. 837; *New Era Life Assn. v. Musser*, 120 Pa. 384, 14 Atl. 155; *Fidelity Mut. Life Assn. v. Ficklin*, 74 Md. 172, 21 Atl. 680, 23 Atl. 197; *Manhattan L. Ins. Co. v. Fields* (Tex. Civ. App.) 26 S. W. 280.

We find no error for which the judgment should be reversed. It is accordingly affirmed.

CALIFORNIA SUPREME COURT.

Re Estate of Olive Jane WICKES, Deceased.

(.....Cal.....)

Placing her husband in a home for incurables, with his expenses for life and for burial paid, does not entitle a woman to acquire a separate domicile which will give jurisdiction to a probate court, notwithstanding a statutory provision that in actions for divorce the presumption of law that the domicile of the husband is that of the wife does not apply.

(March 31, 1900.)

A PPEAL by proponent from an order of the Superior Court for Alameda County refusing to admit to probate the will of Olive Jane Wickes, deceased. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Z. N. Goldsby, P. F. Dunne,** and **B. H. Griffins** for appellant.

Messrs. **Otto Tum Suden** and **George D. Squires** for respondent.

Temple, J., delivered the opinion of the court:

The will of Olive Jane Wickes was refused probate by the superior court of Alameda county on the ground that the testatrix at

NOTE.—For domicile of man under guardianship, see *Talbot v. Chamberlain* (Mass.) 3 L. R. A. 234.

As to domicile of wife for purpose of divorce suit, see *Loker v. Gerald* (Mass.) 16 L. R. A. 497, and *note*.

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the time of her death did not reside in that county, and this appeal is from that order. The will was contested by the surviving husband of the testatrix on many grounds. He also contended that the testatrix at the time of her death resided in San Francisco. This last contention was sustained by the court. At the trial some of the facts were agreed upon as follows: "That in October, 1894, and for many years prior thereto, Olive Jane Wickes and Alfred M. Wickes, her husband, lived and resided in the city of San Francisco, California. That about that time the husband of deceased, Olive Jane Wickes, being afflicted with an incurable disease (paralysis), bedridden and unable to assist himself in any manner whatever, was by the said Olive Jane Wickes, and with the consent of Alfred M. Wickes, removed from the then home of the parties, and placed in an institution for incurables, known as the 'King's Daughters' Home for Incurables,' which is located in said city of San Francisco. That his entrance fee, entitling him to remain for life, was paid, and he did so remain continuously until he died, on December 24, 1898. The said Alfred M. Wickes never did reside in Alameda county. The said Olive Jane Wickes was never admitted as an inmate or otherwise of said home. That at the time said Alfred M. Wickes was placed in said home he required personal care and attention, and that by reason of ill health Olive Jane Wickes was unable to render the same to him personally. That provision was

made for him at said home for life, and for his burial, by the payment of a stipulated sum of money, and a contract entered into accordingly. That after October, 1894, said Alfred M. Wickes never had, or claimed to have, any place of residence, save as an inmate of said home, and that from and after October, 1894, Alfred M. Wickes and Olive Jane Wickes never lived together as husband and wife, but lived separate and apart, by reason of the foregoing circumstances, but not by reason of any agreement of separation, or by reason of any decree of court. That about April, 1895, Olive Jane Wickes sold her then home in San Francisco, and moved to the city of Oakland, said Alameda county, and thereupon purchased a lot in said city, erected a house thereon, and resided therein until November, 1897, when she sold the same, and thereafter lived in said city in rented houses until about July, 1898, when, after stopping in several places in said city of Oakland, she went to Fabiola Hospital, in said city, where she died on November 5, 1898." Additional testimony was given by the contestant, some of which tended to show that, at one time during her stay in Oakland, Mrs. Wickes contemplated returning to San Francisco, and even applied for admission to the same hospital in which her husband was being treated. The court found that Mrs. Wickes was not a resident or domiciled in Alameda county at the time of her death, but that her residence and domicile was in the city and county of San Francisco.

There being no controversy as to any material fact, the question is purely a matter of law. Upon this subject we find in Dicey's work on Domicil: "Rule 9. The domicil of every dependent person is the same as, and changes, if at all, with the domicil of the person on whom he is, as regards his domicil, dependent." "Subrule 2. The domicil of a married woman is, during coverture, the same as, and changes with, her husband's." Under this subrule it is said: "The fact that a wife actually lives apart from her husband (*Warrender v. Warrender*, 2 Clark & F. 488), that they have separated by agreement (*Dolphin v. Robins*, 7 H. L. Cas. 390), that the husband has been guilty of misconduct such as would furnish defense to a suit by him for restitution of conjugal rights (*Yelverton v. Yelverton*, 1 Swabey & T. 574), does not enable the wife to acquire a separate domicil." Rule 10 is, "A domicil cannot be acquired by a dependent person through his own act." Under this rule an illustration is given of a German woman married to an Englishman, who, after living for a time with her husband in England, returns to Germany, to remain for the balance of her life. She may have her home in Germany, but her domicil will remain in England, if her husband continues to reside there. The above rules have application only to the case where husband and wife have separate actual residences. Of course, they can be rebutted only by proof that the case is within some exception to the rule. In our Code it is said: "In actions for di-

voice the presumption of law that the domicil of the husband is the domicil of the wife does not apply." Civil Code, § 129. Counsel say this rule is only a presumption of evidence, and since it is not included in the presumptions mentioned in § 1962, Code Civ. Proc., it may be rebutted by evidence. But the law that the domicil, or, more accurately, the forum, of the wife is where the husband is domiciled, although she is actually living in a different place, is not a rule of evidence. It is a law to which there are some exceptions, and the presumption as to a particular case is that it is controlled by the general rule, unless it is shown that it is within some exception. There are certain well-ascertained exceptions to the rule, but, plainly, this case is not within any of them. The common law is the rule of decision in this state, where no positive law, state or national, obtains. It is certain that in England, at least prior to the present century, there was no exception whatever to the rule of law that the domicil of the husband is the legal domicil of the wife, and that she can under no circumstances, during coverture, acquire a legal domicil for herself.

The matter was elaborately considered in the House of Lords in 1835, in the case of *Warrender v. Warrender*, 2 Clark & F. 488. Warrender was a Scotchman, who, holding certain high offices actually lived for a portion of the time in England. He married an Englishwoman in England. They went to his estates in Scotland for a short time, and then returned to England, where they resided some two years, when a formal separation was agreed to. They agreed to live apart from each other, and the husband, in writing, agreed that the wife could go and reside wherever she pleased. In pursuance of this she lived in France, and some fourteen years afterwards he sued for a divorce in Scotland. The service of process upon the wife was such as could only be made upon a person whose legal domicil was in Scotland. Whether that was the legal domicil of Lady Warrender was the principal point involved on the appeal. It was held that the plaintiff was still domiciled in Scotland, and that his domicil was the legal domicil of the wife. Speaking of the fact that the wife's actual residence was in France, with the consent of her husband, the lord chancellor said: "For actual residence—residence in point of fact—signifies nothing in the case of a married woman, and shall not, in ordinary circumstances, be set up against the presumption of law that she resides with her husband. . . . Nay, had the parties lived in different places, from a mutual understanding which prevailed between them, the case would still be the same. The law could take no notice of the fact, but must proceed upon its own conclusive presumption, and hold her domiciled where she ought to be, and where in all ordinary circumstances she would be,—with her husband." And again: "In other words, no fact and no contract, no matter *in pais*, and no deed executed, can rebut the overruling presumption of the law that the married persons live

together, or, which is the same thing, that they have one residence,—one domicile." These citations show both what the common law of England upon the subject was, and the nature of the presumption, if it can be so called. The rule is absolute. The case of *Dolphin v. Robins*, 7 H. L. Cas. 390, is interesting from the fact that Lord Cranworth, in rendering the opinion of the court, mildly protested against the universality of the rule which denied the right of the wife to establish a domicile different from that of her husband in any case. In that case an Englishwoman having been divorced, as she supposed, married a Frenchman, and lived with him many years in France, where she died, having made a will, which was valid if she was then lawfully domiciled in France. There had been a legal separation between the parties before the divorce. The fact that the testatrix was a married woman did not affect the question, except by determining her domicile. The court held the divorce void and, although there was also the agreement to live in separation, that she could not acquire another domicile for testamentary purposes. A still later case, in 1876, was decided by Sir R. J. Phillimore. *Le Sueur v. Le Sueur*, L. R. 1 Prob. Div. 139. The action was for a divorce. The parties were married in the Island of Jersey, where the husband deserted the wife, and then went to America, where he continued to reside. The wife removed to England, where she commenced the action for divorce. The judge said the husband deserted the wife, and it might well be claimed that this fact entitled her to acquire a domicile for herself, but he says: "I am not aware that any judicial decision has as yet gone to this length, but there is much to be said in favor of the proposition, both on principle and analogy;" and he concludes the decision with the statement that he thinks, in case of desertion, the wife can acquire a domicile which would enable her to bring the action, and says: "In coming to that conclusion, I am aware that I am going a step further than judicial decisions have as yet gone." The court refused to take jurisdiction on other grounds, and the remarks were *obiter*, but are high authority for the proposition that the appellant has no support in the rules of the common law.

In the United States the cases are at variance as to whether, for the purposes of maintaining an action for a divorce, a wife can acquire a domicile by her own act. In the majority of the states the rule is as declared by our own statute. But this rule only allows that she may acquire a domicile for the purposes of the divorce (*Jacob, Domicil*, § 226), and that is really the effect of our statute. In actions for divorce the presumption that the domicile of the husband is the domicile of the wife does not prevail. Of course, for all other purposes her forum is where her husband has his domicile. This consideration would be sufficient to dispose of this case; for, although there are other exceptions to the rule which must be recognized in our state, this case is not within any of 49 L. R. A.

them. It may be admitted, not only as claimed, that a wife may have a different forum whenever it is necessary for her protection that she should have, but that she may by her own act acquire a domicile for herself whenever our statutory provisions justify a separate residence for her. I find no authority in the decisions for this last proposition, save one from New Hampshire, to be presently noticed; but, admitting such to be the rule, this case is not within it. We must not, in this connection, confound the right to a separate home or actual residence with the question of domicile. At common law the right of the wife to a separate home was often recognized and secured, but that fact did not, nor did even a judicial separation, enable her to acquire another and different legal domicile. To a large extent, it is a question as to the forum in which the wife shall assert her legal rights. Counsel cites the case of *Cheever v. Wilson*, 9 Wall. 108, 19 L. ed. 604, where Justice Swayne says in regard to the domicile acquired by a wife for the purposes of divorce: "The rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so." Supposing this rule to apply to a domicile for other purposes than divorce, this case is still not within it.

The stipulation recites that for many years prior to October, 1894, the parties had resided in San Francisco, where the husband, who is, or was, contestant here, being "afflicted with an incurable disease (paralysis), bedridden, and unable to assist himself in any manner whatever," was by his wife, who was apparently possessed of property, removed to a home for incurables, with his consent. "Provision was made for him at said home for life, and for his burial, by payment of a stipulated sum of money, and a contract entered into accordingly." Having done this, it is contended, she was at liberty to leave him and seek another domicile for herself. I think not. It was her duty to stay with him and minister to him in his last sickness. The fact that he required nursing, and that he was placed in a hospital that he might receive proper care, did not release her from her duty to comfort him, if possible, in this trying period. Her duty as a wife was to stay with him to the last, and to give him Christian burial. She should not have contracted for his care during life for a stated sum, making it for the interest of those in charge to do as little as possible for him, and that he should die as soon as possible. She should have been at hand to furnish such relief as his miserable condition permitted, from day to day, so far as her means would justify. And it was not wisely to contract for his burial in her absence in that mode. Never was it more imperatively her duty to make his domicile her domicile than at that time. Perhaps, because of his helplessness, she could have changed the family domicile, but she was not entitled to a separate domicile. It does not appear that Mrs. Wickes had any necessity for a different forum or domicile. So far as it appears, she had no litigation of any kind.

The only case cited by the appellant, the language of which would seem to support his contention, is *Shute v. Sargent*, 67 N. H. 305, 36 Atl. 282. The decision is based upon the statutes of New Hampshire, and for that reason is not authority here, where the common law of England is made the rule of decision. But some of our statutes resemble some in New Hampshire. The court assumed that the common-law rule of domicile was founded upon the proposition that during coverture the personality of the wife is merged in that of the husband, and concludes that now, when she is in all respects before the law on an equality with her husband, and may vote, there is no good reason why she should not be able to acquire a separate domicile for any purpose. The court does not say under all circumstances. I am ready to concede that, so far as our statutes authorize the wife to live apart from her husband, the rule may be relaxed. These are exceptions to the law, but in other cases the law still prevails. The subjection of the wife to the husband was not the only reason for the rule. Parties marrying contract to live together. The husband obligates himself to furnish a proper home for his wife, and to maintain her there in a degree of comfort authorized by his circumstances, and they mutually agree to live there together. It is a matter of great public concern that this should be so. In this association there can be no majority vote, and the law leaves the ultimate decision to the husband. For the protection of the wife, she is allowed a different forum, when necessary in legal proceedings against her husband. In reality, this is not giving her a new domicile, but she is allowed to bring these suits where she actually resides, though that be not her legal domicile. I think the case is not very well reasoned. The general question in England and in this country has importance in regard to the settlement of paupers, and also as to the residence of voters and for testamentary and other purposes. There are dependent persons other than married women who may not select their own domicile,—minors, for instance, and all under guardianship. The rule has practical bearings on many things, and should not be lightly changed, and there is no sort of temptation to disregard the law here.

The order is affirmed.

We concur: **McFarland, J.; Henshaw, J.**

Arthur L. BEGBIE, *Respt.*,
v.

Alice E. BEGBIE, *Appt.*

(.....Cal.....)

The abatement of a divorce proceeding by the death of appellant pending an appeal terminates the power of the court over costs,

NOTE.—As to the abatement of an appeal by death, see also *O'Sullivan v. People* (Ill.) 20 L. R. A. 148.
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under a statute making costs dependent upon a judicial determination of the action.

(March 20, 1900.)

APPEAL by defendant from an order of the Superior Court for the City and County of San Francisco denying a motion for a new trial of a divorce proceeding in which plaintiff recovered judgment. *Dismissed.*

The facts are stated in the opinion.

Mr. C. K. Bonestell for respondent.

Mr. George A. Rankin for appellant.

Harrison, J., delivered the opinion of the court:

A judgment of divorce was entered in the superior court in favor of the plaintiff and against the defendant June 25, 1897. No judgment was rendered for costs, nor is any question of property involved in the action. An order denying the defendant's motion for a new trial was made and entered November 9, 1897. January 4, 1898, the defendant appealed from this judgment and order. The appeal from the judgment was taken more than six months after its entry, and for that reason the judgment is not open to review. After the transcript on appeal had been filed and before the appeal was heard in this court, the defendant died. The action being solely for the purpose of determining her personal status, it abated upon her death, and the court is deprived of all authority to review the proceedings of the superior court. We held in *Kirschner v. Dietrich*, 110 Cal. 502, 42 Pac. 1064, that in an action for divorce the death of the wife subsequent to the entry of judgment deprived the superior court of all power to review its action for the purpose of determining her right to a divorce, and, upon the same principles, her death, pending an appeal from the judgment, takes from the appellate court the right to review the action of the superior court. See also *Barney v. Barney*, 14 Iowa, 189; *Downer v. Howard*, 44 Wis. 82; *Maskall v. Maskall*, 3 Sneed, 208. The appellant does not controvert this proposition, so far as the action affects her personal status as a wife, but insists that the personal representatives of the wife have the right to have the appeal heard, in order that, if it shall be determined that the superior court erred, they may recover from the respondent the costs incurred by them in taking the appeal. The right to recover costs exists solely by virtue of statutory provision (see *Downing v. Marshall*, 37 N. Y. 380, where a history of the subject is given); and their recovery is governed by the statute in force at the time the right to have them taxed accrued (*Onondaga Supers. v. Briggs*, 3 Denio, 174; *Jackett v. Judd*, 18 How. Pr. 385). Under §§ 1021 *et seq.*, Code Civ. Proc., costs are not taxable or recoverable until a judicial determination is had in the action in which they have been incurred. There can be no judgment for costs except as a part of the judgment upon the issues in the action. They are but incident to the

judgment, and, if the court loses power to render a judgment between the parties upon the issues before it, it is equally powerless to render a judgment for the costs incurred therein. When a suit abates by the death of a party, there can be no judgment for costs in favor of the survivor. *Ryder v. Robinson*, 2 Me. 127; *Cutts v. Haskins*, 11 Mass. 56. The rule is the same when the action abates after judgment and pending an appeal. Upon the abatement each party must bear his own costs incurred prior thereto. *Harvey v. Harvey*, 87 Ill. 54. In *Travis v. Waters*, 12 Johns. 500, it was said to be "an established rule in equity that, where there has been no decree for costs, and the suit abates by the death of the party, the right to costs up to the time is extinguished un-

less the costs are payable out of a particular fund, or are connected with a duty towards the party claiming costs. In *Johnson v. Thomas*, 2 Paige, 383, the chancellor said: "If the whole grounds of the suit have been removed by the death of the complainant, it would be against the settled practice of the court to hear an argument of the original merits of the cause merely for the purpose of determining a question of costs between the parties." Upon the foregoing authorities we must hold that the abatement of the suit has deprived the court of all authority to hear the appeal.

The appeal is dismissed.

We concur: **Garçotte, J.; Van Dyke, J.**

CONNECTICUT SUPREME COURT OF ERRORS.

Emily J. ALLEN, *Appt.*,
v.

Moses D. ALLEN.

George H. BARBER, *Appt.*,
v.

Belle Bemis BARBER.

(.....Conn.....)

Evidence of the intemperate habits or condition of defendant subsequent to the commencement of the action is admissible for the defense in an action for divorce on the ground of habitual intemperance, since a divorce concerns the state as well as the parties, and the condition justifying it must be found to exist at the very time when the divorce is granted.

(May 22, 1900.)

A PPEAL by plaintiff from an order of the Superior Court for Hartford County admitting in evidence habits of defendant subsequent to the beginning of the action in a proceeding to obtain a divorce on the ground of habitual intemperance. *Affirmed.*

Statement by **Andrews, Ch. J.**:

These cases present but one question. The complaint in each case claims a divorce on the ground of habitual intemperance. Upon the trial, in each case the superior court admitted evidence respecting habits and practices of the defendant as to intemperance subsequent to the beginning of the action and up to the time of the trial; and in each case dismissed the complaint. The plaintiff in each case has appealed. The error assigned in the first case was that the court erred in admitting such evidence; "that the plaintiff's right to a divorce depends upon the

facts as they existed prior to the time of the commencement of the action."

In the second case the error is assigned in this way: "Because the superior court erred in admitting at the trial of said cause evidence as to the defendant's habits in respect to the use of intoxicating liquors, and her condition from such use since the date of the complaint in said case."

Mr. Charles A. Safford, for appellant Allen:

The facts found at and prior to the commencement of this action constitute habitual intemperance within the meaning of the statute.

The purpose of the act was not primarily to promote temperance or reform the offender, but to preserve the peace, comfort, safety, and happiness of the non-offending party.

Dennis v. Dennis, 68 Conn. 192, 34 L. R. A. 449, 36 Atl. 34; *Tirrell v. Tirrell*, 72 Conn. 567, 47 L. R. A. 750, 45 Atl. 153.

Intemperance so long continued that a fixed habit renders the party incapable of performing the duties of the marriage relation is sufficient ground.

Morehouse v. Morehouse, 70 Conn. 427, 39 Atl. 516; *Dennis v. Dennis*, 68 Conn. 186, 34 L. R. A. 449, 36 Atl. 34.

The habit need not render the party at all times incapable of attending to business. It may be that the drunkard is able to attend to business during the usual hours, and yet be drunk at home so as to become an habitual drunkard.

Nelson, Div. & Sep. § 351.

The reason why the law makes habitual intemperance a ground for a divorce is not alone because it disqualifies the party from attending to business, but in part, if not

NOTE.—The above case makes a clear distinction between divorce cases and other cases in respect to the right to consider facts arising during the pendency of the action as bearing upon the existence of a right of action. The fact of public interest in a divorce case, making the state in some sense a party to the proceeding, seems clearly to justify the declaration that the right to a divorce must exist at the very time when the decree is to be rendered, and not merely at the commencement of the suit.

mainly, because it renders him unfit for the duties of the marital relation.

Richards v. Richards, 19 Ill. App. 465.

Any defense arising after the commencement of the action requires to be pleaded in divorce suits as in other cases.

Steele v. Steele, 35 Conn. 54; *Fuller v. Fuller*, 41 N. J. Eq. 198, 3 Atl. 409; *Strong v. Strong*, 3 Robt. 669.

The judgment must be based upon the pleadings.

Powers v. Mulvey, 51 Conn. 432; *Atwood v. Welton*, 57 Conn. 523, 18 Atl. 322.

The facts upon which the court found the judgment, not having been averred, could not be made a basis for a judgment.

Atwood v. Welton, 57 Conn. 514, 18 Atl. 322; *Daly v. New Haven*, 69 Conn. 646, 38 Atl. 397; *Atchison v. Atchison*, 67 Conn. 40, 34 Atl. 761; *Taylor v. Keeler*, 50 Conn. 346.

Facts found that are not within the issue are to be treated as a nullity.

Gaylord v. Couch, 5 Day, 230; *Sanford v. Thorp*, 45 Conn. 241.

The decree in divorce proceedings should be based upon the pleadings, and not upon issues erroneously raised by the pleadings.

Nelson, Div. & Sep. § 748; Haltenhof v. Haltenhof, 25 Ill. App. 236; *Ward v. Ward*, 20 Wis. 253; *Devoe v. Devoe*, 51 Cal. 543.

In desertion as a ground for divorce, the offer to return must be made within the statutory period.

But after the lapse of the statutory period the injured party has a cause of divorce.

Nelson, Div. & Sep. § 75; Benkert v. Benkert, 32 Cal. 467; *Cargill v. Cargill*, 1 Swabey & T. 235; *Mino v. Mino*, 6 Scotch Sess. Cas. 4th Ser. 353.

Mr. Arthur Perkins for appellant Barber.

Messrs. Bill & Tuttle, for appellee Allen:

The question of habitual intemperance, being one of fact, is not subject to review by this court unless the trier has violated some rule of law in arriving at his conclusions.

Styles v. Tyler, 64 Conn. 461, 30 Atl. 165; *O'Neil v. East Windsor*, 63 Conn. 154, 27 Atl. 237.

Proof of a confirmed habit of drunkenness prior to the period defined in the complaint is admissible as evidence bearing upon the issue.

Reynolds v. Reynolds, 44 Minn. 132, 46 N. W. 236; *Mack v. Handy*, 39 La. Ann. 491, 2 So. 181; *Williams v. Goss*, 43 La. Ann. 868, 9 So. 750; *Walton v. Walton*, 34 Kan. 195, 8 Pac. 110; *Burns v. Burns*, 13 Fla. 369; *Magahay v. Magahay*, 35 Mich. 210; *Richards v. Richards*, 19 Ill. App. 465; *Gourlay v. Gourlay*, 16 R. I. 705, 19 Atl. 142; *Blaney v. Blaney*, 126 Mass. 205; *McBee v. McBee*, 22 Or. 329, 29 Pac. 887.

Evidence of intemperance since the filing of a suit for divorce on that ground is admissible, not to show a substantive cause but a continuing habit.

Mack v. Handy, 39 La. Ann. 491, 2 So. 181; *Thayer v. Thayer*, 101 Mass. 110, 100 Am. Dec. 110.

Mr. Jacob P. Goodhart for appellee Barber.

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Andrews, Ch. J., delivered the opinion of the court:

Marriage is that ceremony or process by which the relationship of husband and wife is constituted. The consent of the parties is everywhere deemed an essential condition to the forming of this relation. To this extent it is a contract. But when the relation is constituted then all its incidents, as well as the rights and duties of the parties resulting from the relation, are absolutely fixed by law. Hence, after a marriage is entered into the relation becomes a status, and is no longer one resting merely on contract. It is the relation fixed by law in which the married parties stand to each other, towards all other persons, and to the state. And it is a relation from which the persons cannot separate themselves by their own agreement, or by their own misconduct. This status can only be dissolved between living parties by the assent of the state which is ordinarily indicated by the judgment of a competent court. When an attempt is made through the courts to undo a marriage the state becomes in a sense a party to the proceedings, not necessarily to oppose, but to make sure that the attempt will not prevail without sufficient and lawful cause shown by the real facts of the case, nor unless those conditions are found to exist at the time the decree is made upon which the state permits a divorce to be granted. The state has an interest in the maintenance of the marriage ties which neither the collusion nor the negligence of the parties can impair: *Dennis v. Dennis*, 68 Conn. 186, 34 L. R. A. 449, 36 Atl. 34; *Gould v. Gould*, 2 Aik. (Vt.) 180; *Opinion of the Justices*, 16 Me. 480; *Whittington v. Whittington*, 19 N. C. (2 Dev. & B. L.) 64; *Hall v. Hall*, 3 Swabey & T. 349, Lord Penzance.

There can be no such thing as a "legal right" to a divorce vested in any married person. "The state does not favor divorces and only permits a divorce to be granted when those conditions are found to exist in respect to one or the other of the married parties which seem to the legislature to make it probable that the interests of society will be better served, and that parties will be happier, and so the better citizens, separate than if compelled to remain together. The state allows divorces, not as a punishment to the offending party, nor as a favor to the innocent party, but because the state believes its own prosperity will thereby be promoted." Obviously this condition must be found to exist at the very time when the divorce is granted, otherwise the divorce should be refused. And to this end "all courts possessing divorce jurisdiction are vested with a discretion. A wise discretion should always be exercised in administering the law of divorce, lest its spirit be disobeyed by a too narrow adherence to its letter." *Dennis v. Dennis*, 68 Conn. 186, 34 L. R. A. 449, 36 Atl. 34.

There is no error in either of the cases.

In this opinion the other Judges concurred.

Phebe E. BROWN'S APPEAL from Probate.

Ester MACDONALD'S APPEAL from Probate.

(72 Conn. 148.)

The right to dower, which a former wife "divorced" without alimony, where she is the innocent party," is given by Gen. Stat. § 618, does not exist in favor of any former wife of a man who had another lawful wife at the time of his death, since that section gives the right first to a woman "living with her husband at the time of his death," and the provision for the divorced wife, when construed in connection with § 2803, permitting both parties to marry again, and § 630, providing for the shares of husband and wife in the distribution of intestate estates, shows the intent to give dower to the lawful wife surviving, if any, and to no one else.

(August 1, 1899.)

RESERVATION by the Superior Court for New London County for the opinion of the Supreme Court of Errors of questions arising upon appeals by claimants from decrees of the Probate Court denying their rights to dower out of the estate of Lucius D. Brown, deceased. *Probate decrees affirmed.*

Statement by **Hammersley, J.:**

These cases were argued as one. Each appellant claimed dower upon the following state of facts: Lucius D. Brown, the decedent, had his domicile in North Stonington, New London county. He died April 9, 1897, possessed of a large amount of land situated in said town and other towns in this state. He was lawfully married to the appellant Phebe E. Brown, November 13, 1858, and was divorced from her, she being the innocent party, on January 20, 1863. On September 2, 1864, said Phebe Brown married one W. B. Brown, with whom she is now living, and by whom she has six children. On April 16, 1864, the decedent, Lucius D. Brown, was lawfully married in this state to the appellant Esther Pierce (whose maiden name was Spink, and who had previously been married and divorced from one Edward Pierce), from whom, on February 21, 1866, he was divorced by the superior court of the state of Rhode Island, she being the innocent party. Said Esther, on March 18, 1882, married one Macdonald, with whom she lived until October 10, 1897, when he died. Neither of the appellants had received any provision by way of jointure, nor had either of them entered into a contract with said Lucius D. Brown, under the statute of 1877, in respect to their property rights, nor received alimony, nor in any way forfeited a right to

NOTE.—For effect of divorce on right of dower, see *Adams v. Storey* (Ill.) 11 L. R. A. 790, and *note*.

For divorce in other state as affecting dower, see *Van Cleaf v. Burns* (N. Y.) 15 L. R. A. 542, and *note*.

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dower, if such right exists under the facts stated. The decedent, Lucius D. Brown, on December 25, 1867, lawfully married Mary Gray, with whom he lived until his death. He left a will, by which he gives his whole estate to his wife, Mary Gray, for life, and upon her death to his brothers and sisters. Prior to his marriage with Mary Gray, the decedent had not been the owner of any property of value. All his real estate was acquired after March 10, 1875, and the greater part of it after March 18, 1882. All persons interested in the estate of Lucius D. Brown were, by order of court, made parties to these appeals.

Messrs. Frank T. Brown and Albert B. Crafts for petitioners.

Messrs. Solomon Lucas and H. A. Hull, for respondent:

The claim that a wife is entitled to protection and support from her husband cannot avail the claimant in this case, because, by divorce, she elected to abandon that claim and right; and, from the moment of divorce, she had no further claim of that character upon the decedent.

Re Ensign, 103 N. Y. 284, 57 Am. Rep. 717, 8 N. E. 544.

The expression "where she is the innocent party," if claimant's rights continue to exist after the divorce so that she is entitled to dower in exchange for support lost or abandoned, would necessarily continue the obligation upon this claimant to remain the innocent party.

The peculiar language employed in this statute was evidently intended for the purpose merely of changing the time when the right of dower should vest from the date of the marriage or acquiring of real estate by the husband to the date of his death, for the purpose of allowing him to freely dispose of his property.

Stewart v. Stewart, 5 Conn. 321.

This claimant at the time of obtaining her divorce, by failing to claim alimony, abandoned no rights, because there was no property out of which alimony could be taken.

Lord v. Lord, 23 Conn. 330.

The proper construction of this statute must adopt the common-law meaning of alimony and dower; and by that construction this claimant is entitled only to dower in one-third part of the real estate of which her husband died possessed in his own right, and which he so possessed during the coverture.

Adams v. Storey, 135 Ill. 448, 11 L. R. A. 790; *Boykin v. Rain*, 28 Ala. 332, 65 Am. Dec. 358; *Leavenworth v. Marshall*, 19 Conn. 4; *Bridgeport v. Hubbell*, 5 Conn. 243; *Richmondville Mfg. Co. v. Prall*, 9 Conn. 495; *Stilson v. Stilson*, 46 Conn. 19; *Seesley's Appeal*, 56 Conn. 202, 14 Atl. 291.

No case can be found where dower was ever set out in property acquired by the husband after the granting of the divorce.

9 Am. & Eng. Enc. Law, p. 857; *Maynard v. Hill*, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723; *Barrett v. Failing*, 111 U. S. 523, 28 L. ed. 505, 4 Sup. Ct. Rep. 598.

Hamersley, J., delivered the opinion of the court:

Section 618 of the General Statutes,* providing for dower, should be read in connection with § 630,† providing for distribution and § 2803, permitting both parties to a divorce to marry again. The appellants read § 618 as if it stood alone, and construe its language, without reference to its history, as if it gave an absolute right to a life estate in one third of his land, not only to a man's widow, but, in addition, to each surviving woman who may have been divorced from him through his fault. Such a construction leads to results absurd and impracticable, which the legislature could not have intended. This of itself is sufficient to mark the construction as wrong. The letter of a statute cannot prevail against the plainly indicated intent of the legislature. *Bridgeport v. Hubbell*, 5 Conn. 237, 243; *Richmondville Mfg. Co. v. Prall*, 9 Conn. 487, 495; *Raeson v. State*, 19 Conn. 292, 299. We think, however, that the letter of the statute and the intention of the legislature may readily be reconciled. Did our law, like that of many states, recognize a right of dower as to all lands possessed during coverture, originating in marriage, and consummate on its termination, and permit this right to be enforced on the termination of marriage by a divorce, the difficulties presented by the lan-

guage would be less apparent. But in these respects our law is wholly different. Section 618, in its essential features, first appears in the revision of 1672. The language referring to a divorced wife has never acquired a practical construction, nor has its meaning been determined, by any utterance of this court. The meaning of the language must therefore be that attached to it as used in the act of 1672. *Hale's Appeal*, 69 Conn. 611, 618, 38 Atl. 392. In order to appreciate the meaning of this act, it is necessary to remember our peculiar law of divorce, of inheritance, and of distribution at the time the act was passed. When the "jurisdiction of Connecticut" was organized, in 1639, the law of the land, as recognized by the settlers, consisted in the orders of the general court, and, in case of the defect of a law, in the Word of God. Educated as Englishmen, and subjects of the British Crown, our ancestors were mainly influenced in their laws and customs by the English law; but their government was both unauthorized (in its beginnings), and practically independent. They never formally adopted the common law of England. But one attempt in that direction was made, and that was abandoned without action. 4 Col. Rec. 261. As our jurisprudence developed, the courts applied the principles of the common law to the decision of causes, so far as they seemed applicable to our social conditions (*Baldwin v. Walker*, 21 Conn. 168, 181); but in many respects, especially in the law of marriage, divorce, land, descent, and distribution, there was a wide departure from the English law.

In England the common law, following the canon law, prohibited absolute divorce for any cause arising after a valid marriage. 1 Bl. Com. 441; *Foliamb's Case*, 3 Salk. 138. The early reformers were opposed to this law. They believed the Scriptures authorized a release from the marriage covenant to the injured party in certain cases. A commission to inquire into this subject was authorized in the reign of Henry VIII., and another in the reign of Edward VI. The work of the latter commission was completed, but the King died before it received royal confirmation. It was, however, published during the reign of Elizabeth under the title of "Reformatio Legum Ecclesiasticarum." It provided that in cases of adultery and malicious desertion the injured party might have liberty to marry again. Pending the work of this commission, it was decided in the case of the Marquis of Northampton, by a special tribunal appointed by the King, that by the Word of God a man divorced for the adultery of his wife might marry again. Possibly, before the accession of Mary, this precedent was followed in other cases. 3 Reeve, History of English Law, pp. 495, 498, 499. This view of marriage and divorce was held by the first settlers of Connecticut. Accepting the Word of God as law in matters not touched by any special ordinance, their courts began at once to decree a separation on what they deemed the scriptural grounds of adultery (citing Matt. xix. 9) and malicious desertion (citing 1

*Sec. 618. Every woman married prior to April twentieth, eighteen hundred and seventy-seven, and living with her husband at the time of his death, or absent by his consent, or by his default, or by accident, or who has been divorced without alimony, where she is the innocent party, shall have right of dower, during her life, in one-third part of the real estate of which her husband died possessed in his own right, unless a suitable provision for her support was made before the marriage by way of jointure, etc.

†Sec. 630. The distribution of intestate estates shall be as follows, that is to say: 1. To the wife of the intestate, whose marriage took place prior to April twentieth, 1877, and who, during the marriage, did not contract with her husband in manner and form, and for the purposes provided in section 624, there shall be distributed and set out one-third part of the personal estate of the intestate forever, and if there be no children of the intestate or any legal representative of them, one half of the personal estate forever, and if she shall not have been otherwise endowed before marriage, one-third part of the real estate to her during life as provided in sections 618 and 619. 2. To the husband or wife of the intestate, whose marriage took place on or subsequently to April twentieth, 1877, or who, having been married before that day, did, during the marriage, enter into a contract with each other in manner and form and for the purposes provided in section 624, and cause the same to be recorded as in said section is provided, there shall be distributed or set out such portion or share of the estate of the intestate as such husband or wife will be entitled to under the provisions of section 623. 3. All the residue of the real and personal estate shall be distributed in equal proportions, according to its value at the time of distribution, among the children and the legal representatives of any of them who may be dead, etc.

Cor. vii. 15); ordering a provision by way of alimony where it seemed equitable, and granting permission to the injured party to marry again. 1 Col. Rec. pp. 276, 301, 362, 379; 2 Col. Rec. pp. 129, 292, 293, 322, 326-328; 3 Col. Rec. p. 23; 4 Col. Rec. p. 59; 10 Col. Rec. p. 168; 14 Col. Rec. pp. 223, 387. These divorces, though granted by the general court, which possessed supreme legislative and judicial power, were not legislative, but purely judicial. This appears (among other reasons) from the fact that when this jurisdiction was first exercised the conception of a legislative divorce had not developed. The first parliamentary divorce was in 1669. All the divorces were based on the scriptural—i. e. common-law—right of the injured party to be released from his conjugal tie, and to be permitted to marry again. This permission was special to the injured party. As phrased in one of the decrees: "In case the said S. T. shall have opportunity to join herself in marriage with another man, she is left at liberty so to do without offense to the law or this court." 2 Col. Rec. p. 293. In 1677 a statute was passed defining the grounds of divorce, and authorizing the court of assistants as well as the general court to grant bills of divorce "to the aggrieved party, who may then lawfully marry or be married to another." Id. p. 328. This law remained unchanged until 1849, when the court was authorized to "declare the petitioner to be single and unmarried; and the parties divorced may then marry again." Revision 1849, p. 274. When, therefore, the act of 1672 was passed, a husband divorced for his own fault had not permission to marry again. By the Connecticut law the English law of prohibition was removed as to the innocent party.

Our land law also was, from the beginning, different from that of England. The rule of descent was substantially that of personal property, and realty and personalty were subject to the same law of distribution. In 1639 it was ordered that the court "shall divide intestate estate to wife, children, or kindred, as in equity they shall see meet." 1 Col. Rec. p. 38. Distributions were made by the magistrates of the general court, and under their rulings a practice grew up of dividing the land and personal property indifferently, one third to the widow and two thirds to the children, modified at times to meet the equities of particular cases. Sometimes, when the main portion of the personal property was given to the widow, she would receive one third of the land for life. Id. p. 446. The tenancy by dower was unknown to our early law. The widow's interest in the land as well as the personal property of her husband was through distribution. As our law gave her one third of all her husband's estate, subject to the discretion of the court in distribution, there was no occasion for dower, except to meet the case where a husband by will should divert his whole property; and it was mainly to meet this emergency (that in such case "there may be suitable provision made for the maintenance and comfortable support of widows after the

decease of their husbands") that the act of 1672 was passed. It was, in effect, an amendment to the law of descent and distribution, and provided that every woman upon the death of her husband shall have "by way of dower" one third of his land for her natural life, and that "the remainder of the estate shall be disposed of according to the will of the deceased, and, where there is no will, according to law." See Revision of 1750, p. 43. The use of the words "by way of dower" may determine to a certain extent the incidents of this life estate. The estate, however, does not arise from the English law of land, but from a statute in aid of the Connecticut law of descent and distribution. This statute practically extends and modifies the widow's right to a share of her deceased husband's estate, realty as well as personalty. In this it differs from the provisions of the New Haven Laws of 1656, and the Massachusetts act of 1641. Both these colonies adopted the English law of dower, giving to the wife a right of dower in any land of which the husband might be seised during coverture. Connecticut extended and modified the right of a wife to share in all the estate her husband might leave at his death. The act was so regarded by other legislation relative to the same subject. When the common law of descent and distribution was first formulated into a statute, in 1696, it was ordered that when a man dies intestate "his widow, if any be, shall have, besides the third part of his real estate during her life, a part also of his personal estate," etc. 4 Col. Rec. p. 167. And the statute of descent and distribution of 1699, being substantially the same as the one now in force, provides that the court of probate shall distribute the estate as follows: "One third part of the personal estate to the wife of the intestate (if any be) forever, besides her dower or thirds in the housing and land during life, where such wife shall not be otherwise endowed before marriage, and all the residue of the real and personal estate, by equal portions, to and among his children," etc. Id. p. 307. And in 1736 it was provided that the court of probate should assign the dower in case of will as well as of intestacy, and such is the present law. Gen. Stat. §§ 619, 630. This view of the origin of the widow's right in the land of her deceased husband is acted upon in *Stewart v. Stewart*, 5 Conn. 317, 320. Such being the existing law of divorce, descent, and distribution in 1672, the act in question was passed, as follows: "That every married woman (living with her husband in this colony or elsewhere absent from him with his consent or through his mere default, or inevitable providence, or in case of divorce where she is the innocent party) that shall not before marriage be estated by way of jointure in some houses, lands, tenements, hereditaments for term of life, or with some other estate in lieu thereof, shall, immediately after the death of her husband, have right and interest by way of dower in and to one third part of the real estate to her deceased husband's lands," etc., "to be to her during her natural life." 8

Col. Rec. p. 56. Reading this language in view of the conditions it was framed to meet, it is certain that this right of dower, like the right to a distributive share of personal property, cannot exist before a husband's death, and affects only the estate left by him; that in no event can more than one third of the real estate be assigned for dower; and that the person entitled to dower is the wife living with the deceased at the time of his death, unless her separation at that time is due to his faults or accident, or a divorce, that leaves her free and the man so far her husband that he has no other conjugal tie. It is certain that a woman divorced is admitted to dower only because she represents, and no other is, the wife living with her husband, or separate through his fault. As was said in *Stilson v. Stilson*, 46 Conn. 15, 19, her right to dower is "precisely the same as that of a woman living with her husband at the time of his death." When a woman lives with her husband at his death, she possesses the right, and the same right can then belong to no other. When the act of 1849 expressly authorized the marriage of a man divorced for his fault, it did not enact a different law for such marriages. It gave to the wife the full rights of a wife, and, among them, the right to share her husband's estate by way of dower as well as of distribution in the same manner as every other wife; and to that extent it modifies the operation of the statute of dower. The present statute enables a woman divorced for her husband's fault to be treated as so far his wife that she may share his estate by way of dower, so long as she represents the wife living with him, or separated by his fault; but the act of 1849 modifies the practical effect of this by enabling the divorced husband to lawfully take a wife, who, living with him at the time of his death, is by the express terms of the statute the one entitled to dower. The words, "or who has been divorced where she is the innocent party," still mean the wife separated by his fault from a man who has no other conjugal tie. If, however, he acquire such tie, and leaves a lawful wife surviving, she is the "married woman living with her husband at his death," and the contingency of separation provided for by the qualifying words does not exist. In *Stilson v. Stilson*, 46 Conn. 15, 19, the divorced husband had married again, but, as appears, the second wife did not survive him. The court assumes that the divorced wife was entitled to dower. Had there been no second marriage, there could have been no question of her right. Whether the result is the same in the case of a second wife not surviving her husband is a question that was not discussed. It was assumed to be the same, the whole contest of the case turning on the effect of a contract between husband and wife before the divorce. If, upon lawful marriage after divorce, the link between the wife and her divorced husband which supports her claim to dower is finally severed, no troublesome questions will arise, no matter how many times a man is divorced; otherwise, such

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questions as have been discussed in this case may arise whenever a man dies, leaving more than one divorced widow and no genuine widow. In this case, however, the much-married man has left a widow, and under the statute she, and no one else, is entitled to dower, so that the questions are not material. They are not likely to become practical. Such a case as this has never before been presented to this court, and it is to be hoped it may never arise again. Moreover, the legislation of 1877 has abolished dower as to all marriages entered into after that date.

Upon the appeal of Phebe E. Brown the Superior Court is advised to render judgment affirming the order of the Probate Court.

Upon the appeal of Esther Macdonald the Superior Court is advised to render judgment affirming the order of the Probate Court.

The other Judges concurred.

HYGEIA DISTILLED WATER COMPANY

v.

HYGEIA ICE COMPANY, Appt.

(72 Conn. 646.)

1. A party is not entitled to have a finding of facts corrected where they are not admitted or undisputed, and the facts found are not without evidence to support them, while the record is not shown to embrace all the evidence adduced with reference to them.
2. Refusal to permit the filing of additional defenses to certain counts in the declaration is not error when the counts are treated as out of the case.
3. The word "Hygeia," as indicating the name of the mythological goddess, is not so merely descriptive of the quality of goods in connection with which it is used that it cannot be protected as a trademark.
4. One adopting the name of the Goddess Hygeia as a trademark is entitled to protection against anyone using it upon similar products as indicating their origin, but not to a protection which will result in a partial monopoly of the English word "hygeia."
5. The adoption of the name of the Goddess Hygeia as a trademark will not prevent the use of the word "hygeia" in its natural signification of healthfulness as part of the corporate or business name of a rival, although some injury is thereby done to the owner of the trademark.

(Torrance, J., dissents.)

(April 4, 1900.)

APPEAL by defendant from a judgment of the Superior Court for New Haven County in favor of plaintiff in an action brought to enjoin the use of the word "hy-

NOTE.—On the question, What words may be appropriated as trademarks? see also *Alff v. Radam* (Tex.) 9 L. R. A. 145, and note.

geia" as an infringement of plaintiff's trademark. *Reversed in part.*

Statement by **Hamersley, J.:**

This cause was before this court at a former term. 70 Conn. 516, 40 Atl. 534. In the report of that case the pleadings of the cause are sufficiently set forth, and need not be here stated. In the former trial the issues were found upon the first and third counts for the defendant, and upon the second count for the plaintiff, and judgment was rendered for the plaintiff. Upon an appeal from that judgment a new trial was granted. At the commencement of the new trial the defendant moved for leave to plead additional and supplemental defenses to the first and third counts, setting up in bar of the same the former judgment in its favor upon said counts. The court denied the motion on the ground that it appeared from the record that judgment had been rendered in favor of the defendant upon said two counts, leaving only the second count to be tried. The case was tried upon the second count only. The defendant excepted to the ruling. During the trial, the court, against the objection of the defendant, admitted certain evidence as detailed in the finding. To these rulings upon evidence the defendant excepted. The court found, in substance: (1) That the word "hygeia" was one which may be appropriated and used as a trademark. (2) That the plaintiff has so appropriated said word, not only as a portion of a device, but as an independent word or symbol, to designate its products of artificial or distilled water and beverages made therefrom, as to entitle it to the exclusive use thereof as its trademark in the business of making and selling such water and beverages. (3) That the defendant, by its use of said word in connection with the business of making and selling distilled water and sundry beverages made therefrom, had infringed and is infringing upon the plaintiff's rights in a way calculated to deceive purchasers and the public, to the plaintiff's damage. (4) That the defendant, by its use of the said word in connection with the manufacture and sale of ice is not infringing upon any rights of the plaintiff. The subordinate facts, from which these controlling facts are found, are set forth in detail and at great length in the record. In substance and effect the subordinate facts set forth in the present record do not materially differ from those contained in the former record (70 Conn. 516, 40 Atl. 534), where a statement of said facts may be found. For the purposes of this case certain parts of the present finding are here stated, namely: "(15) As used in application to said products in the manner hereinbefore set forth the name 'Hygeia' means and indicates in the trade and among the consuming public widely, and especially in the New England and Middle states of this country, and wherever the plaintiff's products are sold or known, that each of said products to which said name is applied is the product of the plaintiff company, and such has always been

its meaning when so used." "(50) From a comparison of the bill heads, advertisements, labels, marks, etc., used by the defendant with those used by the plaintiff, from the foregoing facts and from the attending circumstances and evidence offered upon the subject, I find that consumers and purchasers using ordinary care are liable to be misled, deceived, and confused as to the products of the plaintiff and the defendant (except ice) by the defendant's use of said name 'Hygeia' in any of the ways aforesaid or otherwise, and that the continuance by the defendant of the use of said name 'Hygeia' as a part of its corporate name, or in any other of the ways hereinbefore described, or otherwise, in or in connection with the business of manufacturing and selling distilled water and beverages, is well calculated to induce the belief in purchasers that they are buying the plaintiff's products, when, as a matter of fact, they are buying the defendant's. I also find that the continuance by the defendant of the use of said word 'hygeia' as a part of its corporate name, or in any other of the ways hereinbefore set forth, or otherwise, or in connection with said business in water and beverages, will result in irreparable damage and injury to the plaintiff." (66) No use of said name 'Hygeia,' prior to its appropriation and use by the plaintiff's assignor and by the plaintiff, inconsistent with the rights claimed by the plaintiff, was proved by the defendant." In the reasons of appeal the errors assigned as to the foregoing paragraphs are stated as follows: "(1) The facts set forth in the finding do not support the conclusions stated in paragraph 15, because it is shown that the name 'Hygeia' has been used in connection with water other than the plaintiff's products upon the markets, and, as applied to said other water products, does not indicate that it is the product of the plaintiff company, or that such has always been its meaning; and because of the further reason, as shown in said finding, that the word 'hygeia' and its various cognate forms have been applied in common use to other products as indicative of quality. (2) The facts set forth in the finding do not support the conclusions stated in paragraph 50, because they do not show that anyone has ever been misled, deceived, and confused as to the plaintiff's and defendant's goods; and, further, because they do not show that the use by the defendant of its corporate name has ever misled, deceived, or confused customers, purchasers, or the public generally; and, still further, because they do not show that the defendant's corporate name was ever associated in the minds of customers, purchasers, and the public with the purchase and sale of its products, but, on the contrary, that the goods of the defendant were bought and sold by customers, purchasers, and the public generally by their distinctive tradenames. (3) In finding the fact as stated in paragraph 66, because the same is a conclusion of law; and, secondly, is without evidence to support it." Upon the trial below the defendant made certain

claims of law upon the facts found, which, together with such other parts of the record as it is deemed necessary to state, are sufficiently set forth in the opinion. The court found the issue for the plaintiff upon the second count, "except that the acts of the defendant in making and selling ice as in said second count alleged are not an infringement of the plaintiff's rights, and are not a damage to the plaintiff." Such parts of the judgment as are material upon this appeal read as follows: "Whereupon it is adjudged that the defendant and its officers, agents, employees, and servants be, and they hereby are, each of them, forever enjoined, under a penalty of one thousand dollars: (1) Against transacting business under the name of the 'Hygeia Ice and Water Company;' and (2) so long as the defendant retains the word 'hygeia' as a part of its corporate name, against putting up, bottling, selling, offering for sale, or delivering distilled water in liquid form or for drinking use, or using distilled water as an ingredient in the making and compounding of ginger ale, soda water, lithia water, and other artificial mineral waters; and (3) also against using, in connection with the business of selling or delivering distilled water in liquid form or for drinking use, or in connection with the business of making, manufacturing, compounding, putting up, bottling, selling, offering for sale, or delivering ginger ale, soda water, lithia water, or other artificial mineral waters, in the preparation of which products distilled water shall have been used as an ingredient, the word 'hygeia' in and upon its signs, advertisements, letter heads, bill heads, circulars, printed matter, wagons, bottles, jugs, siphons, labels, corks, seals, wooden boxes and cases, packages, receptacles, or any other thing used by any of them in such business,—the use in and upon its signs, and the other things named, and which is hereby enjoined, to include, not only the use of said word 'hygeia' alone, but as well its use in the combinations the 'Hygeia Ice & Water Company,' the 'Hygeia Ice Company,' its use in combination with the name of the product (as 'Hygeia Water,' 'Hygeia Distilled Water'), and in combinations similar to any of said combinations, whether as a part of its corporate name or not. Nothing in this order shall be construed as preventing the use by defendant of said word 'hygeia' in the business of manufacturing and selling ice, or the use by defendant of its present corporate name in said ice business so long as it refrains from the manufacture and sale of such distilled water and beverages made therefrom." The defendant requested the court to correct the finding in certain particulars, and the court refused to do so. The evidence contained in the record upon which this request is based is certified as "a transcript of a portion of the testimony offered in said case," and as "a transcript of certain depositions offered by the defendant in evidence upon the trial of said case."

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Messrs. Henry Stoddard and Case, Ely, & Webb, for appellant:

The word "hygeia" is not the proper subject of a trademark or tradename, in that it has become a word merely descriptive of character and quality of the goods to which it is applied.

Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 546, 34 L. ed. 1003, 11 Sup. Ct. Rep. 396; *Koehler v. Sanders*, 122 N. Y. 72, 9 L. R. A. 576, 25 N. E. 235; *Enoch Morgan's Sons Co. v. Troxell*, 89 N. Y. 292; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. 599; *Caswell v. Davis*, 58 N. Y. 223, 17 Am. Rep. 233; *Fischer v. Blank*, 138 N. Y. 244, 33 N. E. 1040; *Boardman v. Meriden Britannia Co.* 35 Conn. 402; *Gilman v. Hunnewell*, 122 Mass. 139.

The application of the word "hygeia" and its derivatives as English words has uniformly been to convey the idea of health and healthfulness, as descriptive of the quality and characteristic of the article to which it is applied.

It is immaterial that the word "hygeia" is registered as a trademark in the patent office.

Jaros Hygienic Underwear Co. v. Fleece Hygienic Underwear Co. 65 Fed. Rep. 424.

If "hygienic" cannot be appropriated, certainly "hygeia" cannot.

Hygeia Distilled Water Co. v. Hygeia Ice Co. 70 Conn. 534, 40 Atl. 534.

Words descriptive of the articles to which they are attached, or which indicate their ingredients, mode of composition, characteristic, property, quality, or nature, are not entitled to protection.

Re Farbenfabriken's Trade Mark, 7 Rep. 439 [1894] 1 Ch. 645; *Desmond's Appeal*, 103 Pa. 126, 49 Am. Rep. 118; *Re Talbot's Trade Mark*, 8 Rep. 149, 63 L. J. Ch. N. S. 264; *Beadleston & Woerz v. Cooke Brewing Co.* 46 U. S. App. 18, 74 Fed. Rep. 229, 20 C. C. A. 405; *Taylor v. Gillies*, 59 N. Y. 331, 17 Am. Rep. 333; *Corwin v. Daly*, 7 Bosw. 222; *Royal Baking Powder Co. v. Sherrell*, 93 N. Y. 331, 45 Am. Rep. 229.

The word "hygeia" is a term which clearly refers to grade and quality, and, as applied alone to articles of manufacture, and places, it has the same meaning, and it is only when associated with other words that it can in any way indicate origin or ownership, and be entitled to protection.

Caswell v. Davis, 58 N. Y. 235, 17 Am. Rep. 233; *Waukesha Hygeia Mineral Springs Co. v. Hygeia Sparkling Distilled Water Co.* 24 U. S. App. 172, 63 Fed. Rep. 443, 11 C. C. A. 277.

The plaintiff was not the first to appropriate the word "hygeia" to the class of merchandise to which it is applied.

The foundation of title to a trademark is priority of adoption and actual use in trade.

26 Am. & Eng. Enc. Law, p. 346; *Browne, Trademarks*, § 324; *Leidersdorf v. Flint*, 8 Biss. 327, Fed. Cas. No. 8, 219.

Messrs. Henry C. White and Leonard M. Daggett, for appellee:

Plaintiff has established its exclusive right to the use of the word "hygeia" in the busi-

ness of manufacturing and selling distilled water and products made therefrom.

Filley v. Fassett, 44 Mo. 169, 100 Am. Dec. 275; *Carroll v. Ertheiler*, 1 Fed. Rep. 688; *Braham v. Bustard*, 1 Hem. & N. 447.

Defendant has, in the application of the word "hygeia" to its products, infringed plaintiff's trademark.

Hier v. Abrahams, 82 N. Y. 519, 37 Am. Rep. 589; *Bass, R. & G. v. Feigenspan*, 96 Fed. Rep. 206; *Manitowoc Pea-Packing Co. v. Numsen*, 93 Fed. Rep. 196, 35 C. C. A. 207; *Eckhart v. Consolidated Milling Co.* 72 Ill. App. 70; *Williams v. Brooks*, 50 Conn. 278, 47 Am. Rep. 642; *Hutchinson v. Blumberg*, 51 Fed. Rep. 829; *Johnson & Johnson v. Bauer & Black*, 53 U. S. App. 437, 82 Fed. Rep. 662, 27 C. C. A. 374; *National Biscuit Co. v. Baker*, 95 Fed. Rep. 135; *William Rogers Mfg. Co. v. Simpson, H. M. & Co.* 54 Conn. 527, 9 Atl. 395; *Pittsburg Crushed Steel Co. v. Diamond Steel Co.* 61 U. S. App. 22, 89 Fed. Rep. 706, 32 C. C. A. 324.

Defendant was properly enjoined from using its corporate name in connection with the manufacture and sale of distilled water and products made therefrom.

William Rogers Mfg. Co. v. Simpson, H. M. & Co. 54 Conn. 527, 9 Atl. 395; *Holmes, B. & H. v. Holmes, B. & A. Mfg. Co.* 37 Conn. 278, 9 Am. Rep. 324; *Chas. S. Higgins Co. v. Higgins Soap Co.* 144 N. Y. 462, 27 L. R. A. 42, 39 N. E. 490; *Pinet v. Maison Louis Pinet*, [1898] 1 Ch. 179; *Continental Ins. Co. v. Continental F. Ins. Assn.* 96 Fed. Rep. 846; *Armington v. Palmer*, 21 R. I. 109, 43 L. R. A. 95, 42 Atl. 308.

Defendant has not proved such a prior or concurrent use of the word "hygeia" by others, in connection with water products, as will defeat plaintiff's right as against defendant.

Waukesha Hygeia Mineral Springs Co. v. Hygeia Sparkling Distilled Water Co. 24 U. S. App. 172, 63 Fed. Rep. 438, 11 C. C. A. 277; *Carlsbad v. Schultz*, 78 Fed. Rep. 469.

Plaintiff's right is protected by the Constitutions of the United States and of Connecticut.

Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Orutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; *Black v. Caldwell*, 83 Fed. Rep. 880; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 32 Fed. Rep. 94; *William Rogers Mfg. Co. v. Rogers & S. Mfg. Co.* 11 Fed. Rep. 495; *Investor Pub. Co. v. Dobinson*, 82 Fed. Rep. 56; *Continental Ins. Co. v. Continental F. Ins. Assn.* 96 Fed. Rep. 846; *National Folding Box & Paper Co. v. National Folding Box Co.* 13 Rep. 60, 43 Week. Rep. 156.

The name "hygeia" is such an arbitrary word symbol that plaintiff may prevent its use by others in the manufacture and sale of water and beverages.

26 Am. & Eng. Enc. Law, p. 245; *Keasbey v. Brooklyn Chemical Works*, 142 N. Y. 467, 37 N. E. 476; *Braham v. Bustard*, 1 Hem. 49 L. R. A.

& M. 447; *Pennsylvania Salt Mfg. Co. v. Myers*, 79 Fed. Rep. 87; *Oswell v. Davis*, 58 N. Y. 223, 17 Fed. Rep. 233; *Bennett v. McKinley*, 26 U. S. App. 496, 65 Fed. Rep. 505, 13 C. C. A. 25; *Sheppard v. Stuart*, 13 Phila. 117; *Hier v. Abrahams*, 82 N. Y. 519, 37 Am. Rep. 589; *Waterman v. Shipman*, 130 N. Y. 301, 29 N. E. 111; *Listman Mill. Co. v. William Listman Milling Co.* 88 Wis. 334, 60 N. W. 261; *Waukesha Hygeia Mineral Springs Co. v. Hygeia Sparkling Distilled Water Co.* 24 U. S. App. 172, 63 Fed. Rep. 438, 11 C. C. A. 277.

If the use of the word "hygeia" by defendant is likely to mislead purchasers and the public, such use is an infringement of plaintiff's trademark, against which preventive relief should be granted.

McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828; *Seiao v. Provezende*, L. R. 1 Ch. 192; *Colman v. Crump*, 70 N. Y. 573; *Williams v. Brooks*, 50 Conn. 278, 47 Am. Rep. 642; *Bradley v. Norton*, 33 Conn. 157, 87 Am. Dec. 200.

An actual deception of purchasers need not be shown by plaintiff to entitle it to an injunction.

Filley v. Fassett, 44 Mo. 169, 100 Am. Dec. 275; *Bank of Tomah v. Warren*, 94 Wis. 151, 68 N. W. 549; *Shaw v. Pilling*, 175 Pa. 78, 34 Atl. 446; *Taendstieksfabriks Aktiebolaget Vulcan v. Myers*, 139 N. Y. 364, 34 N. E. 904; *New Home Sewing Mach. Co. v. Bloomingdale*, 59 Fed. Rep. 284; *Edelsten v. Edelsten*, 1 De G. J. & S. 185; *Mossler v. Jacobs*, 66 Ill. App. 571; *Saelehnner v. Apollinaris Co.* [1897] 1 Ch. 893; *Reddaway v. Banham* [1896] A. C. 199; *N. K. Fairbank Co. v. R. W. Bell Mfg. Co.* 45 U. S. App. 190, 77 Fed. Rep. 869, 23 C. C. A. 554; *Johnson & Johnson v. Bauer & Black*, 53 U. S. App. 437, 82 Fed. Rep. 662, 27 C. C. A. 374; *New England Awl & Needle Co. v. Marlborough Awl & Needle Co.* 168 Mass. 154, 46 N. E. 386.

An intent on the part of defendant to defraud the plaintiff need not be proved.

26 Am. & Eng. Enc. Law, p. 444; *Hier v. Abrahams*, 82 N. Y. 519, 35 Am. Rep. 589; *William Rogers Mfg. Co. v. Simpson, H. M. & Co.* 54 Conn. 527, 9 Atl. 395; *Williams v. Brooks*, 50 Conn. 278, 47 Am. Rep. 642; *Saelehnner v. Apollinaris Co.* [1897] 1 Ch. 893; *Reddaway v. Banham* [1896] A. C. 199; *New England Awl & Needle Co. v. Marlborough Awl & Needle Co.* 168 Mass. 154, 46 N. E. 386; *Powell v. Birmingham Vinegar Brewery Co.* L. R. [1896] 2 Ch. 54.

The deception, not of the dealer, but of the retail purchaser, determines the fact of infringement.

Boardman v. Meriden Britannia Co. 35 Conn. 402; *N. K. Fairbank Co. v. Central Lard Co.* 64 Fed. Rep. 133; *Williams v. Brooks*, 50 Conn. 278, 47 Am. Rep. 642; 26 Am. & Eng. Enc. Law, p. 416; *Parkland Hills Blue Lick Water Co. v. Hawkins*, 95 Ky. 502, 26 S. W. 389; *Seiao v. Provezende*, L. R. 1 Ch. 192; *Hutchinson v. Blumberg*, 51 Fed. Rep. 829; *William Rogers Mfg. Co. v. Simpson, H. M. & Co.* 54 Conn. 527, 9 Atl. 395; *Read v. Richardson*, Cox Manual Trade-

marks Cas. No. 698; *Orr-Ewing v. Johnston*, L. R. 13 Ch. Div. 434; *Hutchinson v. Covert*, 51 Fed. Rep. 832; *Johnson & Johnson v. Bauer & Black*, 53 U. S. App. 437, 82 Fed. Rep. 662, 27 C. C. A. 374; *Cochrane v. Mac-nish* [1896] A. C. 225.

Hamersley, J., delivered the opinion of the court:

The defendant is not entitled to have the finding of facts corrected as requested. The facts which it requested the court to find are not admitted nor undisputed facts, nor is it claimed that such facts were found without any evidence, nor does it appear that the evidence certified as to these facts embraces all the evidence adduced with reference to them. Under repeated decisions of this court, the finding, under these circumstances, must stand as made. The denial of the motion for leave to file additional defenses to the first and third counts of the complaint did the defendant no harm. The court treated those counts as out of the case, and upon that view the defenses in question were entirely unnecessary. When this case was before us upon a former appeal (70 Conn. 533, 40 Atl. 534), it was claimed by the defendant that the word "hygeia" could not be adopted as a trademark, because it has become a term merely descriptive of the character and quality of the goods to which it is applied as healthful or health-giving. The trial court had decided that the word as adopted by the plaintiff was entitled to protection, and we then said we thought the court correctly decided against the contention of the defendant "upon the knowledge of this matter acquired by the exercise of its power of judicial cognizance, aided by evidence, and by reference to standard authorities on the subject." The former judgment enjoined the defendant against using the word "hygeia" upon or in connection with the sale of its distilled water products, and further enjoined it against using the word in its corporate or business name while dealing in those products. We held that the latter part of the judgment was not supported by the facts found, and therefore we did not consider the question whether the plaintiff was lawfully entitled to protection against the use of the word "hygeia" in such manner. After a new trial, resulting in a similar judgment, the case now comes before us on an appeal which presents anew the two questions: Is the plaintiff entitled to protection? Can that protection be extended to a prohibition of the use of the word "hygeia" in the defendant's corporate name? On the last question we have had no occasion heretofore to intimate any opinion. We still think that the word "hygeia" is not so merely descriptive of the quality of the goods as to render it legally impossible for the plaintiff to acquire an interest in it as a trademark in the manner found. It is a name of a mythological personage. The trial court has found that it was adopted as such by the plaintiff in combination with a figure of the goddess; that it was used on the

plaintiff's products only as a symbol to indicate that they were its genuine products, and, as a result of the plaintiff's conduct, has become closely associated in the mind of the trade with its products, and, when attached to them, indicates to the consuming public that each product to which it is so attached is the product of the plaintiff. It was lawful for the plaintiff to so appropriate the name of a mythological person. Had it taken the name of Juno or Minerva, no question as to its right could arise. But it chose a name which is also an English word with a settled meaning. The plaintiff disclaims the use of the word with that meaning. And the court finds that it was not adopted with that meaning. The case is in this respect a peculiar one. We feel very strongly the necessity of great caution in permitting the use of a word as a trademark so as to limit in any way its use with its legitimate meaning. "The general rule is against the appropriating mere words as a trademark." *Caswell v. Davis*, 58 N. Y. 223, 235, 17 Am. Rep. 233; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. 599; *Delaware & H. Canal Co. v. Clark*, 13 Wall. 311, 322, 20 L. ed. 581, 583; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.* 138 U. S. 537, 546, 34 L. ed. 997, 1003, 11 Sup. Ct. Rep. 396. "The monopoly of use granted by the law of trademarks should not be extended to embrace terms of doubtful signification." *Beadleston & Woerz v. Cooke Brewing Co.* 46 U. S. App. 18, 74 Fed. Rep. 229, 233, 20 C. C. A. 405. This is not a case of first adoption. It is one where the word has in fact, through long use, actually acquired a signification when attached to the plaintiff's products, simply of ownership and origin. So used it is in fact a mere symbol which conveys the idea of origin, and nothing more, and it is further found that, when attached to products of other dealers, it is in fact regarded as a mere symbol conveying the same idea; i. e. that the products are made by the plaintiff. The labors of the plaintiff have created this condition, and are entitled to some protection, unless it is forbidden by a positive rule of law. We are not prepared to say, under such circumstances, that the name of a mythological person is entitled to no protection as a trademark simply because there is an English word derived from the same root, which cannot be so monopolized. Yet it is evident that the protection must be different from that awarded where there is no such complication. One may adopt his own name as a trademark, but he cannot prevent another having the same name from its honest use in the same business, although he may be injured thereby. "The disadvantages attending the choice of the name of a person as a mark affect every result flowing from such choice." *William Rogers Mfg. Co. v. Simpson, H. M. & Co.*, 54 Conn. 527, 571, 9 Atl. 395; *Rogers & Brother v. Rogers*, 53 Conn. 121, 156, 1 Atl. 807, 5 Atl. 675. A trademark cannot monopolize the name of a place, nor any substantive commonly used in language. *Burton v. Stratton*, 12 Fed.

Rep. 696, 790. But the name of a city may become in fact so associated with one's work, as designating its origin and ownership, as to become entitled to protection as a trademark, subject, however, to the infirmities inherent to such a mark; and so other manufacturers in the same place may honestly use the geographical name in connection with the same work, notwithstanding the incidental injury involved in such use. *American Waltham Watch Co. v. United States Watch Co.* 173 Mass. 85, 43 L. R. A. 826, 53 N. E. 141. In such cases the right of one to the credit of his own labor must accord with the right of all to use of a common language and to free competition; and a court of equity seeks to give reasonable protection to both rights without destroying either. The success with which this can be done depends somewhat on the subtlety of the complication. That may be so great that the court will refuse all protection. And so with the plaintiff. While entitled, upon the facts found, to a protection against anyone else using its trademark on similar products as indicating their origin, it is not entitled to a protection which may result in a partial monopoly of the English word "hygeia."

The trial court has enjoined the defendant against dealing in distilled water and its various products under any corporate or business name which contains the word "hygeia." There is here no question as to the use of a corporate name in this business, which, by reason of similarity, unlawfully infringes the plaintiff's interest in its own corporate name, nor of a dishonest and fraudulent use of the name by the defendant to the injury of the plaintiff. These questions are settled in favor of the defendant by the final judgment on the first and third counts. The sole question, as affecting the point under discussion, is this: Has the defendant a right to use the word "hygeia" in its corporate or business name as indicative of its mode of manufacture, notwithstanding some incidental injury results to the plaintiff's business from that use? It is found as a fact that the defendant manufactures artificial ice from filtered and distilled water by a peculiar process calculated to produce an absolutely pure ice, and for that reason, in good faith, and in ignorance of the plaintiff's existence, it used the word "hygeia" to associate its meaning with the ice produced by this special process, involving filtration and distillation; and that since its incorporation, in pursuance of a design entertained at that time, it has dealt in the water so distilled and filtered in its liquid as well as in its frozen form, and in various products of that water. If this is a correct use of the word the defendant's right to use it in this manner cannot be destroyed by the plaintiff's adoption of its trademark. We must therefore examine the real significance of the word more carefully than seemed necessary at the former hearing. The Greek word "hygeia" means "health." When the daughter of Æsculapius was deified as the goddess of health, 49 L. R. A.

she was named "Hygeia." The Latin word "salus" means "health," and this name also was given to the Roman goddess of health. Both words passed into the English language. The name of the divinity was confined to the Greek form. The derivatives of "salus" came into common use. The Greek word for health was at first appropriated mainly, if not wholly, to medical literature; but within the past century it has passed, with many derivatives, into common use. We find its definition when used as a noun in medical literature in the title of a book published in 1682: "Hygeia, Id Est Bonæ Valetudinis Conservandæ Thesaurus Lucupletissimus." It is used with a similar meaning in many medical books and journals, French and German, as well as English (although its primary meaning seems always to have been health). See Foster, Enc. Dic. It is used in this sense in 1802 in Beddoe's *Hygeia*, or *Essays Moral and Medical*. In 1841 it is used, as meaning the means or system of preserving health, by Emerson in his *Essay on Nominalist and Realist*. Emerson's *Essays*, 2d Series, p. 226. Dr. Richardson uses it with a similar meaning in an address to the Social Science Association on the arrangement of a city so as to reduce the rate of mortality: "Hygeia, or the City of Health," *Chambers's Journal*, Jan. 20, 1877. And in the *Oxford English Dictionary* it is defined as "a system of sanitation or medical practice." During the present century, and especially during the past forty years, the word has been freely used with an adjective meaning (as appears from the finding), as expressing the medically healthful property or effects of places, food, clothing, etc. This meaning of a means or method of preserving health it has always had in medical literature, and for a long period in general literature, although the transfer from medical to general literature has not been recognized by many of the standard dictionaries. The recognition of such changes often follows slowly. But the authority of the *Oxford English Dictionary* is of the highest, and it establishes, not a new use, but the recognition of a long-continued use. We cannot doubt that "hygeia," whether used as a substantive, to express a process or means of preserving health, or, with an adjective sense, to describe an object as resulting from the operation of hygeian method, is an English word, to the use of which, with that meaning, everyone is entitled. It is suggested that such meaning of the word arose from the sale of the plaintiff's products. This is palpably, and even absurdly, untrue. The rapid increase in the use of hygeia and its derivatives commenced long before the plaintiff's business enterprise was conceived, and is due to the force of a widespread social movement, which has made professional investigation of the laws of health a common study, which demands the application of the rules of hygeia to the preparation of everything we eat, drink, or wear, to the construction and maintenance of our houses, factories, and

public buildings, and to the arrangement and care of our cities. So strong and widespread has this movement been, that, to express its exaggerated operation, we have found it necessary to coin and adopt into the language the word "hygeiolatry." Hygeia is a word of peculiar value. By reason of its passage into general literature from the medical it has a significance which the derivatives of "salus" failed to express. The idea conveyed by "salubrity" and "salubrious" is quite distinct from that conveyed by "hygeia" and "hygienic." It is this meaning of the word as expressive of the modern care for health by scientific methods that has brought it into common use, and makes it most valuable. The defendant, therefore, has a right to use the word "hygeia" in its corporate and in its business name as signifying the claim that its products of water, whether congealed or liquid, are prepared in accordance with the rules of hygeia; and any injury the plaintiff may suffer in its business from such honest use is the necessary result of its choosing as a trademark a word which not only was a symbol which it might appropriate, but which was also a valuable word in language, which the law does not permit to be monopolized. So far as attaching the mark "Hygeia" to the defendant's goods is in fact a practical representation that such goods are made by the plaintiff, the plaintiff is entitled to protection; but that protection cannot be extended to preventing the defendant from using in good faith, with its natural signification, the English word "hygeia" in its corporate name or business as descriptive of its method of manufacture. Any injury which results to the plaintiff from such use is not in violation of the

plaintiff's rights, and is not due to a wrongful act by the defendant, but solely to the difficulties the plaintiff assumed in its selection of such a mark.

There ought not to be a new trial. The erroneous portions of the judgment are distinct from and independent of the other portion, and may be reversed without disturbing it. *Sherwood v. Sherwood*, 32 Conn. 1, 15; *Taff v. State*, 39 Conn. 82, 85; *Middlebrook v. State*, 43 Conn. 257, 270, 21 Am. Rep. 650. That portion of the judgment which enjoins the defendant against using, in connection with the business of selling or delivering distilled water in liquid form or for drinking use, or in connection with the business of making, manufacturing, compounding, putting up, bottling, selling, offering for sale, or delivering ginger ale, soda water, lithia water, or other artificial mineral waters in the preparation of which products distilled water shall have been used as an ingredient, the mark "Hygeia," either alone or in combination with the name of the product (as "Hygeia Water," "Hygeia Distilled Water"), in and upon its signs, advertisements, letter heads, bill heads, circulars, printed matter, wagons, bottles, jugs, siphons, labels, corks, seals, wooden boxes and cases, packages, receptacles, or any other thing used by it in such business, is affirmed; the residue of said judgment is reversed, and set aside.

The judgment of the Superior Court is erroneous in part, and the cause is remanded to be proceeded with according to law; costs in this court to be taxed in favor of the appellant.

The other Judges concur, except **Torrance, J.**, who dissents.

KANSAS SUPREME COURT.

B. N. KAGER et al., Plffs. in Err.,
v.

Ira M. VICKERY et al.

(.....Kan.....)

*A judgment for money, and for the foreclosure of a mortgage upon real estate, against a deceased defendant, who had theretofore been duly served with process, is void, although the fact of death does not appear of record; and it may be collaterally im-

*Headnote by DOSTER, Ch. J.

NOTE—Effect of judgment entered against dead person.

- I. Judgments against parties dying before institution of suit.
- II. Judgments on confession.
- III. Void judgments.
- IV. Voidable judgments.
- V. Where death occurs at certain stages of the action.
 - a. Before issue joined.
 - b. Before default taken.
 - c. After default taken, but before final judgment.
 - d. After interlocutory order.

peached because thereof by the heirs of the deceased, if not made parties to the foreclosure proceeding, in an action brought by them for the recovery of the land sold and conveyed in satisfaction of the judgment.

(January 16, 1900.)

ERROR to the District Court for Cowley County to review a judgment in favor of defendants in a proceeding brought to assert title to certain real estate which had been purchased by defendants' grantors in

V.—continued.

e. Before verdict, report, or decision.

f. After verdict.

g. After interlocutory order.

VI. Judgment by relation back to time prior to death.

VII. Death of party pending appeal.

VIII. Judgments in rem.

IX. Classification by states where death occurs after suit is brought.

I. Judgments against parties dying before institution of suit.

The weight of authority is that a judgment

judicial proceedings against plaintiffs' ancestor. *Reversed.*

The facts are stated in the opinion.

Mr. Charles L. Brown, for plaintiffs in error:

Mr. Kager having died intestate, his real estate passed immediately to his heirs, the widow taking one half and the children the other one half.

Dodge v. Beeler, 12 Kan. 525; *Schermerhorn v. Mahaffie*, 34 Kan. 108, 8 Pac. 199.

The heirs were indispensable parties to a legal decree in the foreclosure action, and no legal title could be based upon such proceedings without the heirs being made parties, and their interest in the land cut off by reason of such proceedings.

Britton v. Hunt, 9 Kan. 228.

Inasmuch as they were not parties to the proceeding, the defendants in error, Vickery

and his wife, have no legal claim to the property, as against these plaintiffs in error.

Ibid.; *Curtis v. Parker*, 29 Kan. 130; *Story*, Eq. Pl. § 194; 4 Kent, Com. 185; *Lane v. Erskine*, 13 Ill. 501; *Graham v. Carter*, 2 Hen. & M. 6; *Mayo v. Tomkies*, 6 Munf. 520; *Moore v. Starks*, 1 Ohio St. 369.

Jurisdiction over the person of the defendant is absolutely necessary to the rendition of any valid judgment.

These plaintiffs in error were never made parties to the foreclosure proceedings. This being true, they have never been divested of the title of the property in controversy to the extent of their respective interests.

Rice County Comrs. v. Lawrence, 29 Kan. 158; *Curtis v. Parker*, 29 Kan. 130; *Freeman*, *Void Judicial Sales*, 3d ed. § 2; *Freeman*, *Judgm.* 4th ed. §§ 116, 120 A; *Great West Min. Co. v. Woodmas of Alston Min.*

rendered against a party who was dead at the time of the institution of the suit is void, and such judgment may be attacked collaterally. The cases in Texas deny this, and follow their rule adopted in cases where a judgment is taken against a party who dies after suit is brought and before judgment. An early case in Pennsylvania also claims that there is no distinction as to judgments, whether the death occurs before or after suit. As a judgment where a court has no jurisdiction of a person is void as to such person, and is subject to a collateral attack, it seems that this rule should apply where a judgment is rendered against a party who was dead prior to the institution of the suit.

A judgment against a trustee in a process of foreign attachment, commenced after the death of the principal defendant, and payment of the amount thereof on execution by the trustee, are no bar to a suit against him by the representative of the deceased. *Matthey v. Wiseman*, 18 C. B. N. S. 657; *Loring v. Folger*, 7 Gray, 505.

In the latter case the court said that a judgment against F. and his trustee is a nullity, and may be avoided by the administrator without a writ of error, and furnishes no protection to the trustee.

In *Reid v. Holmes*, 127 Mass. 326, and *Danforth v. Danforth*, 111 Ill. 236, it was said that if a judgment was rendered in an action originally brought against a dead person, in such a case the court never acquired jurisdiction of the cause.

A judgment in a suit commenced and prosecuted against a dead person is void. *Graves v. Ewart*, 99 Mo. 13, 11 S. W. 971; *Crosley v. Hutton*, 98 Mo. 196, 11 S. W. 613; *Williams v. Hudson*, 93 Mo. 524, 6 S. W. 261.

In the last case the court said that if the death is after suit commenced and service of process another question will be presented; but a suit commenced against a dead man gives the court no authority to enter judgment, and as to him the judgment is void.

And where a judgment was rendered on a bond against several obligors, one of whom was dead when the suit was brought, the judgment was set aside as void against the defendant who was dead, but not as against the other defendants. *State ex rel. Ozark County v. Tate*, 100 Mo. 265, 18 S. W. 1088.

A judgment of foreclosure against one who was dead at the commencement of the suit is void. *Bollinger v. Chouteau*, 20 Mo. 89. This case was an action by petition of the heirs of the mortgagor to redeem the land, the mort-

gagor having been brought into court by publication.

And foreclosure proceedings on a mortgage by publication are void, and may be collaterally attacked where the mortgagor was dead at the time of the institution of the suit, and the only parties to the action were the holder of the mortgage and the mortgagor. *Richards v. Thompson*, 43 Kan. 209, 23 Pac. 106.

A judgment rendered against a party who was dead before the action was brought is void, notwithstanding his sole executor was a defendant in the same action, but in his individual capacity. *Bragg v. Thompson*, 19 S. C. 572.

But it was held in this case that the execution would protect the sheriff, and he was only liable to the purchaser at execution sale for so much of the proceeds as had not been paid to the plaintiff in the execution before notice of the defect in the judgment.

A decree based upon a suit by a warning order to collect an assessment is void where the person named was defendant and owner of the property, and was dead at the time of the institution of the suit, and it may be collaterally attacked by an heir who is the owner of the property, and who was not a party to such decree. *Greenstreet v. Thornton*, 60 Ark. 369, 27 L. R. A. 735, 30 S. W. 847. See subhead *Judgments in rem.*

In *Claffin v. Dunne*, 120 Ill. 241, 21 N. E. 834, it was said that where an action was instituted against a dead person, and a judgment followed, it may be conceded that the judgment may be void on the ground that the court never acquired jurisdiction of the person of the defendant.

In *Camden v. Robertson*, 3 Ill. 508, where judgment was rendered for defendants on the ground that it appeared from the evidence that one of the plaintiffs was dead before the institution of the suit, it was held to be erroneous on the ground that the death of a plaintiff in such a case could only be available to the defendant by a plea in abatement.

But in *Taylor v. Snow*, 47 Tex. 462, 26 Am. Rep. 311, which was an action of trespass to try title to land sold on execution, the trial court instructed the jury that if the defendant was dead at the time the original suit was commenced the court acquired no jurisdiction of the subject-matter, and that any judgment rendered against a dead man without making his legal representatives parties is void, and that execution and proceedings thereon were also void, and could not be the foundation of a

Co. 12 Colo. 46, 20 Pac. 771; *Barber v. Morris*, 37 Minn. 194, 33 N. W. 559.

A judgment is void and a nullity where it is rendered against a deceased person, even though such person may have been served with summons while living.

Rice County Comrs. v. Lawrence, 29 Kan. 158; *Loring v. Folger*, 7 Gray, 505; *Carter v. Carriger*, 3 Yerg. 411, 24 Am. Dec. 585; *Ewald v. Corbett*, 32 Cal. 493; *McCulloch v. Norwood*, 58 N. Y. 562; *Sturges v. Vanderbilt*, 73 N. Y. 384; *Norton v. Jamison*, 23 La. Ann. 102; *Gerault v. Anderson*, Walk. (Miss.) 30, 12 Am. Dec. 521; *West v. Jordan*, 62 Me. 484; *Lee v. Gardiner*, 26 Miss. 521; *Clay Dist. Twp. v. Buchanan*, 63 Iowa, 188, 18 N. W. 859; *Nolan v. Cameron*, 9 Lea, 234.

Messrs. C. T. Atkinson, J. E. Torrence, Madden & Buckman, Jackson

title to the land. On appeal this instruction was held erroneous.

The instruction in this case goes to the question of jurisdiction, which is not noticed in the opinion of the supreme court; but the court discusses the question in the light of previous decisions, in which cases the court had jurisdiction before death. The court said that, if the defendant dies before the execution of a judgment, its payment must be enforced through the probate court, and not by execution; and if execution issue and sale is made, such sale might be said to be void because it has an inherent vice for which it may be avoided; and such sale will be declared void when the irregularity is shown by the proper parties and in the proper time and manner, just as a judgment having the like vice will be held void when its error is pointed out in the proper manner for invoking the action of the court upon it, but it cannot be collaterally attacked.

In *Hooper v. Caruthers*, 78 Tex. 432, 15 S. W. 98, which held that a sale was void where the record showed that the defendant was dead at the time of the rendition of the judgment, the court said: "In *Taylor v. Snow*, 47 Tex. 464, 26 Am. Rep. 311, from the opinion we understand that the party attacking the execution sale sought to show that the person against whom the judgment was, died prior to its rendition; but there is much in the opinion which seems to hold that a sale under execution issued after the death of a sole defendant is not void without reference to the time of the death." This was not approved.

Where a suit by publication was begun after defendant's death, and judgment and sale were had, and the heir brought a bill of review to set aside the judgment, and was decreed the proceeds of the sale, which was accepted without appealing, in an action of trespass to try title subsequently brought by the same heir for the same land, it was held that she was estopped from recovering the land. *Powell v. Heckerman*, 6 Tex. Civ. App. 304, 25 S. W. 166.

In *Ledbetter v. Higbee*, 13 Tex. Civ. App. 287, 35 S. W. 801, which was an action of trespass to try title where the defendant claimed title under a judgment of specific performance against R. and recovered in the present suit, it was assigned for error by plaintiff that the evidence tended to show that R. died in 1845, and that, as the county where the decree was had was organized in 1850, the proceedings must have been instituted after the death of R. The court held that if the fact that R. was dead at that time would justify holding the judgment to be an absolute nullity the fact of

& Love, and Pollock & LaFerty, for defendants in error:

The death of Eustace B. Kager, after the commencement of the suit in the Federal court to foreclose the mortgage, and after the service of the chancery subpoena upon him, and before final decree, did not render the decree or the commissioner's deed based thereon absolutely void, and the same is not open to the collateral attack made upon it in this case.

Freeman, Judgm. 4th ed. § 140; *Black*, Judgm. § 200; *New Orleans v. Gaines*, 138 U. S. 595, *sub nom. New Orleans v. Whitney*, 34 L. ed. 1102, 11 Sup. Ct. Rep. 428; *Beard v. Roth*, 35 Fed. Rep. 397; *Yaple v. Titus*, 41 Pa. 202, 80 Am. Dec. 604; *Reid v. Holmes*, 127 Mass. 326; *Hayes v. Shaw*, 20 Minn. 405, Gil. 355; *McCormick v. Paddock*, 20 Neb. 486, 30 N. W. 602; *Jennings v. Simpson*, 12

death should be established, and that the bill of exceptions did not show this. The court further said: "If, however, it had appeared from the bill of exceptions that Robinson was dead at the time referred to, we could not hold that the judgment was void for that reason." This, in effect, was the holding in *Taylor v. Snow*, 47 Tex. 462, 26 Am. Rep. 311, *supra*, although the court does not discuss that question at all, but bases its opinion upon a line of Texas cases which hold that where a judgment is taken against a party who dies after suit is brought before judgment, such judgment is not void, but voidable.

In an action of debt on a poor debtor's bond, where the defense was a discharge under Mc. Rev. Stat. chap. 148, providing for a citation to be served on the creditor if alive and in the state, otherwise on his attorney or agent, it was held that it could not be collaterally shown that the judgment creditor was dead previous to the disclosure by the debtor, and that this fact was known to the debtor and magistrates. *Waterhouse v. Cousins*, 40 Me. 333. In this case the sheriff returned service at the last and usual place of abode of P. It was held that if the sheriff's return was false the plaintiff had another remedy.

A judgment in sci. fa. upon a mortgage returned "nihil," and that there are no terretenants, followed by an alias sci. fa. and the same return, is not void, although the defendant was dead when the first writ issued. *Murray v. Weigle*, 118 Pa. 159, 11 Atl. 781; *Wardner v. Tainter*, 4 Watts, 270.

In the latter case it was said that a judgment rendered against a defendant after his death, who died pending the suit, is at most voidable, and that there is no distinction between that and a case where a judgment is "rendered against one who died before the commencement of the action, but, from the sheriff's return to the original writ, appeared to be alive at the time." In this case it was objected that the judgment in the sci. fa. upon the mortgage awarding execution was not voidable merely, but absolutely void for want of jurisdiction on the part of the court, because the defendant named therein was dead prior to suing out the writ. The court said: "This objection I have already met, as I conceive, by showing that from the return made by the sheriff to the writs of scire facias, and the judgment rendered thereon by the court, the plaintiffs below are concluded from making it even upon a writ of error, and much more in a collateral suit." The court further held, in addition to the facts above: "But the pro-

Neb. 558, 11 N. W. 880; *Mitchell v. Schoonover*, 16 Or. 211, 17 Pac. 867; *Elliott v. Bastian*, 11 Utah, 452, 40 Pac. 713; *Stocking v. Hanson*, 22 Minn. 545; *Coleman v. McAnulty*, 16 Mo. 177, 57 Am. Dec. 229; *Tapley v. Martin*, 116 Mass. 275; *Murray v. Weigle*, 118 Pa. 159, 11 Atl. 781; *Knott v. Taylor*, 99 N. C. 511, 6 S. E. 788; *Clafin v. Dunne*, 129 Ill. 241, 21 N. E. 834.

A judgment cannot be collaterally impeached on the ground that defendant was dead at the time the writ issued or judgment was rendered.

Knott v. Taylor, 99 N. C. 511, 6 S. E. 788; *Mitchell v. Schoonover*, 16 Or. 211, 17 Pac. 867; *Warder v. Tainter*, 4 Watts, 270; *Yaple v. Titus*, 41 Pa. 195, 80 Am. Dec. 604; *Murray v. Weigle*, 118 Pa. 159, 11 Atl. 781;

ceeding by scire facias upon a mortgage, under our act of assembly is one *in rem*, and not against the person at all, and therefore jurisdiction against his person cannot be indisputably necessary."

The reasoning of *Warder v. Tainter*, to the effect that a judgment where the defendant dies before suit, and a judgment where the defendant dies after suit but before judgment, are both alike, is hardly sound, and weakens the case. The judgment in the *Warder* Case may be sustained on the other grounds stated in the opinion.

See *Mills v. Alexander*, 21 Tex. 154, subd. IX.

II. Judgments on confession.

English cases.

Generally speaking the death of the defendant is a countermand of a warrant of attorney, and a judgment taken after death without notice of the same should be set aside. But the English cases do not appear to be very clear as to the practice in regard to taking judgments on confession after the defendant's death. Some cases hold that a judgment taken after death, where the defendant dies within a year and a day from the time of giving the confession, will be valid by fiction of relation back to a time when the party was alive, as in *Robinson v. Tonge*, 3 P. Wms. 399; *Oades v. Woodward*, 1 Salk. 87, 2 Ld. Raym. 766, 850; *Fann v. Atkinson*, Willies, Rep. 423; *Calvert v. Tomlin*, 5 Bing. 1; *Saville v. Wiltshire*, Barnes's Notes, 270.

And in *Fuller v. Jocelyn*, 2 Strange, 882, and *Chancy v. Needham*, 2 Strange, 1081, where judgments were taken on old warrants of attorney, the court refused to set the same aside, although the defendants were dead at the time of taking judgment.

In *Tripp v. Stauley* (1847) 5 Dowl. & L. 262, 17 L. J. Q. B. N. S. 19, 11 Jur. 1062, it was held that a party may, by the terms of the warrant of attorney, waive the necessity of an affidavit being made of his having been recently seen alive, in order to obtain leave to enter up judgment after a year and a day have elapsed. *Patteson, J.*, said: "I see no reason why such a stipulation in a warrant of attorney should not be good."

But in *Heath v. Brindley* (1834) 2 Ad. & El. 365, 4 Nev. & M. 235, it was held that a judgment entered on confession at a term which commenced more than a year and a day from the date of the warrant should be set aside at the instance of the administrator, where the defendant died in the vacation of that term, although the warrant of attorney provided for 49 L. R. A.

Mills v. Alexander, 21 Tex. 154; *Thouvenin v. Rodriguez*, 24 Tex. 468.

Where a sale is made under and in pursuance of a decree which is irregular and voidable only, but not absolutely void, the sale relates back to the decree, and a deed based on such decree is not subject to collateral attack.

Cross v. Know, 32 Kan. 725, 5 Pac. 32.

Doster, Ch. J., delivered the opinion of the court:

This was an action of ejectment, for partition, and for the rents and profits of the land. Eustace B. Kager was at one time the owner of the tract in dispute. He and his wife, Ada L. Kager, executed a mortgage of the land to secure the payment of money. They made default in the payment of the

judgment, notwithstanding more than twelve months should elapse, or that the defendant should be dead. The court said that the waiver in the warrant of attorney is not binding upon his representatives, and still less on the court.

Rule 73, Hilary Term, 2 Wm. IV. (Charnock's New Rules, p. 62), provides that "leave to enter up judgment on a warrant of attorney, above one and under ten years old, must be obtained by a motion in term, or by order of a judge in vacation; and, if ten years old or more, upon a rule to show cause."

It seems that since the Rule of Hilary Term, 4 Wm. IV., General Rules and Regulations, 3, providing that judgments take effect when signed, a showing must be made that the defendant was alive within a reasonable time prior to taking judgments on warrants of attorney. *Jordan v. Farr*, 2 Ad. & El. 437; *Howard v. Batho*, 5 Dowl. & L. 396; *Powell v. Howard*, 6 Scott, 826, 8 L. J. C. P. N. S. 16; *Chell v. Oldfield*, 4 Dowl. P. C. 629; *O'Neill v. Coghlan*, 2 Dowl. & L. 5. 13 L. J. Q. B. N. S. 204, 8 Jur. 361; *Jacobs v. Griffiths*, 5 Dowl. P. C. 577; *Reeder v. Whip*, 5 Dowl. P. C. 576; *Croft v. Egmont*, 8 Dowl. P. C. 95; *Key v. Mountague*, 1 Dowl. N. S. 853; *Watson v. Mathews*, 2 Dowl. N. S. 670, 12 L. J. Q. B. N. S. 139, 7 Jur. 627; *Lot v. Anderson*, 1 Dowl. N. S. 305.

From these cases *supra* it does not appear what would be the effect of taking a judgment where it subsequently appears that the party was dead at the time. But the deduction from them is that the court will not allow a judgment to be taken after the death of the defendant, although it might not set aside such judgments for that cause.

American cases.

There are not many cases in this country in regard to taking judgments by confession on warrant of attorney where the defendant died before judgment; and it seems that in Pennsylvania such judgment will be stricken off. In New York they are made void by the Code of Civil Procedure.

Under N. Y. Code Civ. Proc. § 1275, relating to judgments on confession, and providing, "but a judgment shall not be entered upon such a statement after the defendant's death."—a judgment entered upon confession after defendant's death, which occurred on the same day at about 8 o'clock in the morning, was set aside. *Maddock v. Stevens*, 15 N. Y. Civ. Proc. Rep. 248.

In *Nichols v. Chapman*, 9 Wend. 452, prior to the Code of Civil Procedure, it was held that a judgment on a warrant of attorney may

debt, and on the 9th day of September, 1878, suit to foreclose the mortgage was brought in the circuit court of the United States for the district of Kansas. On the 23d day of September, 1878, they were both duly served with a subpoena in chancery issued in the case. January 8, 1879, the defendant Eustace B. Kager died intestate, leaving surviving him his wife, Ada, and two minor children. These two children were the plaintiffs in the action of ejectment in the court below, and are the plaintiffs in error in this court. July 15, 1879, final decree was rendered and entered in the foreclosure action against the defendants, Eustace B. and Ada L. Kager. This decree adjudged the amount due upon the mortgage indebtedness, and directed a sale of the land to be made to satisfy it. The sale was made on the 23d of February, 1880, and on the 5th day of April,

1880, the sale was confirmed, and a deed executed to the purchaser,—one J. B. Watkins. By mesne conveyances the title of Watkins has been transferred to Ira M. Vickery, the defendant in the ejectment suit, and the defendant in error here. B. N. Kager and Ada Kager, the children and heirs of Eustace B. Kager, having arrived at majority, instituted the action for the partition of the land, and to recover an undivided one half of it, and for the rents and profits of such portion, upon the theory that, their ancestor having died before the rendition of the decree of foreclosure, such decree was a nullity, and could not be made the basis of the sale that was had, and the deed that was executed. It is to be assumed that the decree was procured by complainants' counsel and rendered by the court in ignorance of the previous death of the de-

be entered after the defendant's death, to be entered as of the term if the death happen during a term, and to be entered as of the term preceding the death if the defendant dies in vacation. But execution in such a case cannot issue until one year after the death. In this case the death of the defendant was suggested of record.

In *Livingston v. Rendall*, 59 Barb. 493, it was said that *Nichols v. Chapman*, 9 Wend. 453, holding that a judgment on bond and warrant may be entered after the defendant's death, was based upon the old and technical theory that a judgment was entered as of the first day of the preceding term, and it is doubtful whether even then that decision would apply to a judgment by default. "There is certainly no such theory now remaining. There is no sense in which judgments are entered as of any term. And it would be very useless, and worse than useless, to continue a mere fiction when no good is to be gained."

A judgment entered on a warrant of attorney against a defendant where the record showed that he was dead at the time of entry will be stricken off on a rule. *Tobias v. Dorsey*, 2 W. N. C. 15.

And it was held proper to strike off a judgment that had been entered on a warrant of attorney on the fact being found that the defendant was dead before it was entered. *Lanning v. Pawson*, 38 Pa. 480. In this case the court said: "We speak now only of a judgment entered on a warrant of attorney, and therefore by the act of the plaintiff, and not really by the court."

And where a warrant of attorney authorized a joint or several judgment on a bond, and the plaintiff did not enter a several judgment but a joint one, and at the time of so doing one of the obligors was dead, it was held that the judgment was therefore clearly irregular, and must be opened as to all the defendants, and a *fi. fa.* set aside. *Lewis v. Ash*, 2 Miles (Pa.) 110.

But in *Hartman v. Hesserlich*, 8 W. N. C. 483, where a confession of judgment had been taken on a joint note, and the maker had died before the judgment was entered, on a rule by the sureties to strike off the judgment it was contended, on one side, that a judgment cannot be entered on a warrant of attorney against a survivor after the death of a defendant, and, on the other side, that in case of the death of one of the makers of a warrant of attorney judgment can be entered against the survivor. The court: "Rule discharged."

In *Webb v. Wiltbank*, 1 Clark (Pa.) 324, 49 L. R. A.

where the defendant gave an agreement for judgment as of March 1, with stay of execution until June 1, the agreement not to be filed until June, and before June the defendant died, and after June 1 the plaintiff filed the agreement suggesting the names of the executors, and issued execution, it was held that the judgment was rightly entered up, but that the execution could not issue without a *sci. fa.*

In this case the judgment evidently was intended to be revived. The case does not show how the judgment was entered.

Where a judgment was confessed during vacation, and after the next term the contingency happened upon which the defendant was to have the right to enter it up, and after the contingency happened the defendant died and the plaintiff entered up the judgment, it was held that the judgment was valid notwithstanding the tenth rule of court, providing that parties are at liberty to enter judgment obtained at one term of court on or before the last day of the court or term next succeeding, and that no judgment shall be entered up after such second term without giving a term's notice to the adverse party or his attorney. *Keep v. Leckie*, 8 Rich. L. 164.

This case followed the English rule of making a judgment valid by relation to a time prior to defendant's death.

In this case it was said: "A judgment is the conclusion of law upon facts found or admitted. The entry is merely the formal registry of what was adjudged, having relation, as all agree, to the term when the conclusion is supposed to have been entered. Why or how can the death interpose to arrest the mere formula of entering it up? If the party lives there is no judicial action requisite. No order by the court in point of fact. There is nothing interlocutory or inchoate; no verdict necessary: the facts are admitted; no assessment required: the sum is ascertained, and by consent is considered as adjudged. The whole proceeding by our practice is begun, prosecuted, and perfected in vacation, and the whole action is exploded if the entry does not follow as a legal corollary. The defendant is excluded, and the plaintiff cannot be postponed by the mere withdrawal of his assent, however bitter the penitence of the defendant. Continued assent is not of the essence of the right to sign judgment."

Where a chattel mortgage authorized an entry of judgment as on confession, and the court issued a writ of seizure, after the mortgagor had died, and the purchaser brought a suit of monition under La. Rev. Stat. 1832, p. 425,

fendant Eustace B. Kager. Upon the above-recited state of fact these questions arise: Was the foreclosure decree rendered by the circuit court on the 15th day of July, 1879, and the succeeding sale and deed, void as to the plaintiffs in error, and subject to the collateral attacks made upon it, by reason of the death of Eustace B. Kager on the 8th day of January, 1879, after the bringing of suit, and service of process upon him? Or did his death render the proceedings had thereafter voidable only, and not subject to collateral attack? The court below ruled that the decree and other proceedings were not void, but were voidable only, and therefore could not be collaterally attacked. From this ruling the plaintiffs below have prosecuted error to this court.

In our judgment, the contention of the plaintiffs in error is sound, and must pre-

vail. The foreclosure decree and subsequent proceedings were void, and constituted no basis for a claim of title. Upon the precise question involved, counsel for plaintiffs in error has not carried his investigation of the authorities along the entire line of decisions applicable thereto; and because thereof we have been compelled to make such independent research as the multiplicity of our labors would allow, and in consequence have rested our judgment largely upon what appears to be the reason and principle of the question, and less upon the authority of adjudged cases. We are free to confess that the position of the defendants in error is supported by the greater weight of authorities, numerically considered. In the Encyclopedia of Pleading and Practice (vol. 11, p. 843) it is said: "As to the validity of a judgment rendered for or against a party

Acts 1834, p. 125, providing that the judgment of the court confirming the sale operates as *res judicata* against all persons, whether present or absent; and the executrix resisted the confirmation, the supreme court of Louisiana held that neither the executrix nor her agent and vendee could question the sale, but that the creditors might. Bank of Louisiana v. Ford, 9 La. Ann. 209.

In a subsequent suit by the vendee of the executrix to recover the property the Federal court held that the decision in the state court that the court had jurisdiction was *res judicata*. Jeter v. Hewitt, 22 How. 352, 16 L. ed. 345.

In *Bernes v. Weissner*, 2 Bradf. 212, it was held that a judgment against a surety on a stipulation in admiralty recovered after the death of the stipulator, as in a recognizance, was not entitled to priority of payment out of his estate. The court said that the judgment was unauthorized; that not being in the state court was not such a judgment as 2 N. Y. Rev. Stat. p. 359, § 8, contemplates when it authorizes judgments to be docketed after the death of the party. The court said that the stipulation was nothing more than a conditional obligation to pay, and although judgment could be entered on it without service of process immediately on the final decree against the principal, yet that was not in fact done during the intestate's lifetime.

III. Void judgments.

In *KAGER v. VICKERY* it is held that a judgment for money and for the foreclosure of a mortgage is void, and may be collaterally attacked, where the defendant after service of process had died before judgment. This decision is in line with those of some states, although, as said in the opinion, the weight of authority is the other way. It is treated as a new question in that state, but a similar question arose in *Richards v. Thompson*, 43 Kan. 209, 23 Pac. 106, where a judgment was held void on account of the mortgagor having died before suit. And in *McLaughlin v. State*, 17 Kan. 283, it was held that a judgment against a principal and surety on a forfeited recognizance may be vacated as to the principal, but not as to the surety, where the principal was dead at the time of judgment, under Kan. Code, § 568, providing for vacating a judgment where the party was dead at the time of its rendition.

At common law a judgment taken against a party after his death is void. The court loses jurisdiction of the person and cannot render a

valid judgment against him. This rule has been followed by some states while the weight of authority now is that, in the absence of statutory provisions, such judgments are voidable and erroneous, but not void, and cannot be collaterally attacked. The leading case adopting this view is *Warder v. Tainter*, 4 Watts, 270, where the defendant died before suit, and the judgment was in a proceeding *in rem*, and it was not necessary to establish the rule in that case. It is cited largely in cases which hold that a judgment taken against a party who dies after suit is voidable and erroneous. The cases seem to be irreconcilable.

It does not seem to be material at what stage of the proceedings the death occurs in order to render a judgment void, where the death is after suit and before judgment, except where the death is after verdict and in cases under the New York Code of Civil Procedure. See subd. V., *Where death occurs at certain stages of the action*.

Some cases cited by authors as holding that judgments against dead persons are null use the word "void" in the sense of "erroneous." They are cases where, by proper proceedings, they are sought to be reversed, and are not attacked collaterally. Such are the cases of *Colson v. Wade*, 5 N. C. (1 Murph.) 43; *Burke v. Stokely*, 65 N. C. 569; *Moore v. Easley*, 18 Ala. 619; *Smith v. Pratt*, 13 Ohio, 548; *Bragg v. Thompson*, 19 S. C. 572. There is a wide difference between a judgment null and void and one erroneous and voidable. The latter may be effective until set aside. This distinction was noticed in *Carr v. Townsend*, 63 Pa. 202.

The cases holding that a judgment is void where it is taken against a party who died after the action commenced, and before judgment, are as follows: *Randal's Case*, 2 Mod. 308; *Snodgrass v. Cabiness*, 15 Ala. 160; *Meyer v. Hearst*, 75 Ala. 390; *Swink v. Snodgrass*, 17 Ala. 633, 52 Am. Dec. 190; *Haydock v. Cobb*, 5 Day, 527; *Edwards v. Whited*, 29 La. Ann. 647; *McCloskey v. Wingfield*, 29 La. Ann. 141; *Norton v. Jamison*, 23 La. Ann. 102 (before issue); *New Orleans & C. R. Co. v. Bosworth*, 8 La. Ann. 80 (before issue); *Parker v. Horn*, 38 Miss. 215; *Gerault v. Anderson*, Walk. (Miss.) 30, 12 Am. Dec. 521 (after interlocutory order); *Carter v. Carriger*, 3 Yerg. 411, 24 Am. Dec. 585 (after default); *Kelly v. Hooper*, 3 Yerg. 395; *Nix v. French*, 10 Helsk. 377; *Smith v. Cunningham*, 2 Tenn. Ch. 565; *Collins v. Knight*, 3 Tenn. Ch. 183; *Requa v. Holmes*, 16 N. Y. 193, 26 N. Y. 338 (before interlocutory order); *Griswold v. Stewart*, 4 Cow. 457 (before default); *Adams v. Nellis*, 59 How. Pr.

after his death, the authorities seem to be hopelessly irreconcilable. Thus, according to numerous decisions, such judgments are utterly void, and may be collaterally attacked. The decided weight of authority, however, seems to be that if a court of general jurisdiction, or a court which has acquired full jurisdiction over the cause and over the parties, renders a judgment for or against a party after his death, the judgment is not for that reason void. Such a judgment, while erroneous, and voidable when properly assailed in a direct proceeding for that purpose, is valid until reversed by some appropriate proceeding, and may not be collaterally attacked." In *Freeman on Judgments* (vol. 1, 4th ed. § 153) it is said: "The decisions respecting the effect of judgments for or against persons who were not living at the time of their rendition

are conflicting and unreasonable. Some of them apparently affirm that a judgment so rendered is void under all circumstances, and others that it is valid under all circumstances, because its rendition implies that the parties for and against whom it was given were then living, and that to show that either was then dead is to dispute the verity of the record, and therefore not permissible." In *Black on Judgments* (vol. 1, § 200) it is said: "The great preponderance of authority is to the effect that, where the court has acquired jurisdiction of the subject-matter and the persons during the lifetime of a party, a judgment rendered against him after his death is, although erroneous and liable to be set aside, not void nor open to collateral attack." However, in the preceding section (199) the author says: "At the common law an action was abated

385 (before decision Code); *Lemon v. Smith*, 20 App. Div. 523, 47 N. Y. Supp. 158 (before report—Code); *Stephens v. Humphries*, 73 Hun, 199, 25 N. Y. Supp. 946 (before decision—Code).

And in *Johnson v. Johnson*, 40 Ala. 247; *Stewart v. Nuckols*, 15 Ala. 225, 50 Am. Dec. 127; *Ex parte Swan*, 23 Ala. 192; *Hood v. Branch Bank of State*, 9 Ala. 335; *Nolan v. Cameron*, 9 Lea, 234; *Morrison v. Deaderick*, 10 Humph. 342; and *Hewly v. Johns*, 3 Baxt. 85,—it was said that judgments taken against a party after his death are void.

In *Randal's Case*, 2 Mod. 308, in an action of debt upon a bond against an administrator who pleaded a judgment against the intestate and that he had no assets *ultra*, and the other party replied that the defendant died before judgment was obtained, the judgment was held ill, and "the court were of opinion that the plaintiff might avoid the judgment without a writ of error; especially in this case, where it is not only erroneous, but void."

This case was criticised in *Warder v. Taintner*, 4 Watts, 270, which held that a judgment was not void in an action where the defendant was dead at the time of the institution of the suit. It was there said that, although the judgment in *Randal's Case*, 2 Mod. 308, "may be correct in deciding that the plaintiff in that case could avoid the judgment as to himself, which was set up by the defendants in their plea to postpone his claim, by showing that it was obtained before the death of the intestate, yet I apprehend it cannot be so for the reason given by the reporter, to wit, 'that it was not only erroneous, but void;' for this would be contrary to the current of authorities already cited, which show that a judgment for such cause is only voidable at most, and not void. I am inclined, also, to believe that the reporter, through misapprehension, has misstated the reason which induced the court to make their decision; for Lord Holt seemed not to think the book of the best authority when in *Salisbury v. Phillips*, 1 Ld. Raym. 537, he, upon it being cited by counsel, said, *in tra*, 'that no books ought to be cited at the bar but those which were licensed by the judges.' The decision of the court, however, may be sustained upon the ground that the judgment was erroneous and voidable merely; but the plaintiff, not being either a party or privy to it, was therefore unable to reverse it by writ of error, and, being prejudiced by it, was entitled to do so in effect as to himself by pleading and showing the error whenever the judgment should come to be set up for the purpose of prejudicing or depriving him of his right."

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In *Smith v. Evans, Donnelly's Cases*, 25, it was held that where a decree was taken, and at the time of the decree a party to the suit was dead, the decree would be imperfect, and could not be remedied by a subsequent bill of revivor against the representatives of the deceased party.

A sale under an execution issued on a judgment rendered against an intestate after his death is void, and passes no title. *Snodgrass v. Cabiness*, 15 Ala. 160; *Meyer v. Hearst*, 73 Ala. 300; *Swink v. Snodgrass*, 17 Ala. 653, 52 Am. Dec. 190; *Parker v. Horne*, 38 Miss. 215.

And a judgment against a partnership which has ceased to exist by the death of one of the partners before the date of the judgment is null and void, and a surety on a release bond may show that such judgment is void. *McCloskey v. Wingfield*, 29 La. Ann. 141.

And a decree or judgment rendered against a dead person jointly with others may be void as to the party deceased, but is valid as to the living defendants. *Collins v. Knight*, 3 Tenn. Ch. 183.

In this case it was said that the weight of authority in this state certainly is that a judgment or decree against a deceased party to a suit is an absolute nullity; and our decisions are, upon this point, in conflict with the weight of judicial authorities elsewhere.

In *Hood v. Branch Bank of State*, 9 Ala. 335, the court set aside a judgment that had been rendered against a defendant after his death, and then entered judgment against the other defendants; and said: "The judgment against D. was a nullity."

In *Powell v. Washington*, 15 Ala. 803, where a judgment in favor of a deceased plaintiff was sustained, the court said: "We are referred to *Hood v. Branch Bank of State*, 9 Ala. 333, where it is said a judgment rendered against a dead man is a nullity. In such case, the representatives of the party deceased may move to set it aside. They are not estopped, not being party or privy to the proceeding. The cases are distinguishable."

In Tennessee, the death of a defendant to a suit before decree renders void as to him and his representatives all proceedings taken thereafter. *Smith v. Cunningham*, 2 Tenn. Ch. 565. In this case it was said that the weight of authority seems to be that, when jurisdiction has been obtained over the defendant in his lifetime, a judgment rendered against him subsequent to his death is not void, but only erroneous and voidable: but the decisions of our state are, however, otherwise, and are conclusive.

Where a party dies during the pendency of

by the death of a sole plaintiff or defendant. And in some of the states the doctrine seems to be irrevocably settled that a judgment against a person who was dead at the time of its rendition is absolutely null and void." In *Life Assn. of America v. Fassett*, 102 Ill. 315, the court says: "Much of the confusion and uncertainty which prevail in the authorities on this subject is attributable, doubtless, to the fact that courts, in jurisdictions where the common-law system obtains, in attempting to follow the adjudications of other courts, have failed to distinguish the cases resting on purely common-law grounds from those resting in whole or in part upon statutes modifying the common law. A careful examination of the authorities clearly shows that a judgment by the common law, in the absence of any statutory provisions on the subject, against a dead person,

either natural or artificial, is absolutely void, and the fact that service may have been obtained, or the suit commenced, before the death of the party, makes no difference in this respect; and this was unquestionably the rule from the earliest period of the common law down to the seventeenth year of the reign of Charles II., when the British Parliament passed the first act somewhat modifying the common law on the subject. *Randal's Case*, 2 Mod. 308; 1 Salk. 8; 2 Saund. 72, note m. The rule of the civil law was the same. 7 Rob. Pr. 157. By statute (17 Car. II. chap. 8, § 1) it was enacted, in substance, that the death of neither plaintiff nor defendant between verdict and judgment should be assigned for error, provided the judgment should be entered up within two terms after such verdict. The courts of Westminster, in giving a construc-

a suit, a decree two years thereafter without any notice of the party's death being taken in the proceeding is void for want of jurisdiction, and upon a suit founded on such decree the want of jurisdiction may be shown by a plea, if it does not appear upon the face of the record. *Kelly v. Hooper*, 3 Yerg. 395.

In *Haydock v. Cobb*, 5 Day, 527, where the assignee of a note had levied on land of the obligor on his judgment obtained in the name of the assignor, and then obtained a decree against his assignor that the title acquired by the levy of the execution might be vested in him, but before the decree the assignor died, it was held, in an action of dissesin brought by the purchaser against the obligor, that he might show that the assignor died before the passing of the decree. The court said that if H. was dead at the time of the decree there was no party upon whom the decree could operate, and his heir could not be divested of his title by a decree which as to him was passed merely *ex parte*.

A judgment rendered against a party who was dead is void notwithstanding his executor was defendant in the same action in his individual capacity. But an execution regular in form issued upon such judgment will protect the sheriff, and a purchaser under such void judgment may recover from the sheriff so much of the proceeds of the sale as has not been paid to the plaintiff in execution before notice had by the sheriff of any defect in the judgment. *Bragg v. Thompson*, 19 S. C. 572.

But where a suit was commenced against the heirs to subject the real estate of the decedent to the payment of his debts, one of the heirs died without children, leaving her brothers and sisters her heirs, who were also parties to the suit, and no notice was taken of her death in the action, and the land was sold under a decree after her death. It was held that the estate vested in the surviving defendants, and that the purchaser obtained a good title. *Gilchrist v. Cannon*, 1 Coldw. 581. In this case the court said it would have been otherwise if the heirs of the decedent had been strangers to the record.

A judgment dissolving an injunction with damages rendered against a party who at that time was dead is a valid judgment binding on his succession and representatives who were parties to that proceeding. *Stackhouse v. Zuntz*, 41 La. Ann. 415, 6 So. 666. The court held the error to be clerical, and not to vitiate the judgment, and said: "Had not the widow, as widow in community and as tutrix, been a party to the record at the time the judgment

was rendered, the case would have presented quite different features."

IV. Voidable judgments.

The majority of cases hold that a judgment taken against a party who dies after suit, but before judgment, is not void. These cases generally hold that such judgments cannot be attacked collaterally; that they are erroneous and voidable, and that they are open to an attack in the proper manner, by motion or by writ of error coram nobis, etc.

For the particular facts in these cases, see subd. IX., *Classification by states*.

A judgment rendered against a party after his death is not void. *Trall v. Snouffer*, 6 Md. 308; *McCormick v. Paddock*, 20 Neb. 486, 30 N. W. 602; *Swasey v. Antram*, 24 Ohio St. 87; *Mitchell v. Schoonover*, 16 Or. 211, 17 Pac. 867; *Holman v. G. A. Stowers Furniture Co. (Tex. Civ. App.)* 30 S. W. 1120; *Fleming v. Seelgison*, 57 Tex. 524; *Best v. Nix*, 6 Tex. Civ. App. 349, 25 S. W. 130; *King v. Burdett*, 28 W. Va. 601, 57 Am. Rep. 687; *Beard v. Roth*, 35 Fed. Rep. 397; *Wallace v. Center*, 67 Cal. 133, 7 Pac. 441; *Tyrrell v. Baldwin*, 67 Cal. 1, 6 Pac. 867; *Elliott v. Paterson*, 65 Cal. 109, 3 Pac. 493; *Claffin v. Dunne*, 129 Ill. 241, 21 N. E. 834; *Danforth v. Danforth*, 111 Ill. 236; *Palmerton v. Hoop*, 131 Ind. 23, 30 N. E. 874; *Reid v. Holmes*, 127 Mass. 326; *Collins v. Mitchell*, 5 Fla. 364.

And the same was said to be the rule in *Carr v. Townsend*, 63 Pa. 202; *Moke v. Brackett*, 28 Tex. 443; *Denni v. Elliott*, 60 Tex. 337; *Harrison v. McMurray*, 71 Tex. 122, 8 S. W. 612; *Spalding v. Wathen*, 7 Bush, 659; *New Orleans v. Gaines*, 138 U. S. 595, 34 L. ed. 1102, 11 Sup. Ct. Rep. 428; *Coleman v. McNulty*, 16 Mo. 173, 57 Am. Dec. 229.

And such judgment cannot be attacked collaterally. *Tyrrell v. Baldwin*, 67 Cal. 1, 6 Pac. 867; *Lockridge v. Lyon*, 68 Ga. 137; *Elliott v. Paterson*, 65 Cal. 109, 3 Pac. 493; *Claffin v. Dunne*, 129 Ill. 241, 21 N. E. 834; *Palmerton v. Hoop*, 131 Ind. 23, 30 N. E. 874; *Reid v. Holmes*, 127 Mass. 326; *Jennings v. Simpson*, 12 Neb. 558, 11 N. W. 880; *Knott v. Taylor*, 99 N. C. 511, 6 S. E. 788; *Swasey v. Antram*, 24 Ohio St. 87; *Yaple v. Titus*, 41 Pa. 195, 80 Am. Dec. 004; *Mills v. Alexander*, 21 Tex. 154; *Evans v. Spurgin*, 6 Gratt. 107, 52 Am. Dec. 105; *King v. Burdett*, 28 W. Va. 601, 57 Am. Rep. 687.

And the same was said to be the rule in *Davies v. Coryell*, 37 Ill. App. 509, and *Hayes v. Shaw*, 20 Minn. 405, 111 355.

tion to this act, held that where a party—and there was no difference between plaintiff and defendant in this respect—died in term time, though before verdict, the cause might nevertheless proceed to trial and judgment, upon the theory the entire term was in contemplation but one day. 2 Saund. 72, note m. The judgments in these cases were entered precisely in the same manner as if the death of the party had not occurred, and the statute applied as well where the right of action did not survive to or against the legal representatives of the deceased party as where it did. *Ibid.* The next legislation on the subject was the statute of 8 & 9 Wm. III. Section 6, chap. 11, of that act provided, in substance, that in all actions to be commenced in any court of record, if the plaintiff or defendant should happen to die after interlocutory and before final judg-

ment, the action should not by reason thereof abate, if such action could be originally prosecuted or maintained by or against the executors or administrators of the party dying; but the plaintiff in such case, or, in the event of his death after such interlocutory judgment, his executors or administrators, might have a scire facias against the defendant, or, if he should die after such interlocutory judgment, then against his executors or administrators, to show cause why damages should not be assessed or recovered in such action, etc. It will be perceived that this act is in some of its main features much like our own statute on this subject, and is doubtless the original from which our own was modeled, though ours is unquestionably a great improvement on the English model. This act, it will be further observed, extends only to cases where the death of either

And a judgment rendered against a party after his death will not be enjoined. *Lockridge v. Lyon*, 68 Ga. 137; *Mosley v. Southern Mfg. Co.* 4 Okla. 492, 46 Pac. 508; *Holman v. G. A. Stowers Furniture Co.* (Tex. Civ. App.) 30 S. W. 1120; *Harper v. Hill*, 35 Miss. 63.

A judgment taken against a party after his death is erroneous and voidable. *Tedlie v. Dill*, 3 Ga. 104; *Lynn v. Lowe*, 88 N. C. 478; *Colson v. Wade*, 5 N. C. (1 Murph.) 43; *Burke v. Stokely*, 65 N. C. 569; *Wittenburgh v. Wittenburgh*, 1 Mo. 226; *Jennings v. Simpson*, 12 Neb. 558, 11 N. W. 880.

And the same was said to be the rule, in *Collins v. Mitchell*, 3 Fla. 364; *Lockridge v. Lyon*, 68 Ga. 137; *Claffin v. Dunne*, 129 Ill. 241, 21 N. E. 834, *Overruling Life Assn. of America v. Fassett*, 102 Ill. 315; *Davies v. Coryell*, 37 Ill. App. 509; *Case v. Ribellin*, 1 J. J. Marsh. 30; *Spalding v. Wathen*, 7 Bush, 659; *Smith v. Rice*, 11 Mass. 507; *Hayes v. Shaw*, 20 Minn. 405, Gil. 355; *Knott v. Taylor*, 99 N. C. 511, 6 S. E. 788; *Smith v. Pratt*, 13 Ohio, 548; *Swasey v. Antram*, 24 Ohio St. 87; *Mosley v. Southern Mfg. Co.* 4 Okla. 492, 46 Pac. 508; *Yaple v. Titus*, 41 Pa. 195, 80 Am. Dec. 604; *Fleming v. Seeligson*, 57 Tex. 524; *Moke v. Brackett*, 28 Tex. 443; *McClelland v. Moore*, 48 Tex. 355; *Harrison v. McMurray*, 71 Tex. 122, 8 S. W. 612; *Best v. Nix*, 6 Tex. Civ. App. 349, 25 S. W. 130; *Elliott v. Bastian*, 11 Utah, 452, 40 Pac. 713; *Evans v. Spurgin*, 6 Gratt. 107, 52 Am. Dec. 105; *King v. Burdett*, 28 W. Va. 601, 57 Am. Rep. 687; *Watt v. Brookover*, 35 W. Va. 323, 13 S. E. 1007; *Beard v. Roth*, 35 Fed. Rep. 397.

And such a judgment will be reversed on error, after the trial court overrules a motion to set the same aside. *Tedlie v. Dill*, 3 Ga. 104.

And will be reversed where the record shows that the death of the defendant was suggested and ignored. *Wittenburgh v. Wittenburgh*, 1 Mo. 226; *Jennings v. Simpson*, 12 Neb. 558, 11 N. W. 880.

And will be reversed if the death is shown by the record. *Yaple v. Titus*, 41 Pa. 195, 80 Am. Dec. 604.

And in *Watt v. Brookover*, 35 W. Va. 323, 13 S. E. 1007, the same was said to be the rule.

And such a judgment will be corrected on proceedings in error. *Flock v. Wyatt*, 49 Iowa, 466.

And the same was said to be the rule in *Smith v. Rice*, 11 Mass. 507; *Beard v. Roth*, 35 Fed. Rep. 397.

But in *Merrill v. Suffolk Bank*, 31 Me. 57, 50 Am. Dec. 649, it was said that a judgment will not be corrected on error if the record 49 L. R. A.

shows that the court has jurisdiction of the person, and does not show that he is dead.

A judgment rendered against a party after his death may be revoked or recalled by writ of error coram nobis. *Collins v. Mitchell*, 3 Fla. 364; *Calloway v. Nifong*, 1 Mo. 223; *Devoreux v. Roper*, 1 Phila. 182; *Hill v. West*, 1 Blinn. 486; *Yaple v. Titus*, 41 Pa. 195, 80 Am. Dec. 604; *Milam County v. Robertson*, 47 Tex. 222.

And the same was said to be the rule, in *Case v. Ribellin*, 1 J. J. Marsh. 30; *Watt v. Brookover*, 35 W. Va. 323, 13 S. E. 1007; *Dows v. Harper*, 6 Ohio, 518, 27 Am. Dec. 270; *Harrison v. McMurray*, 71 Tex. 122, 8 S. W. 612.

The writ of error coram nobis lies only in the court rendering judgment. *Latham v. Hodges*, 35 N. C. (13 Ired. L.) 267.

And in *Elliott v. Bastian*, 11 Utah, 452, 40 Pac. 713, it was said that this writ has become obsolete.

And in *Spalding v. Wathen*, 7 Bush, 659, it was said that such a judgment can only be corrected by the court which rendered it.

A judgment rendered against a party after his death may be set aside on motion. *Knott v. Taylor*, 99 N. C. 511, 6 S. E. 788; *Burke v. Stokely*, 65 N. C. 569; *McClelland v. Moore*, 48 Tex. 355; *Elliott v. Bastian*, 11 Utah, 452, 40 Pac. 713.

And the same was said to be the rule in *Wood v. Watson*, 107 N. C. 52, 10 L. R. A. 541, 12 S. E. 49.

And in *Lockridge v. Lyon*, 68 Ga. 137, it was said that a judgment may be set aside on motion or by affidavit of illegality.

V. Where death occurs at certain stages of the action.

Where a judgment is taken against a party who dies after suit brought, but before issue joined, or before default taken, or after default taken, or before trial, or before verdict, report, or decision, or before interlocutory order, it seems that such a judgment is erroneous and voidable, and according to the English cases, where it does not relate back, will be set aside. In New York it is made absolutely void by the Code, and in Louisiana and Tennessee, following the general rule in those states, it is a nullity. In Texas and California it is voidable, and in Massachusetts such a judgment has been held valid against the mode of attack, and it is questioned if it was erroneous.

Attention is called to subdivisions *Void judgments*, and *Voidable judgments*, where many cases evidently were similar in that the judg-

party occurs after an interlocutory judgment. This brief reference to the earlier decisions founded on the common law, and subsequent legislation on the subject, clearly shows that the idea that a judgment against a dead person is voidable only, had its origin in the construction given to the act of 17 Car. II. above mentioned; and any extension of the doctrine to cases not falling within that act, or other acts of a similar character, would, on principle, be a clear misapplication of it. It is also to be observed that these statutes, having both been passed since the fourth year of the reign of James I., are not of any binding force in this country; and it is clear the decisions of the English courts construing them are likewise, on principle, of no authority here; and, so far as they have been acted upon by the courts of this country in deducing the common law as to

ment must have been taken at one of these stages of proceedings; but the question simply discussed in those cases was, Is a judgment taken against a party after his death void or voidable? And such decision generally followed the rule in that state.

a. Death before issue joined.

Where, after imparlance and before judgment, one of the defendants died, and judgment was entered up against both defendants, and an execution issued without any suggestion of the death of the other defendant, on error coram vobis, the record was amended suggesting the death of the defendant. *Hamilton v. Holcomb*, 1 Johns. Cas. 29.

A judgment taken against a defendant after being cited, but who died before issue joined, is a nullity, and his heirs cannot be made liable on such judgment. *New Orleans & C. R. Co. v. Bosworth*, 8 La. Ann. 80.

So, a judgment against one who, though cited, dies before issue joined, is void. *Norton v. Jamison*, 23 La. Ann. 102.

In this case the court said that it was necessary to make his legal representative a party, otherwise the judgment was inoperative as to either, and the recording of it created no judicial mortgage on the property left by the defendant, and the insertion of the word "heirs" in the decree gave no force to the judgment against his heirs and legatees who were not cited.

b. Before default taken.

Where the defendant died after service of summons, a judgment taken against such defendant after his death was set aside on motion of his administrator. *Livingston v. Rendall*, 59 Barb. 493.

In this case the court held that, although the time to answer expired by its own limitation under the Code, without the entry of a rule for a default, yet the mere lapse of twenty days from the service of summons is not the obtaining of a judgment. The court said: "Probably the plaintiff might have filed his proof of service and entered a rule for judgment; although this practice seems at present to prevail only in cases of actual application to the court for judgment."

In this case the court said that 2 N. Y. Rev. Stat. p. 359, § 7, providing that in a case in which the record of judgment should be filed and docketed within one year after the death of a party against whom such judgment was obtained, a suggestion of such death, if it happened before judgment rendered, shall be en-

the effect of a judgment for or against a dead person, they have led, as already remarked, to much misapprehension and confusion on the subject. Such a judgment, when tested by the common law alone, as we have already seen, is absolutely void."

It is proper, however, to say that in the subsequent case of *Clafin v. Dunne*, 129 Ill. 241, 21 N. E. 834, the supreme court of that state repudiated the quotation we have made from *Life Asso. of America v. Fassett*, as being a dictum. Therefore we have not made the quotation as expressive of the rule of authority in Illinois, but as the pertinent and deliberate declaration of eminent judges upon the abstract question of law, and also historically upon the origin and progress of the innovation in the common law made by the cases holding to a contrary doctrine. In the view of Mr. Black, and also in the view

tered on the record, referring to the old practice, has become practically inapplicable to the practice under the Code, as originally judgments were perfected only in term time. The court further said, it will be seen, also, by reference to Rev. Stat. p. 387, §§ 3, 4, and 5, that under the old practice it was only after verdict or judgment interlocutory that a final judgment could be entered where the sole defendant had died, and even in the case of judgment interlocutory a scire facias was to be issued against the executors, and the judgment was against them.

A judgment by default, entered at a term which commenced after the defendant's death, is void, as the judgment does not relate back to a period beyond the first day of the term at which it is entered. *Griswold v. Stewart*, 4 Cow. 457. The court said the rule that records cannot be impeached in pleading is confined to parties and privies which only can bring error, and does not apply to strangers. The court further said that it was a judgment by default, and not by confession or verdict, and therefore not within 17 Car. II. chap. 8. 1 N. Y. Rev. Laws, 144, § 5, providing that the death of either party between verdict and judgment shall not be alleged for error so as the judgment be entered within two terms after the verdict, nor within 1 Rev. Laws, 312, providing that judgments shall not abate by the death of either party after interlocutory judgment, and that on a scil. fa. against terretenants they may plead the judgment so entered.

In *Gerry v. Post*, 13 How. Pr. 118, it was said that in *Griswold v. Stewart*, 4 Cow. 457, one Walton died October 5, 1873, and judgment was rendered against him by default at the next term in that month, and on scil. fa. against the terretenants they pleaded these facts; and it was held that the judgment was void, and no lien on the lands, and that no statute cured the effect of the death.

In *United States v. Ambrose*, 7 Fed. Rep. 554, referring to *Griswold v. Stewart*, 4 Cow. 457, it was said that was a scil. fa. against Stewart, who pleaded that on the day on which judgment was entered the defendant in the judgment was dead, and that consequently the judgment was void for want of jurisdiction; and it was held that the plea was a good plea because it did not contradict the record, but only undertook to avoid the effect of it by showing that the court had no jurisdiction.

In *Warder v. Tainter*, 4 Watts, 270, it was said that, as to the case of *Griswold v. Stewart*, 4 Cow. 457: "I think I have shown already that the judgment in question in that

of the supreme court of Illinois, as first expressed, it would appear that at common law a judgment against a dead man was a nullity. We have not been able to examine many of the numerous decisions which appear to hold to the contrary. It is altogether likely that the reasons for the complete reversal which they have made of the common law upon the subject have been in many instances influenced by statutory provisions. Some of the cases we have read appear to have been so influenced. To hold that a valid judgment can be rendered against a dead man (that is, a judgment which can be made the basis for an assertion of title adverse to his heirs or legal representatives) would seem to be a holding requiring the sanction of a statute more or less explicit in its terms. There is no statute in this state which in terms or by impli-

cation sanctions the rendition of a judgment against one deceased. Code Civ. Proc. § 40, reads as follows: "An action does not abate by the death or other disability of a party, or by the transfer of any interest therein, during its pendency, if the cause of action survive or continue. In case of the death or other disability of a party, the court may allow the action to continue by or against his representative or successor in interest." This statute, however, is no authority for the rendition of a judgment against a dead man. It simply provides that, in the case of a cause of action which may survive to the party plaintiff or against the party defendant, the death of either of such parties shall not abate the action; that is, the action shall not be stricken from the docket. The proceedings so far conducted shall not go for naught, but may be contin-

case was not void, but voidable only at most, on account of its having been given after the death of the defendant; and that the learned judge who delivered the opinion of the court misapprehended its real character when he said it was 'absolutely void.' But still the conclusion of the court on the case may be right, provided Stewart was really a stranger to the judgment and could not have brought a writ of error to reverse it. Of this, however, I entertain some doubt; because if I apprehend the facts of the case rightly, Stewart was heir . . . to Walton, against whom the judgment had been given, as well as tenant of the land to whom as such it had descended, . . . and if the judgment, being voidable only, became a lien upon the land, I am not satisfied but that he was privy, and might therefore as such have sued out a writ of error."

In *Sternbergh v. Schoolcraft*, 2 Barb. 153, the case of *Griswold v. Stewart*, 4 Cow. 457, was cited to the proposition: "The rule is well settled that no matter of defense which existed anterior to the recovery of the judgment can be pleaded or shown as a defense to an action upon the judgment." But what the court did decide was that this rule did not apply to strangers.

In *Dyckman v. New York*, 5 N. Y. 434, the case of *Griswold v. Stewart*, 4 Cow. 457, was cited to the proposition that "when the jurisdiction of a court of limited authority depends on a fact which must be ascertained by that court, and such fact appears and is stated in the record of its proceedings, a party to such proceedings, who had an opportunity to controvert the jurisdictional fact, but did not, and contested upon the merits, cannot afterwards in a collateral action against his adversary in those proceedings impeach the record, and show the jurisdictional fact therein stated to be untrue." But what the court really held was that "the reason of the rule shows its limitation," and that it was only confined to parties and privies.

In *Grant v. Griswold*, 21 Hun, 509, it was held that N. Y. Code Civ. Proc. § 763, providing that if death occurs after an accepted offer to allow judgment to be taken, or verdict, report, or decision, or an interlocutory judgment, the court must enter judgment, excludes an ordinary default. The court further said that this section was an adaptation of 2 Rev. Stat. 387, § 4, permitting final judgment in the names of the original parties within two terms after verdict or plea, notwithstanding the death of either party, and applied only to a verdict or plea by confession; that § 5 provided that

nothing in § 4 shall be construed to authorize the entry of a judgment against any party who shall have died before a verdict is actually rendered against him, notwithstanding he may have died on the first or any other day of the term or sitting of the court at which such verdict shall have been taken; but such verdict shall be absolutely void. The court said: "There was no power in the court, either inherent or statutory, to direct any such judgments as of a date prior to his decease. This was explicitly held in *Livingston v. Rendall*, 59 Barb. 493, where the case of *Nichols v. Chapman*, 9 Wend. 455, was considered, and the doctrine there enunciated, of relation back to the first day of the preceding term, found to be wholly inapplicable to the present system. (And see Code Civ. Proc. § 1210, with Mr. Throop's note on *Livingston v. Rendall*, 59 Barb. 493, showing his intention to keep the section in harmony with this case.) The court certainly has no inherent power to enter judgment directly against a party deceased. This is impliedly conceded in all the cases. It results from their exclusive leaning upon the statute and strict application thereof. *Lewis v. Rapelyea*, 1 Barb. 29; *Warren v. Eddy*, 13 Abb. Pr. 28; *Burhans v. Burhans*, 10 Wend. 601; *Spalding v. Congdon*, 18 Wend. 543; *North v. Pepper*, 20 Wend. 677; *Dowbiggin v. Harrison*, 10 Barn. & C. 480. The only exception is where a party dies after verdict, and before the decision on a motion for a new trial. There the court has inherent power to direct the entry of judgment as of a date preceding such death. *Ryghtmyre v. Durham*, 12 Wend. 245. The reason of the latter rule is, that the party shall not be prejudiced by the delay of the court in giving judgment, if it can be avoided."

In *Borsdorff v. Dayton*, 17 Abb. Pr. 36, note, it was held that where the defendant dies before the expiration of his time to answer, the court has no power to enter judgment against him. And a judgment so entered will be set aside on motion, even after the expiration of a year from the date of entry. The court said: "At the time of his death, he was not in default, and the plaintiff had no right to a judgment. I cannot concede that a default can be taken against a dead man, any more than a summons can be served on a dead body."

But in *Reid v. Holmes*, 127 Mass. 326, it was held that the entry of a judgment against the defendant having jurisdiction of the subject-matter of the parties after the death of the defendant upon a default by him in his lifetime, without the knowledge of his death, will not avoid the judgment if otherwise valid,

ued in the name of or against properly substituted plaintiffs or defendants. The statute means that the progress of a case, though arrested at the point at which death intervenes, nevertheless from thenceforward may be conducted by those upon whom the right of action devolves, or against those upon whom the liability descends. This statute, however, does not assume to validate proceedings conducted in the name of or against deceased persons. It simply provides that, if parties die, the proceedings begun may be thereafter conducted in the name of or against their successors in interest. The common law has been nowise changed, therefore, by statute in this state. The common law, as we believe, gave no sanction whatever to judgments against dead persons, even though such persons had been in their lifetime subject to the jurisdiction

of the court, by complaint duly filed and process duly served. As remarked by the supreme court of Mississippi in *Gerault v. Anderson*, Walk. (Miss.) 30, 12 Am. Dec. 521: "In courts of justice there must be actor, *reus*, and *judez*, before the court can act effectually to bind parties." "To say that the court had jurisdiction over the dead would contradict every principle of law and rule of proceeding. Why, in chancery, on the death of a party and the transmission of his interests to another, is a bill of review required? Why is a suit said to abate on the death of either party? The answer is that on the death of the party his interest ceases, and the jurisdiction of the court ceases also." Nor do the statutory provisions for the revivor of judgments bear upon the question. By statute, judgments may be revived; but that means that judgments

In this case the court said that, even if the judgment might have been reversed by writ of error for error in fact, yet, the error being a mere irregularity in the mode of exercising a judicial authority, it would seem that neither party could collaterally dispute the validity of the judgment, and certainly the plaintiff who has converted his demand into the form of a judgment, valid upon its face and which the defendant has made no attempt to set aside, but has pleaded it in bar, cannot treat it as of no effect by reason of the irregularity of the entry of judgment after defendant's death.

c. After default taken but before final judgment.

Where a judgment by default is taken against a defendant, and, before a writ of inquiry is executed, the defendant dies, a final judgment without noticing his death or reviving the suit is void, and may be taken advantage of by the administrators upon plea to a sci. fa. issued against them. *Carter v. Carriger*, 3 Yerg. 411, 24 Am. Dec. 585.

This case follows the rule in Tennessee, holding that all judgments taken against persons after their death are void without regard to the stage of the proceedings when the death happened.

So, upon the death of a party after a writ of inquiry executed and before return thereof, judgment should not be entered, but sci. fa. should be taken against the executor to show why the damages assessed should not be adjudged to the plaintiff. *Goldsworthy v. Southcott*, 1 Wils. 243.

Where death occurred between judgment by default and final judgment, it was held erroneous as void, and was reversed. *Colson v. Wade*, 5 N. C. (1 Murph.) 43. The word "void" in this case was evidently used in the sense of voidable.

d. Before interlocutory order.

In New York such a judgment is absolutely void.

In an action of ejectment, where one party claimed title under proceedings in a partition suit, it was held that all the proceedings in the partition suit subsequent to the death of the defendant were absolutely void as against his heirs. *Requa v. Holmes*, 16 N. Y. 193.

In this case the court said that 1 N. Y. Rev. Laws, 488, act April 10, 1813, providing that no suit in chancery shall abate by the death of any one of the defendants, but should survive, etc.; but that no order or decree of the court should bind any person not a party there-
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to,—applied to courts of chancery for partition.

In *Wasson v. Hoff*, 27 Misc. 55, 57 N. Y. Supp. 953, it was said that the case of *Requa v. Holmes*, 16 N. Y. 193, relied on by the moving party, does not seem to be in point, because the defendant in that case died before interlocutory judgment, and before the rights of the parties were determined.

And in *Requa v. Holmes*, 26 N. Y. 338, the court said: "On this precise state of facts this court in 1837, when the cause was here for the first time, held that the proceedings in the partition suit subsequent to the death of Samuel Requa were absolutely void as against his heirs, and that all the title the defendant obtained was that which the surviving parties to the partition suit had at the time of the decree for sale." This case decides that the plaintiff could attack the decree of the court of chancery collaterally by proof that the defendant died before the same was made.

e. Before verdict, report, or decision.

If a defendant die on the night before the trial of the case at the sittings in term a verdict and judgment thereafter will be set aside on motion. *Taylor v. Harris*, 3 Bos. & P. 549. The court said that if a cause from never having been entered in the cause paper could not possibly have been tried until after the death of the defendant, a verdict obtained after his death cannot stand, as the postea is made up as of the very day on which the cause was tried, whereas in the case of trials after term the postea is made up as of the first day.

Where the defendant in ejectment died before the assizes began, the court refused to arrest the judgment, and the party was put to his writ of error that the point might be put in issue and tried by a jury. 1 Salk. 8.

The death of the defendant between the commission day of assizes and the day of trial is not a ground for setting aside the verdict for the plaintiff. *Jacobs v. Miniconi*, 7 T. R. 32. In this case the court said that all the verdicts given refer to the first day.

In *Taylor v. Harris*, 3 Bos. & P. 549, it was said in regard to *Jacobs v. Miniconi*, 7 T. R. 31, "that the cause there might have been tried at any period after it had once been entered in the judge's cause paper; and nothing but the multiplicity of business prevented it from being tried on the first day of the sittings. But the sittings in term neither commenced with the term nor are any part of the term. They are appointed at the discretion of the chief justice; and if a cause, from never having been

which have been rendered against living persons may be revived after the death of such persons, not that judgments rendered against dead persons as though they were living may be revived. As remarked by the supreme court of Tennessee in *Carter v. Carriger*, 3 Serg. 411, 24 Am. Dec. 585: "The object of all law is the living man, not the dead body. The defendants in error's case is not helped by a scire facias. Its object is to enforce against the administrators a lien previously established against and fixed upon their intestate. When there is no such lien the scire facias is powerless. Its action is not original, but consecutive and successive,—wholly dependent upon the liability created against the living man. Without this foundation the scire facias against the administrator is only an inoperative and empty form, without substance and without effect."

entered in the cause paper, could not possibly have been tried until after the death of the defendant, a verdict obtained after his death cannot stand."

In *Harrison v. McMurray*, 71 Tex. 122, 8 S. W. 612, it was said that in numerous cases our courts have held that judgments against a defendant who had died before verdict are not void but only voidable, and can be set aside by a proceeding *coram nobis*,—that is, by proceedings in the same court where rendered, showing the fact of death at the rendition of the judgment.

In New York such a judgment is absolutely void.

In *Gerry v. Post*, 13 How. Pr. 118, it was said that at common law death abated all actions, and by 2 N. Y. Rev. Stat. 306, 307, § 8, if the defendant died after interlocutory, but before final, judgment, nothing could be done until his executors or administrators were brought in; that by § 5, if either party died after verdict, or a plea in confession, the court could enter final judgment in the names of the original parties at any time within two terms after the death; but if a verdict were entered after the death of a party, though he were alive at the beginning of the term, the verdict was absolutely void.

New York Code Civ. Proc. § 765, provides: "This title does not authorize the entry of a judgment against a party who dies before a verdict, report, or decision is actually rendered against him. In that case the verdict, report, or decision is absolutely void."

So, where a party dies before "decision" is actually rendered against him in a cause tried before the court, such decision and judgment thereon are void under this section. *Adams v. Nellis*, 59 How. Pr. 385. In this case the court said that until such a decision is signed and filed the cause is not removed from the authority of the trial court, but remains within its control. (Motion to set aside.)

And under this section a referee's report made after the death of a party defendant is void, and should be vacated on motion. *Lemon v. Smith*, 20 App. Div. 523, 47 N. Y. Supp. 158. In this case it was said that under this section the verdict, report, or decision is absolutely void. "Void as to whom? Clearly, as to the party who is dead, and as to the parties whose interests would be affected by the determination of the dead man's rights or obligations."

So, where an action was brought to foreclose a mortgage, and prior to the rendering of any decision therein a defendant who owned an undivided interest in the premises died, a judgment *L. R. A.*

The principle of the question for decision has been already considered by this court in *Halsey v. Van Vliet*, 27 Kan. 474. The facts of that case were that a judgment for money was recovered against a defendant who subsequent to its rendition died intestate. Before a revivor of the judgment was had, an execution was issued. After revivor, and less than five years therefrom, another execution was issued. This execution, however, was not issued within five years from the date of the judgment, nor within five years from the date of the preceding execution. The validity of a sale of land made upon the execution last issued was drawn in controversy. It was held by a majority of the court that the first execution having been issued after the death of the judgment debtor, and before the revivor, and while there was no defendant in being against

ment against such party is void, and does not affect the interest of her heirs. *Stephens v. Humphries*, 73 Hun. 199, 25 N. Y. Supp. 946.

And where no "decision" within the meaning of that word in Code Civ. Proc. § 765, *supra*, has been rendered as to any of the matters at issue in the accounting proceeding, no decree can be entered against the accounting party. *Herbert v. Stevenson*, 3 Dem. 236.

In *Corbett v. Twenty-third Street R. Co.* 114 N. Y. 379, 21 N. E. 1033, it was held that, under § 764, Code Civ. Proc., providing that an action for a wrong does not abate by the death of a party, the word "decision," as used in this section, refers to a decision made by a court upon the trial of issues without a jury, and does not apply to a nonsuit.

In *Smith v. Joyce*, 11 N. Y. Civ. Proc. Rep. 257, it is said that "It is only where a party against whom the judgment is rendered dies before the verdict, decision, or report against him, that the judgment is absolutely void. (Code Civ. Proc. § 765.)"

In *Arents v. Long Island R. Co.* 36 App. Div. 379, 55 N. Y. Supp. 401, it was said that the case of *Smith v. Joyce*, 11 N. Y. Civ. Proc. Rep. 257, recognized the principle that where a party against whom a judgment is rendered dies before verdict, decision, or report against him, the judgment is absolutely void under N. Y. Code Civ. Proc. § 765.

In *Kissam v. Hamilton*, 20 How. Pr. 360, it was said that 2 N. Y. Rev. Stat. 387, § 5, provides that a verdict is absolutely void unless actually rendered before the decease of a party.

1. After verdict.

The general rule is that where a verdict is taken against a party before his death, a judgment thereon, rendered after his death, will be held valid.

Under English Rules Supreme Court 1888, Ord. XVII. rule 1, a judgment may be entered against a party after his death where he died after verdict. This is founded on procedure act 1852, § 139, and derived from 17 Car. II. chap. 8, § 1.

And if the defendant dies after verdict and before the day in banc, the plaintiff may enter up judgment in the cause as if he were alive, under 17 Car. II. chap. 8, *infra*. *Colebeck v. Peck*, 2 Ld. Raym. 1280.

A judgment on a verdict where the defendant died between the verdict and judgment is valid. *Burnett v. Holden*, 1 Lev. 277.

And where a verdict was taken for the plaintiff, and, the question being difficult, the facts were stated in the form of a special case, which,

whom or against whose property the process could run, such execution was null and void, and its issuance could not have the effect to keep the judgment from becoming dormant intermediate the death of the debtor and the issuance of the execution upon the revived judgment. The reason for the decision, of course, was that judicial proceedings against a dead man or against his property are nullities. If the issuance of an execution against the property of a deceased debtor upon a judgment rendered against him in his lifetime is a nullity, *a fortiori* would a judgment rendered against a dead man be a nullity. In the case of *Rice County Comrs. v. Lawrence*, 29 Kan. 163, a judgment against a convict in a case commenced against him before conviction was vacated upon direct proceedings instituted for the

purpose. It was unnecessary in that case to determine whether the judgment was void in the sense of being subject to collateral attack, but it was characterized as a "nullity," and the trend of the opinion by Mr. Chief Justice Horton seemingly carries to the point of its utter invalidity upon collateral attack.

Upon reason and upon the authority of many adjudged cases, we are constrained to hold that *the judgment of the court below was erroneous and should be reversed*. Such reversal is therefore ordered, with directions to proceed in accordance with this opinion.

All the Justices concur.

Rehearing denied.

on account of press of business in the court, stayed over for more than two terms, and the defendant died before judgment, it was held that this did not deprive the plaintiff of his right to judgment, where it was not shown that defendant's estate had suffered prejudice by the delay. *Green v. Cobden*, 4 Scott, 486. In this case on a rule final judgment was awarded.

So, where the defendant died after verdict, and motion was made in arrest of judgment, it was held that the court would not take cognizance of such informations, and would not regard it, but would give judgment for the plaintiff. *Blaby v. Eastwigg*, 1 Cro. Ells. 202.

Where error was taken on a judgment, and the error assigned was that one of the defendants died before the day of nisi prius after verdict, it was held not assignable for error because the record mentioned that all appeared that day, and judgment was affirmed. *Plummer v. Webb*, 2 Ld. Raym. 1415, note.

In *Chase v. Hodges*, 2 Pa. 48, it was held that the death of the defendant between verdict and judgment, if not more than two terms intervene, cannot be avoided for error, since Stat. 17 Car. II. chap. 8, is made perpetual by 1 Jac. II. chap. 17, § 5, providing that when either party dies between verdict and judgment the death shall not be alleged for error, so that the judgment be had within two terms after verdict.

Under Minn. Gen. Stat. 1878, chap. 66, § 274, providing that if a party dies after verdict or decision upon an issue of fact and before judgment the court may, nevertheless, render judgment thereon, and such judgment is not a lien on the real property of the deceased, but is payable in the course of administration on his estate, a judgment may be entered in such case without making the executor or administrator a party. *Berkey v. Judd*, 27 Minn. 475, 8 N. W. 383.

A money judgment against a decedent after his death, upon a verdict rendered during his lifetime, relates to the time of the verdict, and is a judgment docketed against the deceased, and entitled to priority of payment in the course of administration, under 2 N. Y. Rev. Stat. 87, § 28, subd. 3, providing that in case a judgment recovered shall be filed and docketed within one year of the death of the party against whom it is obtained, such judgment shall not bind the real estate, but be a preferred debt to be paid in the usual course of administration. *Re Dunn*, 5 Redf. 27.

New York Code Civ. Proc. § 763, provides: "If either party to an action dies, after an accepted offer to allow judgment to be taken, or after a verdict, report, or decision, or an inter-

locutory judgment, but before final judgment is entered, the court must enter final judgment, in the names of the original parties, unless the offer, verdict, report, or decision, or the interlocutory judgment, is set aside."

A judgment may be entered against a deceased defendant where a verdict is had before his death, and the entry of the judgment is a mere formal matter which the court may order without notice to anyone, under N. Y. Code Civ. Proc. § 763, *supra*, and § 1210, providing that when judgment is entered in such a case a memorandum of the party's death must be entered with the judgment in the judgment roll, indorsed on the judgment roll, and noted on the margin of the docket of the judgment; and that such a judgment does not become a lien upon the property of the decedent, but establishes a debt to be paid in the course of administration. *Long v. Stafford*, 103 N. Y. 274, 8 N. E. 522. In this case the entry was *non pro tunc*, but that fact was held to be immaterial.

Where a decision in a foreclosure action was made adjudicating the rights of the parties determining all the issues, fixing the lien, determining the amount, directing a judgment and sale, and awarding costs, and the owner of the equity of redemption then died, it was held that the court could subsequently determine the amount of costs, and appoint a referee to make the sale and enter final judgment in the names of the original parties, under Code Civ. Proc. § 763. It was further held that a party who did not claim under the owner of the equity of redemption could not attack the judgment. *Wasson v. Hoff*, 27 Misc. 55, 57 N. Y. Supp. 953.

But where judgment was given in assumpsit against two, and one of them died between verdict and the judgment, it was held that the King's bench on error may reverse its own judgments for such error. *Meggot v. Broughton*, 1 Cro. Ells. 106.

In an action of trespass against husband and wife, where the husband died after verdict between the day of nisi prius and the day in banc, as to whether the court will enter judgment or the bill shall abate, the court would advise. *Anonymous*, Cro. Car. 509.

g. After interlocutory order.

It seems that the authorities do not agree as to whether a judgment or decree is valid, where the death of the party occurs after interlocutory judgment. In the absence of any statute allowing such a judgment it may be said to be, at least, erroneous.

So, where death occurs between interlocutory and final judgment, judgment should not be entered against the deceased, but should be taken against the administrator under 8 & 9 Wm. III. chap. 10, providing after interlocutory judgment for a scil. fa. against an administrator. *Weston v. James*, 1 Salk. 42.

If the death is between interlocutory and final judgment the executor may defeat it by confessing judgments to others prior to the final judgment. *Smith v. Eyles*, 2 Atk. 886.

But an account settled in chancery between parties will stand notwithstanding the death of one before the final decree. *Slingsby v. Hale*, 1 Cas. in Ch. 122.

And where a decree directing a sale of land was made, and the commissioners sold the land, and after the defendant had been dead many years the court confirmed the report of the commissioners, it was held that, the death of the defendant not having been suggested on the record, the validity of the decree of condemnation could not be impeached in a collateral action. *Evans v. Spurgin*, 6 Gratt. 107, 52 Am. Dec. 105.

The court said that the error and proceedings to decree after the death of the defendant should have been shown in some proceeding instituted by the proper parties to set aside the decree for that cause.

In an action upon a foreign decree rendered after death, although founded on an interlocutory order made during life, it was held that such a decree rendered against an unrepresented deceased person was a nullity. *Gerault v. Anderson*, Walk. (Miss.) 30, 12 Am. Dec. 521.

This decision followed the general rule in Mississippi, which does not sustain judgments taken against parties after their death.

In *Thomson v. Dudley*, 3 Edw. Ch. 137, where the mortgagor in a foreclosure suit died after a bill taken *pro confesso*, and after a reference to compute the amount, when the cause was on the calendar upon the master's report, it was held that no decree could be had until the suit was revived against his representatives.

Where an interlocutory judgment was granted on overruling a demurrer and giving the defendant leave to answer, and he died before the expiration of the time, it was held that final judgment was properly rendered against him, under N. Y. Code Civ. Proc. § 763, providing that if either party to an action dies after an interlocutory judgment but before final judgment is entered, the court must enter final judgment in the names of the original parties. It was further held that such a judgment was a preferred claim against the estate, under 2 N. Y. Rev. Stat. pt. 2, chap. 6, title 3, § 27, 3 Banks, 7th ed. 2298, § 3, providing for a preference of judgments docketed and decrees enrolled against the deceased. *Clark's Estate*, 12 N. Y. Civ. Proc. Rep. 383. (But see next case.)

Where an interlocutory judgment was entered which directed that final judgment in favor of plaintiff be entered unless the defendant answer within twenty days, and before that time the defendant died, it was held that the action abated at the death until it should be revived, and, the condition of the order being interrupted by death, and therefore, there being no absolute order or interlocutory judgment, final judgment could not properly be entered until after revivor and substitution. *Secor v. Clark*, 22 Jones & S. 461.

This case seems directly opposite to *Clark's Estate*, 12 N. Y. Civ. Proc. Rep. 383. Both cases were decided at about the same time. The case of *Secor v. Clark* does not cite any authorities or discuss that section of the Code. 49 L. R. A.

In a cause which survives where an interlocutory judgment is taken against two defendants and one of the defendants dies, who is not a necessary party, a motion may be made for leave to drop the deceased defendant out of the case and the action to proceed against the survivor. *Halstead v. Cockroft*, 49 How. Pr. 342.

VI. Judgment by relation back to time prior to death.

Formerly some cases sustained judgments taken against a party after his death, by relation back to the time prior to his death. This is similar to a *nunc pro tunc* judgment; but that subject is not intended to be discussed in this note.

English Rule Sup. Court 1883, Ord. XLI. rule 3, provides where a judgment is pronounced the entry should be dated as of the date on which such judgment is pronounced, unless ordered otherwise, provided that by special leave a judgment may be antedated.

A judgment signed in any part of a term or the subsequent vacation relates back to the first day of the term, notwithstanding the death of the defendant before judgment actually signed. *Bragner v. Langmead*, 7 T. R. 20.

And a decree pronounced before defendant's death may be enrolled afterwards like a judgment at law. *Anonymous*, 2 Cas. in Ch. 227.

Where judgment was signed at the opening of the office at 11 o'clock, and the defendant died at half-past 9 the same day, the judgment should not be set aside on motion. *Wright v. Mills*, 4 Hurst. & N. 468, 28 L. J. Exch. N. S. 223, 5 Jur. N. S. 771. In this case the court said that signing a judgment is a judicial proceeding, and is to be considered as having taken place at the earliest period of the day when it is done, and therefore not invalidated by what occurred in this case.

In *Davies v. Davies*, 9 Ves. Jr. 461, where a cause having stood sometime for judgment one of the defendants died in the interval, and the counsel for plaintiff said that it was settled that the death of a defendant does not necessarily prevent judgment, "judgment was pronounced accordingly by the Lord Chancellor a few days afterward."

After the hearing of a case one of the defendants, who had answered, died before decree was pronounced. A decree should have been rendered notwithstanding the death of the defendant, and without the consent of his representatives. *Hall v. Clifton*, 2 M'Cord, Eq. 88.

If a defendant die after an order for judgment on a bond, final judgment may be entered upon it at any time within two terms thereafter. *Lynch v. Ingalls*, 1 Bay, 449.

So, where a trustee dies after filing his answer the judgment may be rendered as of the term of answer. *Hall v. Harvey*, 3 N. H. 61.

An order for a judgment as in case of nonsuit, against the intestate in his lifetime, entered in the minutes of the court, is the basis of a valid claim against his estate, though the record be not signed or filed till after his decease. *Salter v. Neville*, 1 Bradf. 488.

In this case the court said: "The record itself, when duly made up, related back to the time of the entry of that order or judgment, no matter when it was in fact signed; though the actual time of signing, filing, and docketing might affect the rights of the party in case of any question as to priority of payment."

In *Flock v. Wyatt*, 49 Iowa, 466, it was held that the entry of a decree as of a date subsequent to the death of one of the defendants was irregular, and it should have been entered

as of the date of submission, or at any rate as of a date prior to defendant's death.

See also subd. II., *Judgments on confession.*

VII. Death of party pending appeal.

There is some conflict of authority as to the effect of the death of a party pending an appeal, where such death is not noticed in the appellate court. Some cases hold that the death does not render the judgment void; but in Tennessee, Louisiana, and Mississippi, following the rule in other cases in such states, the judgment is held to be void.

Where an appeal was taken from the refusal to open a decree of divorce, and to allow a defense, and the case was submitted to the appellate court by both parties, and the appellant died before the judgment of reversal was entered, it was held that the appellate court a year thereafter could amend the record so as to make the judgment take effect as of a time prior to the death. *Danforth v. Danforth*, 111 Ill. 236.

In this case the court said: "Where the sole defendant is dead when the suit or writ of error is brought, it may be true that a judgment against the deceased defendant is a nullity, for the reason that the court never acquired jurisdiction of the cause. In such a case the court never acquires any authority to act or take any step. But that is not the case here. Here, the court, before taking any steps, was clothed, by the act of the parties and the law, with full jurisdiction and rightful authority to render the judgment it did. Did the death of the appellee—not brought to the notice of the court by plea, suggestion, or otherwise—deprive it of such jurisdiction lawfully acquired? We think not. . . . The most that can be said of the entry of final judgment after the death of the appellee is, that it was irregular and informal."

Upon a former appeal it was held that a city was liable for rents and profits received by its grantees, but was entitled to a reduction in case compromises had been made between the occupants and the plaintiff, and a reference was ordered. On a subsequent appeal it was claimed that a number of the defendants had died before the remand of this cause to the circuit court on the former appeal and before the decree of reference of the circuit court upon the mandate, and that there had been no revivor. It was held that the order, if erroneous, was not prejudicial, as the decree was not against those defendants, but against the city, and no change by death could affect the rights of plaintiff in the present suit. *New Orleans v. Gaines*, 138 U. S. 595, *sub nom.* *New Orleans v. Whitney*, 34 L. ed. 1102, 11 Sup. Ct. Rep. 428.

Where one of the defendants died pending certiorari to review a judgment against him, and the cause was dismissed and the judgment of the justice ordered to be executed, it was held that the remedy was by appeal; that injunction was not the remedy. The death of the defendant did not render the judgment void. *Holman v. G. A. Stowers Furniture Co.* (Tex. Civ. App.) 30 S. W. 1120.

In *Rogers v. Paterson*, 4 Paige, 409, where the court of chancery held that it had no power to correct a decree entered on a mandate from the court of errors although the respondent had died before judgment of reversal, and no notice had been taken of his death in the appellate court, and that the remedy, if any, was in the court of errors, it was said "that the court for the correction of errors had jurisdiction to make the decree notwithstanding the death of Taylor after issue joined in that 49 L. R. A.

court. The decree is not void, but is at most only erroneous." That if the death had been known the decree would have been entered *nunc pro tunc*, as of a day previous to his death, or perhaps the court might have declined hearing the case. That the practice of the House of Lords, adopted by the court for the correction of errors, rule 28, provides for revival by the representatives of either party, and that it appears to be the practice in the House of Lords to hear the case after the respondent's death without regard to the same, if the respondents do not apply for an order to revive the suit.

In *Spalding v. Wathen*, 7 Bush, 659, it was said: "We are not prepared to say that the want of a personal representative [where the plaintiff dies] renders void the appeal and all the proceedings" thereon. "Such a conclusion might be insisted upon with the same degree of plausibility in cases of the death before judgment of the defendant in the court below, or of the appellee in this court, as in such cases there would be no person *in esse* upon whom a judgment *in personam* could be made to operate, nor whose title to property could be divested by a judgment *in rem*; but even this proposition is by no means free from doubt."

But in *Edwards v. Whited*, 29 La. Ann. 647, it was held that a judgment of the supreme court on appeal against a person who is dead is an absolute nullity, and this may be shown by any person against whom the attempt is made to enforce it.

Where a surety on an appeal bond from a justice of the peace died shortly after appeal was taken, and the judgment was affirmed more than three years after his death, it was held that as to such surety the judgment was void, and was enjoined. *Nix v. French*, 10 Heisk. 377. In this case the respondent did not deny the right of the complainants to the relief sought, but asserted a cross bill, which was dismissed.

And a judgment on appeal to the effect that the death of appellant is suggested, and the case revived in the name of his administrator, and appeal is dismissed for want of prosecution, is void, where the administrator was not brought into court, as the question is jurisdictional, and, the record showing want of jurisdiction, the same could be attacked collaterally. *Tarleton v. Cox*, 45 Miss. 430.

VIII. Judgments in rem.

Where a judgment is taken *in rem*, and the debtor dies before final judgment but after the proceedings are brought, such judgment is not void, although it may be erroneous and voidable.

If jurisdiction is obtained by publication in an action for partition, the subsequent death of the defendant will not render the further proceedings void in a collateral attack, even though the defendant was confined in an insane asylum in another state at the time of the suit, and although a guardian *ad litem* should have been appointed. *McCormick v. Paddock*, 20 Neb. 486, 30 N. W. 602.

Where an action of attachment was brought against joint debtors, and no service was made, and one of the defendants died before judgment was taken against the garnishees, in a subsequent action against the garnishees under Ohio Code, §§ 218, 219, authorizing an action by the plaintiff in attachment against the garnishee, it was held that such judgment was not void on account of the failure to make the representative of the deceased defendant a party. *Swasey v. Antram*, 24 Ohio St. 87. The court said that the judgment was void-

able and erroneous, and might be avoided by the representative of the deceased.

So, where attachment proceedings were instituted in February, 1801, against a nonresident who died in June of that year before judgment, and land was sold thereunder, it was held, in an action of ejectment by the heirs of the deceased to recover the land, that the judgment was not void, and that it could not be collaterally attacked. *Cochran v. Loring*, 17 Ohio, 409. The court said: "Now, the lessors of the plaintiffs are the heirs of Cochran. They stand in the relation of privies to this judgment. But were it otherwise, inasmuch as this attachment proceeding is a proceeding *in rem*, I should be unwilling to say that the death of the debtor, after the property is attached, would prevent the court from proceeding to liquidate the claims presented, and distribute the avails of the property according to the meaning and intent of the law under which the proceedings were had. To put this matter beyond controversy, the legislature, in subsequent attachment laws, have expressly provided that the death of the debtor shall not put a stop to the proceedings."

Where a court, having jurisdiction over the cause and over the parties, renders a judgment in attachment after the death of such party, the judgment is not for that reason void; but, although irregular and erroneous, it will be held valid until reversed or vacated by proper proceedings, and cannot be restrained by injunction. *Mosley v. Southern Mfg. Co.* 4 Okla. 492, 46 Pac. 508. In this case the court said that Okla. Code Civ. Proc. § 238, providing that if, after issuing attachment, the defendant should die, the proceeding shall be carried on, but his legal representatives shall be made a party, and § 586, providing that the district court shall have power to vacate or modify its judgment at or after the term at which such judgment or order is made, for the death of one of the parties before judgment, and § 588, providing that proceedings to vacate or modify such judgment shall be by verified petition, direct the procedure for the correction of the irregularity of a judgment rendered after the death of the party against whom such judgment was rendered, and preclude a proceeding by injunction.

Where an action was brought on a note by attachment, and after death of defendant the plaintiff took judgment on an order for the sale of the attached property which belonged to the deceased, and an administrator was appointed and petitioned to be allowed to appear in said action, and that further proceedings be taken against him as such legal representative, the part of the petition which recited that judgment was taken after defendant's death was struck out on motion. It was held that the attachment was not dissolved by the death, and the judgment was not void. The court said, we are not required to say whether it is reversible for error or not. *Mitchell v. Schoonover*, 16 Or. 211, 17 Pac. 867. The court said the decided weight of authority seems to be to the effect that if a court of general jurisdiction, or a court which has acquired full jurisdiction over the cause and over the parties, renders a judgment for or against a party after the death of such party, the judgment is not for that reason void. It may be erroneous, but until reversed by some appropriate proceeding it is valid.

In *Kennedy v. Raguet*, 1 Bay, 484, it was held that the death of an absent debtor after an attachment is issued will not avoid proceedings against the garnishees who make default. The court said that as they did not come in and deny that they did not have ef-

fects, or assert a right to retain them, they admitted effects to be in their hands sufficient to satisfy plaintiff's demand and then they became liable, and from thenceforth they ought to be considered as defendants.

In *Crocker v. Radcliffe*, 1 Treadway, Const. 83, where a copy of the writ of foreign attachment was served on the garnishee who returned that he had in his possession certain effects of the defendant, the absent debtor, but before any judgment was had against the defendant he died, the death of the defendant being admitted, the district court decided that the suit had thereby abated. On appeal it was held: "My opinion upon the whole is that the decision of the district court was correct, and that the motion in this court ought to be rejected." The effect of the *Crocker Case* is that if a judgment had been taken a garnishee could not have disputed the same although an administrator might.

In *Crocker v. Radcliffe*, 1 Treadway, Const. 83, it was said: "I do not mean to controvert or to disapprove of the decision made in the case of *Kennedy v. Raguet*, 1 Bay, 484. . . . In that case it seems there was a judgment and an execution against the defendant, the absent debtor, and the application was on the part of the garnishee to set them aside upon the ground that the defendant had died before judgment. I do not at present feel disposed to favor an application of this sort, as it could not be any injury or prejudice to the garnishee, to pay money due to the absentee or his representatives or deliver up the property to whoever might be authorized by law to receive it. The application ought, I think, to have been by the legal representatives of the absent debtor."

Where a trustee answered, and the cause was continued, and the trustee died before judgment was rendered, it was held that judgment might be rendered against the trustee as of the term when he answered. *Hall v. Harvey*, 3 N. H. 61.

But where a judgment was entered subsequent to a judgment by default, and the defendant died before rendering of final judgment upon execution of the writ of inquiry in an attachment case, the judgment was erroneous as void in law, and was reversed. *Colson v. Wade*, 5 N. C. (1 Murph.) 43. The word "void" evidently is used in this case in the sense of "erroneous."

Where a judgment is taken against a party who was dead at the time of the institution of the suit there is some conflict of authority as to whether the judgment is void or voidable.

Two returns "nihil" to a scire facias upon a mortgage are equivalent to a return of scire feci, and a judgment entered upon such returns cannot be collaterally impeached by evidence that at the time the writ issued the mortgagor was dead. *Murray v. Weigle*, 118 Pa. 159, 11 Atl. 781; *Warder v. Tainter*, 4 Watts, 270. This latter case was an action in ejectment. The property had been sold in proceedings against a lunatic, and it was held that the proceedings against the lunatic were *in rem*, and that in an application to sell the real estate of a lunatic the law does not contemplate his being heard; that he has lost nothing, therefore, by death, and that if a personal judgment would be only voidable, a decree for the sale of his property can be no more than voidable.

In an action to collect assessments for a drainage ditch, where the notice of the assessment had been held sufficient by the county board, that decision is conclusive as against a collateral attack. The fact that a property owner was dead prior to the time of the proceedings in the county court, and that not'

was given by publication as against a nonresident, will not render the assessment void. *Otis v. De Boer*, 116 Ind. 531, 19 N. E. 317.

The court did not discuss the effect of the death, but said: "In proceedings *in rem* proof of actual notice as against nonresidents, or unknown defendants, is seldom, if ever, required, and in a collateral attack upon a judgment *in rem* a liberal interpretation will be given to the rules governing constructive notice when necessary to sustain the judgment."

In *Collins v. Mitchell*, 5 Fla. 364, it was held that a party executing a replevin bond in an attachment upon partnership property was estopped by the bond from alleging that one of the partners was dead before the institution of the suit. The court further held that he was a privy to the judgment, and that the death of a party before judgment did not render it void, but erroneous, to be corrected by a writ of error *coram vobis*.

But a decree in a suit to collect an assessment on process by warning order is void as against the owner who was dead at the time of the institution of the suit. The decree may be collaterally attacked by the heir. *Greenstreet v. Thornton*, 60 Ark. 369, 27 L. R. A. 735, 30 S. W. 347. The court said: "But the fact that an action of this kind partakes of the nature of an action *in rem* does not dispense with the necessity of notice."

The custom of foreign attachment in London does not authorize proceedings against a defendant who was dead prior to the suit, and payment by the garnishee in such a case is no defense to a suit by the personal representative of the deceased for the debt. The proceedings are a nullity. *Matthey v. Wiseman*, 18 C. B. N. S. 657.

So, where the debtor was dead prior to the institution of an attachment suit a judgment was held to be no defense in an action by the personal representative against the garnishee, who had satisfied the judgment. *Loring v. Folger*, 7 Gray, 505.

Foreclosure proceedings on a mortgage by publication are void, and may be collaterally attacked where the mortgagor was dead at the time of the institution of the suit, and the only parties to the action were the holder of the mortgage and the mortgagor. *Richards v. Thompson*, 43 Kan. 209, 23 Pac. 106.

And such a judgment on publication service is void where mortgagor dies before suit. *Bolinger v. Chouteau*, 20 Mo. 89.

IX. Classification by states where death occurs after suit is brought.

Alabama.

A judgment against a party who died prior to the rendition of the judgment is void. *Snodgrass v. Cabiness*, 15 Ala. 180; *Meyer v. Hearst*, 75 Ala. 390; *Swink v. Snodgrass*, 17 Ala. 653, 52 Am. Dec. 190.

And the same was said to be the rule in *Johnson v. Johnson*, 40 Ala. 247; *Stewart v. Nuckols*, 15 Ala. 225, 50 Am. Dec. 127; *Es parte Swan*, 23 Ala. 192; *Hood v. Branch Bank of State*, 9 Ala. 335.

California.

A judgment rendered against a party to an action after his death is not void on its face, and proceedings must be taken to set the same aside before an application for a mandamus can be made to compel the court to substitute the administrator of the deceased as a party to the action. *Elliot v. Paterson*, 65 Cal. 109, 8 Pac. 493.

And the death of a defendant in an action of ejectment, after the filing of his answer and before the trial, does not render the judgment 49 L. R. A.

against him void as to purchasers, *pendente lite*, of his interest in the premises. *Tyrrell v. Baldwin*, 67 Cal. 1, 6 Pac. 867.

And a judgment dismissing an action for want of prosecution is not void, although made after the death of the defendant and without the substitution of his personal representative. *Wallace v. Center*, 67 Cal. 133, 7 Pac. 441. The court said: "The right to attack the judgment for 'irregularities' was long since lost by lapse of time."

Connecticut.

Where a party dies after suit is brought, a judgment rendered thereafter against him is void. *Haydock v. Cobb*, 5 Day, 527.

Florida.

The death of a party before judgment rendered does not make the judgment void, but it is an error of fact for which the same may be recalled or revoked by writ of error, returnable in the same court where the record remains, called a writ of error *coram vobis* or *qua coram vobis* resident; for error in fact is not the error of the judges, and reversing it is not reversing their own judgment. *Collins v. Mitchell*, 5 Fla. 364.

Georgia.

That a judgment is a nullity by reason of having been rendered against a defendant after his death will not authorize an injunction. *Lockridge v. Lyon*, 68 Ga. 137. The court said that the error can be taken advantage of by an affidavit of illegality or motion to set aside the judgment.

If a judgment is rendered against joint defendants, and one of them is dead, the judgment shall be reversed for error as to them all. *Tedlie v. Dill*, 8 Ga. 104. The court said that if the plaintiff proceed it is at his peril. He ought to make a special entry of the death of the party, namely, to suggest it on the record with *nihil ulterius versus eum fiat*, and then take judgment only against the others.

Illinois.

A judgment rendered against a party after his death is not void. *Danforth v. Danforth*, 111 Ill. 236.

A court having complete jurisdiction, the subsequent death of the defendant, not pleaded or suggested, will render a judgment against him voidable only. Such judgment cannot be attacked collaterally. It may be reversed on error if the fact of death appears from the record. If not, there is an error in fact, to be reached by motion; the judgment may be vacated in the court of its rendition. *Claflin v. Dunne*, 129 Ill. 241, 21 N. E. 834. Overruling *dictum* in *Life Asso. of America v. Fassett*, 102 Ill. 315.

In *Life Asso. of America v. Fassett*, 102 Ill. 315, Overruling in *Claflin v. Dunne*, 129 Ill. 241, 21 N. E. 834, it was said that judgments taken against defendants after their death are absolutely void; that there is a distinction between the death of a plaintiff and the death of a defendant, as a deceased defendant cannot plead in abatement the fact of his own death, and his legal representatives, until brought into court by the plaintiff, are not supposed to know anything about the pendency of the suit; but that, where the plaintiff dies, the defendant may well plead the fact in abatement, and there is no hardship in holding that if he does not the judgment will bind him when collaterally drawn in question.

In *Davies v. Coryell*, 37 Ill. App. 509, it was said that a judgment rendered after the death of a party is suggested, is a mere irregularity, and the error is to be corrected on a direct review. On a collateral attack it will be held valid.

Indiana.

If a defendant has been served with process, and then dies, a judgment thereafter rendered against him is not void or open to collateral attack. *Palmerton v. Hoop*, 131 Ind. 23, 30 N. E. 874. In this case the court said that in the matter of a collateral attack on a judgment a minor stands in no better situation than an adult.

Iowa.

A judgment against a party who has died after suit is brought is irregular, as it should have been dated back to a time previous to his death. *Flock v. Wyatt*, 49 Iowa, 466.

Kansas.

KAGER V. VICKERY holds that a judgment taken against a mortgagor after his death is void, and that such judgment may be collaterally attacked.

In *Rice County Comrs. v. Lawrence*, 29 Kan. 158, it was said that: "If counsel intend to assert that the judgment obtained in an action which is commenced against a party in his lifetime is valid and binding notwithstanding the death of the party before the hearing or trial, we do not assent."

Where a judgment is rendered against the principal and surety on a forfeited recognizance after the death of the principal, the judgment may be vacated as to the principal, but not as to the surety, under Kan. Civ. Code, § 568, providing that the district court shall have power to vacate or modify its own judgments or orders, at or after the term at which such judgment or order was made, for the death of one of the parties before the judgment in the action. *McLaughlin v. State*, 17 Kan. 283.

Kentucky.

In *Case v. Ribellin*, 1 J. J. Marsh. 80, it was said that if a judgment were rendered against a dead man which would be manifestly erroneous as soon as the facts should appear, the error could be corrected only by the court which rendered the judgment, and the appellate court would not notice it because it does not appear on the record. The court further said there must be some remedy for such a case, and there are numerous authorities showing that a writ of error coram vobis is the usual, and perhaps the only, one.

In *Spalding v. Wathen*, 7 Bush, 659, it was said that Ky. Code, § 579, provides that the death of one of the parties before judgment shall be ground for the vacation of the judgment by the court in which it is rendered, and that "It would have been an act of folly for the legislature to have enacted that the existence of a fact should constitute valid ground for the vacation of a judgment, which fact of itself rendered such judgment absolutely null and void."

Louisiana.

Judgments taken against a party after service of process and after his death are void. *New Orleans & C. R. Co. v. Bosworth*, 8 La. Ann. 80; *Edwards v. Whited*, 29 La. Ann. 647; *McCloskey v. Wingfield*, 20 La. Ann. 141; *Norton v. Jamison*, 23 La. Ann. 102.

But such a judgment was held valid where all his heirs were parties to the action. *Stackhouse v. Zuntz*, 41 La. Ann. 415, 6 So. 666.

Maine.

In *Merrill v. Suffolk Bank*, 31 Me. 57, 50 Am. Dec. 649, it was said that "error may be assigned on the death of a party before judgment. *Wilkes v. Jordan*, *Hobart*, 5b. The death of a defendant is not assignable for error if the record states that he appeared; for nothing can be assigned as error which contradicts the record. *Plummer v. Webb*, 2 Ld. Raym. 1415, note. The statute of 17 Car. II. chap. 8, provided that death between the ver-

dict and judgment should not be assigned as error."

Maryland.

In *Trail v. Snouffer*, 6 Md. 308, it was said: "It is well settled that at common law a judgment cannot be obtained where either party has died, if the objection be taken in due time; but if not then made, the judgment concludes all persons from denying the fact of the party's existence at the time of its entry. There are exceptions by statute (*Foster's Law of Scire Facias*, chap. 5), and by our acts of Assembly in reference to the death of parties in this court."

Massachusetts.

In *Reid v. Holmes*, 127 Mass. 326, it was said that a judgment rendered against a person who died after issue joined was different from a judgment rendered in an action originally brought against a person already dead, for in such a case the court never acquired jurisdiction of the cause. In this case it was said that in *Hildreth v. Thompson*, *infra*, the dictum "that if either party to an action dies before judgment no judgment can be entered" is unnecessary to the decision, and is controlled by the authorities already cited.

In *Hildreth v. Thompson*, 16 Mass. 191, it was said that by the common law all proceedings in a suit at law are stopped by the death of one of the parties; if one of them die before judgment no judgment can be entered.

In *Smith v. Rice*, 11 Mass. 507, it was said that if a party die before judgment rendered against him his executor may reverse it on error, and it is no objection to a writ of error that the case is open to appeal, inasmuch as the plaintiff in error had no opportunity to avail himself of that remedy.

Michigan.

In *Hochgraef v. Hendrie*, 66 Mich. 556, 34 N. W. 15, in an action of ejectment, judgment below being affirmed by an equal division, nothing was decided.

In this case the trial court held that the death of a mortgagor after sale and before decree of confirmation did not make the confirmation void.

Minnesota.

In *Hayes v. Shaw*, 20 Minn. 405, Gil. 355, it was said that most of the cases go to the point that even the death of the defendant before the rendition of the judgment against him will not make the judgment void where the court has jurisdiction of the subject-matter and of the parties before the death of the defendant.

In this case it was said that while the court ought to cease to exercise its jurisdiction over a party at his death, the neglect to do so is an error to be corrected by some proceeding in the action in which the error occurs, and the judgment, though erroneous, is not on that account to be attacked in a collateral action.

In an action by executors to open up a judgment in ejectment against the plaintiff, who had died pending the suit, where the answer was that the executors had made final settlement and had not claimed the real estate in the inventory, it was held that the application should have been denied on the ground of plaintiff's delay in instituting the same. *Stocking v. Hanson*, 22 Minn. 542.

A judgment is valid where the defendant dies after verdict. *Berkey v. Judd*, 27 Minn. 475, 8 N. W. 383.

Mississippi.

A judgment taken against a party after his death is void. *Parker v. Horne*, 38 Miss. 215; *Gerault v. Anderson*, *Waik.* (Miss.) 30, 12 Am. Dec. 521.

In the latter case, the court of appeals in another state decreed during the lifetime of defendant that he should pay the value of land to be ascertained by the court below, and, after interlocutory decree, and before it had been carried into effect, the defendant died, and the court below, without the knowledge of the defendant's death, assessed the damages and passed the final decree. It was held that act of Congress May 26, 1790, providing that the records and judicial proceedings shall have the same faith and credit in every court in the United States as they have in the courts from whence they are taken, did not render valid such judgment.

Missouri.

In *Voorhis v. Gamble*, 6 Mo. App. 1, it was held that in an action of ejectment where one derived title through a sheriff's deed, and through a subsequent decree, which set aside other deeds made by the debtor as fraudulent against creditors, it could be shown that a party to such decree was dead at the time of the decree. It was also held that such decree "was a nullity as to her rights," and inoperative against her heirs. The principal contention and discussion in this case was that, as the dead party in the suit to cancel deeds was only a *cestui quo trust*, and as the trustee was a party, it was not necessary to make her heirs parties to that suit after she died; but the court held otherwise. This case does not appear to have been subsequently cited or reviewed. In *Coleman v. McAnulty*, 16 Mo. 173, 57 Am. Dec. 229, it was said that such judgments were erroneous and not void. And in *Wittenburgh v. Wittenburgh*, 1 Mo. 226, it was held that such a judgment was reversible for error if the record showed that the party was dead before judgment. These cases are not noticed in *Voorhis v. Gamble*, 6 Mo. App. 1.

Where one of two defendants dies before a judgment rendered against both, the error can only be corrected in the court where the judgment is rendered, by writ of error coram nobis, as error in fact can only be corrected where it accrued. *Calloway v. Nifong*, 1 Mo. 223.

In *State ex rel. Meinhard v. Stratton*, 110 Mo. 426, 19 S. W. 803, it was said that the statute provides for a judgment against a party who dies after verdict.

Nebraska.

A judgment taken against a party after his death is not void. *McCormick v. Paddock*, 20 Neb. 486, 30 N. W. 602.

A judgment against a person after his death is reversible if the fact and time of death appear on the record, or for error coram nobis if the fact must be shown *aliunde*. It is voidable, but not void, and cannot be impeached collaterally. *Jennings v. Simpson*, 12 Neb. 558, 11 N. W. 880.

In this case the court said the authorities are not uniform or free from conflict, but that this is a rule of law according to the weight of authority.

New Hampshire.

A judgment taken against a trustee after his death is valid. *Hall v. Harvey*, 3 N. H. 61 (judgment *in rem*).

New York.

A judgment against a party, taken after his death, is void unless it is within the saving clause of the statutes or Code. The following judgments were held void: *Griswold v. Stewart*, 4 Cow. 457; *Requa v. Holmes*, 16 N. Y. 193, 26 N. Y. 338 (before interlocutory order); *Adams v. Nellis*, 59 How. Pr. 385 (before verdict—Code); *Lemon v. Smith*, 20 App. Div. 523, 47 N. Y. Supp. 158 (before report—Code); *Stephens v. Humphries*, 73 Hun, 199, 25 N. Y. Supp. 946 (before decision—Code); *Herbert v. 49 L. R. A.*

Stevenson, 3 Dem. 236 (before decision—Code).

And the same was said to be the rule, in *Gerry v. Post*, 13 How. Pr. 118 (before verdict); *McCulloch v. Norwood*, 58 N. Y. 562; *Smith v. Joyce*, 11 N. Y. Civ. Proc. Rep. 257 (Code, § 765); *Kissam v. Hamilton*, 20 How. Pr. 369 (before verdict—statute).

And the following judgments were held erroneous: *Hamilton v. Holcomb*, 1 Johns. Cas. 29 (before issue); *Livingston v. Randall*, 59 Barb. 493.

And a decree was refused in *Thompson v. Dudley*, 3 Edw. Ch. 137 (decree *pro confesso*).

And the following judgments were held valid by relation back or under a statute: *Salter v. Neaville*, 1 Bradt. 488 (relation back; order before death); *Re Dunn*, 5 Redf. 27 (after verdict—statute); *Long v. Stafford*, 103 N. Y. 274, 8 N. E. 522 (after verdict—Code); *Wasson v. Hoff*, 27 Misc. 55, 57 N. Y. Supp. 953 (after decision—Code).

In *Clark's Estate*, 12 N. Y. Civ. Proc. Rep. 383, a judgment was held valid where the death occurred after an interlocutory order.

But the contrary was held in *Secor v. Clark*, 22 Jones & S. 461.

In *McCulloch v. Norwood*, 58 N. Y. 562, it was said that N. Y. Code Civ. Proc. § 121, providing that no action shall abate by the death of a party if the cause of action survive, does not permit it to proceed against a dead party, but requires that his representative or successor in interest be regularly brought into court.

North Carolina.

When final judgment in an action against several defendants is rendered after the death of one of the defendants, such judgment should be vacated on motion, and it is error in fact. *Burke v. Stokely*, 65 N. C. 569. The court said that "It was the business of the plaintiff to make this suggestion, as it is 'error in fact' to take judgment against one who is dead." When the action is joint the objection may be taken by a surviving defendant.

A judgment in ejectment where the defendant died before judgment is irregular and voidable, and might be declared void by the court on a proper application by motion in the action; but such judgment cannot be attacked collaterally or by an independent action for such irregularity. *Knott v. Taylor*, 99 N. C. 511, 6 S. E. 788.

The remedy is writ of error coram nobis in the court rendering such judgment. *Latham v. Hodges*, 35 N. C. (13 Ired. L.) 267.

A judgment rendered against a party after his death is irregular, and the same will be set aside in a direct proceeding for that purpose, so that a representative may have an opportunity to resist a recovery. *Lynn v. Lowe*, 88 N. C. 478.

The court said that if no opportunity has been offered the defendant to be heard the court will at once, when judicially informed of the error, correct it, and in such a case the court does not investigate the merits of the matter in dispute, but sets aside the judgment, and reopens the otherwise concluded matter, to afford the representatives the opportunity not open to his intestate, which the law accords to all, of being heard in opposition.

And such judgment was held to be erroneous and voidable, and was reversed. *Colson v. Wade*, 5 N. C. (1 Murph.) 43. In this case the court said that the judgment was "void."

In *Wood v. Watson*, 107 N. C. 52, 10 L. R. A. 541, 12 S. E. 49, it was said that there is manifest reason why a judgment against a dead man may be avoided and set aside as irregular by a proper motion in the action; but these

reasons do not apply to a judgment in favor of a dead defendant against a living plaintiff. Ohio.

A judgment *in rem*, taken against a party after his death, is not void. *Swasey v. Antram*, 24 Ohio St. 87; *Cochran v. Loring*, 17 Ohio, 409.

In *Dows v. Harper*, 6 Ohio, 518, 27 Am. Dec. 270, it was said that a writ of error *coram nobis* is the proper remedy where the party dies before judgment.

In *Smith v. Pratt*, 13 Ohio, 548, it was said that if a court falsely assume the existence of the fact on which their jurisdiction depends, and carry into the record the finding of its existence, the proceedings, although void, yet admit reversal on error, since it may afford the only effectual protection of the parties. Upon this principle judgments against a person deceased, although void, are reversible at common law upon the assignment of the error in fact.

Oklahoma and Oregon.

A judgment *in rem*, taken against a party after his death, is not void. *Mosley v. Southern Mfg. Co.* 4 Okla. 492, 46 Pac. 508; *Mitchell v. Schoonover*, 16 Or. 211, 17 Pac. 887. Pennsylvania.

Where after suit was brought one of the defendants died and the judgment was entered against both, and error was brought to the superior court, where the writ was nonprossed, and then on error *coram nobis* the death of one of the defendants before judgment assigned, it was held that an amendment should be permitted by entering a suggestion of the defendant's death with the same effect as if it had been done before judgment. *Hill v. West*, 1 Blinn. 486.

In *Devereux v. Roper*, 1 Phila. 182, a writ of error *coram nobis* was allowed upon suggestion that the defendant died before judgment was entered.

In *Yaple v. Titus*, 41 Pa. 195, 80 Am. Dec. 604, which held that a judgment *in rem* was not void where the defendant had died before suit, it was said that a judgment rendered against a person after his death is reversible if the fact and time of death appear on the record, or in error *coram nobis* if the fact must be shown *alibunde*. It is voidable and not void; and cannot be impeached collaterally.

In *Carr v. Townsend*, 63 Pa. 202, it was said: "No authority has been shown for the position taken in this case, that judgment taken or entered in favor of a deceased party is a nullity. Even a judgment against a deceased party is not so."

In *Hurst v. Fisher*, 1 Watts & S. 440, it was said that when a judgment against a dead man is inadvertently rendered the party aggrieved may be relieved by writ of error *coram nobis*.

South Carolina.

Judgments taken against a party after his death have been held valid. *Hall v. Clifton*, 2 M'Cord, Eq. 88; *Lynch v. Inglis*, 1 Bay, 449 (by relation back).

And in a proceeding *in rem* by attachment a judgment was held valid. *Kennedy v. Raguet*, 1 Bay, 484. (See subd., *Judgments in rem*.)

But in *Crocker v. Radcliffe*, 1 Treadway, Const. 83, in a similar case it was held that the suit abated.

Tennessee.

In this state judgments taken against deceased parties are void. *Carter v. Carriger*, 3 Yerg. 411, 24 Am. Dec. 585 (after default); *Kelly v. Hooper*, 3 Yerg. 395; *Nix v. French*, 10 Helsk. 377; *Smith v. Cunningham*, 2 Tenn. Ch. 563; *Collins v. Knight*, 3 Tenn. Ch. 183. 49 L. R. A.

And the same was said to be the rule in *Nolan v. Cameron*, 9 Lea, 234; *Morrison v. Deaderick*, 10 Humph. 342; *Hewgly v. Johns*, 3 Baxt. 85.

But in *Gilchrist v. Cannon*, 1 Coldw. 581, where the heirs of the deceased were parties to the action, the judgment was held valid. Texas.

The death of a defendant after the court has acquired jurisdiction of the person by citation, appearance, and answer, and when represented by a counsel, will not render the judgment void, but voidable only, if the record does not show that he was dead at the time. *Fleming v. Seeligson*, 57 Tex. 524.

This was a proceeding in the nature of a bill to review and set aside the judgment, but was unavailing by reason of the statute of limitations.

And a judgment taken against a party after his death is not void but voidable, and the relief against the same is to be had by motion to set aside. But such relief was denied on account of the statute of limitation. *Best v. Nix*, 6 Tex. Civ. App. 349, 25 S. W. 130.

A decree ordering a curator *ad hoc* to make a deed where the absent defendant was dead, was held binding, and not subject to a collateral attack. *Mills v. Alexander*, 21 Tex. 154. The defendant in this case died in 1833, and the decree was in 1839, and evidently the suit was not brought until after death; but this does not appear in the opinion. The court holds that a judgment is not void by reason of the death of a party before its rendition, but that it will be held valid until avoided by a direct proceeding for that purpose.

Where a judgment authorized an administrator to sell land to satisfy judgments against the intestate, it was held that the latter judgments were not void by reason of the defendant being dead at the time of their rendition, but were only voidable. They should have been annulled by proceedings in the same court where they were rendered. *Giddings v. Steele*, 28 Tex. 732, 91 Am. Dec. 336. In this case the death of the defendant S. had been suggested, but, without having made his representative a party or dismissing the cause as to S. judgments were rendered against him and H. for the debt sued on. The court said: "We are not prepared to say that these judgments are of themselves nullities and void; but from the rulings of this court in a number of cases we are inclined to the opinion that they were not void, but only voidable, and could have been annulled and set aside by a proceeding *coram nobis*,—that is, by proceedings instituted in the same court where the voidable judgments were rendered, and by showing the fact that Steele was dead at the rendition of the judgments. Then they would have been set aside and the error corrected."

And where the defendant was dead at the rendition of the judgment, and this is not shown by the judgment, the relief can only be had by petition in the nature of a bill of review, or for a new trial, or by motion to set aside the judgment. *McClelland v. Moore*, 48 Tex. 355. In this case the court said the death of the defendant had been suggested, and the court had granted leave to the executor to enter himself as a party; but this error had not been carried into the minutes of the court, and the error in the judgment for the want of a party defendant was owing to a mere defect in the record.

A judgment against a party who was dead, and whose death was shown by the record, may be corrected by the court on a writ of error *coram nobis* by the court rendering it. *Milam County v. Robertson*, 47 Tex. 222. In

this case the court said that whether this judgment was void or voidable it was not necessary to decide.

And the remedy is by appeal where the defendant dies pending certiorari. *Holman v. G. A. Stowers Furniture Co.* (Tex. Civ. App.) 30 S. W. 1120.

In *Denni v. Elliott*, 60 Tex. 337; *Harrison v. McMurray*, 71 Tex. 122, 8 S. W. 612; and *Moke v. Brackett*, 28 Tex. 443,—it was said that a judgment rendered against a party who was dead at its rendition is not void, but only voidable.

In *Taylor v. Snow*, 47 Tex. 462, 26 Am. Rep. 311, an instruction that if the defendant was dead at the time of the institution of the suit the judgment was void, and that a purchaser under execution sale obtained no title, was held erroneous. The court, on appeal, does not notice the distinction between death of party before suit and death of party after suit, but discusses judgments where defendant dies after suit is brought, and says they are voidable, but not void. The court holds that while an execution sale is void, if an execution issues after death of the debtor it cannot be collaterally attacked.

Referring to this case, the court, in *Hooper v. Caruthers*, 78 Tex. 432, 15 S. W. 98, *infra*, says: "There is much in the opinion which seems to hold that a sale under execution, issued after the death of a sole defendant, is not void without reference to the time of the death."

... Giving technical effect to a judgment, the case of *Taylor v. Snow* was probably correctly decided on its facts; but we are of opinion that the law is correctly stated in the other cases referred to, and that a sale made under execution against a deceased person after his death, he being alive at the time judgment was rendered, is void in the sense that it is wholly inoperative to pass title to or against anyone, and therefore may be attacked directly or collaterally."

But if a judgment shows on its face that the party against whom it was rendered was dead at the time judgment was rendered, a "sale" made thereunder will be void, and may be attacked collaterally. *Hooper v. Caruthers*, 78 Tex. 432, 15 S. W. 98. In this case the court said: "Conceding that it cannot be shown in a collateral proceeding that a person against whom a judgment was rendered was not alive at the time, and a sale under it thus invalidated, it does not follow from this that an execution and sale made under it will not be absolutely void—void for all purposes—if the judgment shows on its face that the party against whom the judgment was rendered was not at the date of its rendition alive, or if it be shown that his death occurred after the judgment was rendered."

Utah.

Where the court has jurisdiction of the parties and subject-matter of an action, a judgment rendered therein against a party after his death, though erroneous, is not void if his death does not appear from the judgment roll. *Elliott v. Bastian*, 11 Utah, 452, 40 Pac. 713. The court said that in such a case the proper way to have the judgment set aside is by a motion supported by affidavit or otherwise, but, unless made in time, it will not be set aside.

Virginia.
A decree entered after the death of a purchaser, directing a commissioner to convey the land to the "said purchasers, or to those to whom they may have sold," was held to be not void, where a deed was made to a vendee of the purchaser who was in possession. The "said purchaser," or "to their vendees," import that they were living, and, the record not dis-

closing the contrary, the decree cannot be collaterally assailed. *Pugh v. McCue*, 86 Va. 475, 10 S. E. 715.

And a decree confirming a commissioner's report of sale is not void where the death of the party occurred after sale and before the decree of confirmation. *Evans v. Spurgin*, 6 Gratt. 107, 52 Am. Dec. 105.

On a motion supported by an affidavit, a decree, as to one of the defendants who was dead at the time of the decree, was set aside as to such defendant. *Hooe v. Barber*, 4 Hen. & M. 439.

West Virginia.

Where process has been regularly served on a defendant, and there is no appearance, and the defendant dies before judgment, and his death is not suggested on the record, and after his death judgment is rendered against him, such judgment is not void but voidable, and cannot be collaterally attacked. *King v. Burdett*, 28 W. Va. 601, 37 Am. Rep. 687. In this case the court said that a number of cases may be found which hold that, although a court has fairly obtained jurisdiction of the parties, a judgment against a party who is dead is a nullity; but the great weight of authority is in favor of holding a judgment against a deceased person not void but voidable. It is easy for the personal representative, upon motion, to correct the same under W. Va. Code, chap. 134, § 1, providing for correcting a clerical error or error in fact on motion, as this gives an additional remedy to a writ of *coram nobis*.

In *Watt v. Brookover*, 35 W. Va. 323, 13 S. E. 1007, it was said that where the fact of death is apparent in the record of the judgment its rendition would be error of law to be corrected by appellate process, and when it does not appear in the record, but is to be shown *alibi*, it is called error in fact to be corrected at common law by writ of error *coram vobis*, and under W. Va. Code 1887, chap. 135, § 1, providing a motion in lieu of that writ.

Federal cases.

A judgment of a county court, rendered after the death of an administrator, and fixing the amount due on his settlement, is not void. *Beard v. Roth*, 35 Fed. Rep. 397. In this case the court said: "The court had exclusive original jurisdiction of the subject-matter, and had acquired jurisdiction of Vaughn's person in his lifetime. It is probable that the judgment of the county court, rendered after his death, might have been reversed on appeal; but it is not void, and is not open to collateral attack."

Such a judgment cannot be set aside on motion after the term. The remedy is by bill of review or appeal. *Scott v. Blaine, Baldw.* 287, Fed. Cas. No. 12,525.

Where it was contended that the court erred in charging a city in an accounting, with the amount of a pretended decree against A. S. rendered five years after his death, for rents accruing after his death, it was held that he was represented by his brother, his universal legatee, and counsel was employed, and it would be a fault to set aside these proceedings as void. *New Orleans v. Gaines*, 138 U. S. 595, *sub nom.* *New Orleans v. Whitney*, 34 L. ed. 1102, 11 Sup. Ct. Rep. 428. In this case the court said that "a judgment rendered after a defendant's death without the plaintiff's fault is not void. The irregularity or error may be cured by entering it *nunc pro tunc* of a date prior to the defendant's death; and even this has been held not necessary in a collateral proceeding." But it was further held that the city cannot raise the question now after the decree of the circuit court and an appeal to this court and a remand of the cause to the

circuit court, during all of which time this objection could have been made.

See subd. I. *Judgments against parties dying before institution of suit.*

Summary.

In conclusion, it may be said that the weight of authority is that judgments are void in cases where they are taken against parties who have died before the institution of the suit; that they are voidable in cases where they are taken against parties dying after service of process

and before judgment. As to this latter proposition, there are quite a number of states holding *contra*, and the cases cannot be reconciled. It seems that where the party dies after verdict a judgment entered thereafter will not be held void. Some states now regulate by statute or Code the effect of judgments taken against parties who have died.

See, further, *O'Sullivan v. People* (Ill.) 20 L. R. A. 143, note, *As to entry of judgment nunc pro tunc.* I. T.

GEORGIA SUPREME COURT.

GEORGIA RAILROAD & BANKING COMPANY, *Plff. in Err.*,
v.

Moselle FITZGERALD.

(108 Ga. 507.)

1. An admission by a person, tending to show that a physical injury received by him, and which subsequently resulted in his death, was caused by an accident, and not by the negligence of a railroad company of which he was an employee, was admissible in evidence for the defendant on the trial of an action for the homicide of such person, brought by his widow against that company.
2. On the trial of an action against a railroad company for a homicide alleged to have been caused by the negligent "kicking" of a car, it was, in the absence of evidence showing that a "running switch" and a "kick" were the same thing, erroneous to admit in evidence against the defendant one of its rules, which related exclusively to running switches. The more especially is this true if it affirmatively appeared from the evidence that the two things were essentially different.
3. While some of the charges excepted to may not have been precisely accurate presentations of the law, the only errors of sufficient importance to warrant the granting of a new trial are those dealt with in the preceding notes.

(July 26, 1899.)

ERROR to the Superior Court for Walton county to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's husband. *Reversed.*

The facts are stated in the opinion.

Messrs. Joseph B. Cumming, Bryan Cumming, and H. D. McDaniel for plaintiff in error.

Messrs. H. C. Roney and W. S. Upshaw for defendant in error.

*Headnotes by FISH, J.

NOTE.—The decision in the above case, though it seems to be unusual, and is within the express provisions of the statute (Ga. Civil Code, § 5193) as to admissions of privies, doubtless states the rule that would be followed everywhere.

That the plaintiff in an action for wrongful death of another is chargeable with the con-

Fish, J., delivered the opinion of the court:

1. This was an action brought by a widow to recover damages for the homicide of her husband, an employee of the railroad company, who was killed while making an effort to couple cars. As has been expressly decided, her right to a recovery must necessarily depend upon a determination of the question whether or not "the husband, had he lived, would have had such right; and whatever would have been a good defense to his suit, had he lived, will be equally available against one brought by her." *Berry v. Northeastern R. Co.* 72 Ga. 137. In other words, she is to be considered in privity with the husband, in so far as her right to complain of his homicide is concerned. It follows, necessarily, that the company should have been permitted to show, by any competent evidence at its command, that the injuries sustained by him were occasioned, not by the alleged acts of negligence on its part of which complaint was made, but by other and wholly different causes. Section 5181 of our Civil Code provides in terms that "the declarations and entries of a person, since deceased, against his interest, and not made with a view to pending litigation, are admissible in evidence in any case;" while § 5193 undertakes to state the rule that "the admissions of privies in blood, privies in estates, and privies in law are admissible as against" all persons with whom they are in privity. Accordingly we think that in the present case the defendant company should have been permitted to prove that the plaintiff's husband, in undertaking to state the cause of his injuries, had "said he was making an effort to couple cars, and that his foot struck some obstacle on the track, and he fell." Even were she not a privy in law with him, this evidence was admissible under the rule that "self-deserving" declarations made by a deceased person having peculiar opportunities to know the truth as to the matter under investigation may be

tributary negligence of the deceased, see cases in note to *Usher v. West Jersey R. Co.* (Pa.) 4 L. R. A. on page 263; also *Meyer v. King* (Miss.) 35 L. R. A. 474; *Clark v. Louisville & N. R. Co.* (Ky.) 36 L. R. A. 123; and *Wolf v. Lake Erie & W. R. Co.* (Ohio) 36 L. R. A. 812.

proved even in cases between third parties, none of whom claim under or through him. See *Field v. Boynton*, 33 Ga. 239; 1 Wharton, Ev. §§ 226 *et seq.*; 5 Am. & Eng. Enc. Law, 1st ed. 366, and cases cited.

2. The plaintiff alleged in her petition that her husband's death resulted from the negligence of the company's servants in "kicking" a car "from the train of cars at a high and dangerous rate of speed, which speed prevented a coupling from being made." At the trial she was permitted to introduce in evidence a rule of the company providing that "running switches shall not be made," notwithstanding the defendant objected to this evidence "on the ground that the petition undertook to specify the particular negligence complained of, and that the complaint was about 'kicking,' and not about 'running switches';" that there were no allegations which would authorize such evidence, especially as it had been shown by the evidence that a 'kick' and a 'running switch' were radically different." We are of the opinion that this objection was well taken. Certainly the trial judge was not authorized, in the absence of proof, to explain these purely technical and arbitrary terms, or to assume to take judicial cognizance of their precise meaning; and more especially was it error so to do when it affirmatively appeared from the evidence introduced before him that these terms were not synonymous but that they were employed to designate two things, which were essentially different in character and manner of execution.

3. Some of the charges excepted to may be open to a number of the minor criticisms suggested by counsel for the plaintiff in error, but in the main they were correct expositions of the law, and the inaccuracies to which our attention has been called will doubtless be eliminated when the case again comes on for a hearing, which it must do because of the errors above pointed out.

Judgment reversed.

All the Justices concur.

E. A. HORNE, *Plff. in Err.*,

v.

A. M. RODGERS.

(.....Ga.....)

- *1. One who bought land, paid a part of the purchase money, gave a promissory note for the balance, and took a bond for titles with knowledge of an existing encumbrance on the property, and who subsequently entered into an agreement with the vendor recognizing liability on the note, and, in effect, the promise to pay therein contained, upon the vendor's removing the encumbrance, could not defeat a recovery upon

*Headnotes by COBB, J.

NOTE.—As to the effect of the temporary absence of a judge from the courtroom, see also *Ellerbe v. State (Miss.)* 41 L. R. A. 569, and note.
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the note, when on the trial of an action thereon brought by the vendor it affirmatively appeared that the latter had complied with the terms of the agreement, and could, and would, on the payment of the note, have made the defendant a good title.

2. It was not on the trial of such an action a fact material to the case that the land declined in value after the note for the purchase money had matured, nor that, ordinarily, property under encumbrance was not marketable.
3. Nor was it good matter of defense that the defendant had never been placed in possession of the premises, it not appearing that he had ever desired possession, and it being shown that he could at any time have obtained possession on demand therefor.
4. The amendment to the petition offered by plaintiff pending the trial was subject to several of the objections set up in the special demurrer thereto, and was properly disallowed.
5. The absence of the judge from the courtroom while the trial is in progress for a brief space of time, will not, in a case where the evidence demanded the verdict as rendered, be, in the light of the former rulings of this court, a sufficient reason to reverse the judgment, when such absence was known to counsel, and there was no request to suspend the trial, no objection to the absence, and no motion for a mistrial upon the judge's return. (a) The rulings made in *O'Shields v. State*, 81 Ga. 301, 6 S. E. 426, and *Pritchett v. State*, 92 Ga. 65, 18 S. E. 536, criticised and disapproved, but, in the absence of an application to review the same, they are followed in the present case.
6. The rulings on evidence were free from error; the charge, taken as a whole, fairly and properly submitted the case to the jury; the evidence demanded the verdict as rendered; and the court did not err in refusing to grant a new trial.

(April 5, 1900.)

ERROR to the Superior Court for Bibb County to review a judgment in favor of defendant in an action brought to recover damages for failure to make title to property sold by defendant to plaintiff. *Affirmed.*

The facts are stated in the opinion.

Mr. Hugh V. Washington, for plaintiff in error:

The evidence as to whether the land was marketable with a mortgage foreclosure suit pending against it was clearly relevant and admissible, as evidence that was admitted showed that the land was bought for resale.

Sedgw. & W. Trial of Title to Land, § 841; *Brashier v. Gratz*, 6 Wheat. 533, 5 L. ed. 324; 2 Parsons, Contr. 538, 539.

The evidence that "defendant stated to plaintiff at the time of the second contract that certain notes therein referred to and deposited as security would be paid," when defendant knew at the time of the statement that they would not be paid, was admissible as showing fraud and bad faith on the part of defendant.

Civil Code, § 3685; *Smith v. Mitchell*, 6 Ga. 458; *Brown v. Doane*, 86 Ga. 38, 11 L. R. A. 381, 12 S. E. 179; *Gordon v. Irvine*, 105 Ga. 144, 31 S. E. 151.

This evidence was further admissible as being for the jury to say whether it was a statement of fact or of opinion.

Robinson v. Woodmansee, 80 Ga. 249, 4 S. E. 497; *Andrews v. Jackson*, 108 Mass. 266, 37 L. R. A. 402, 47 N. E. 412.

A contract may be set aside for fraud in the procurement.

Civil Code, § 3533; *Smith v. Mitchell*, 6 Ga. 458; *Epps v. Waring*, 93 Ga. 768, 20 S. E. 645; *Printup v. Rome Land Co.* 90 Ga. 180, 15 S. E. 764; *Peel v. Bryson*, 72 Ga. 331; *Walters v. Eaves*, 105 Ga. 586, 32 S. E. 609; *Adams v. Henderson*, 168 U. S. 573, 42 L. ed. 584, 18 Sup. Ct. Rep. 179.

The amendment to plaintiff's petition alleging a secret agreement between the defendant and the maker of certain notes deposited by him as security, by which the maker was to be relieved from payment, set up a good defense to the cross action for purchase money, and should have been allowed.

Civil Code, § 3685; *Epps v. Waring*, 93 Ga. 765, 20 S. E. 645; *Printup v. Rome Land Co.* 90 Ga. 180, 15 S. E. 764; *Weems v. Georgia Midland & G. R. Co.* 84 Ga. 359, 11 S. E. 503; *O'Neal v. Phillips*, 83 Ga. 556, 10 S. E. 352.

Parol evidence may be pleaded and heard to avoid a written contract for fraud.

McBride v. Macon Teleg. Pub. Co. 102 Ga. 424, 30 S. E. 999; *Smith v. Mitchell*, 6 Ga. 479; *Ham v. Parkenson*, 68 Ga. 830; *Watson v. Kemp*, 41 Ga. 586; *Printup v. Rome Land Co.* 90 Ga. 180, 15 S. E. 764; *Lunday v. Thomas*, 26 Ga. 537.

Where the vendor is insolvent the vendee is entitled to relief.

Johnson v. Dorough, 99 Ga. 644, 27 S. E. 187.

Defendant had repudiated his obligation under the second contract, which was a release to plaintiff.

Ford v. Smith, 25 Ga. 675.

The absence of the judge from the bench during the argument of counsel for plaintiff, without suspending the case, and without counsel's consent, was illegal and improper.

Hayes v. State, 58 Ga. 36; *O'Shields v. State*, 81 Ga. 301, 6 S. E. 426; *Pritchett v. State*, 92 Ga. 65, 18 S. E. 536; *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580; *Smith v. Sherwood*, 95 Wis. 558, 70 N. W. 682; *Thompson v. People*, 144 Ill. 378, 32 N. E. 908; *O'Brien v. People*, 17 Colo. 561, 31 Pac. 230; *Turbeville v. State*, 56 Miss. 793; *People v. Eckert*, 16 Cal. 111; *People v. Shaw*, 63 N. Y. 38; *Palin v. State*, 38 Neb. 862, 57 N. W. 743; *State v. Carnagy*, 106 Iowa, 483, 76 N. W. 805; *Meredeth v. People*, 84 Ill. 479; *State v. Smith*, 49 Conn. 376; *Hinman v. People*, 13 Hun, 266; *Blend v. People*, 41 N. Y. 604.

Messrs. Minter Wimberly and Hardeman, Davis, & Turner for defendant in error.

Cobb, J., delivered the opinion of the court:

On March 24, 1894, Horne brought suit 49 L. R. A.

against Rodgers, making allegations which were, in substance, as follows: On May 4, 1892, plaintiff paid to defendant \$400, and delivered to him notes for \$350 and \$750, due, respectively, on May 30, 1892, and May 4, 1893, and defendant delivered to plaintiff a bond conditioned to make title to a one-half interest in a described lot of land upon the payment of the notes. Plaintiff was fraudulently induced to contract for the land by the representations of defendant that the \$400 cash and the amount of the \$350 note would be used to obtain a favorable settlement of a purchase-money claim on the land which was due one Carstarphen. Plaintiff did not know what the character or the amount of the claim of Carstarphen was, and paid the note upon the assurance that the two amounts above referred to would satisfy the Carstarphen claim, and would be used for that purpose. Plaintiff has since discovered that the claim of Carstarphen was secured by a mortgage upon the land, and that defendant failed and refused to apply any part of the money paid by plaintiff to the satisfaction of the same. Carstarphen instituted proceedings to foreclose the mortgage, which was pending on May 4, 1893, and for this reason plaintiff has refused to pay the note due on that date. By reason of defendant's failure to pay off the mortgage and make to plaintiff an unencumbered title, he was prevented from making a sale of the property, and sustained a loss thereby of \$500, which would have been the profits arising from such sale. Damages are laid at \$750 and interest and \$500, and judgment prayed accordingly. The defendant in his answer admitted that the contract for sale had been entered into, that plaintiff had paid the \$750, and that Carstarphen had a mortgage on the land, but denied the other allegations. Defendant alleged that plaintiff well knew at the date of the contract that the mortgage was in existence and was a valid lien on the property; that defendant has been always ready to pay whatever amount was due Carstarphen, but there was a dispute about the matter; that plaintiff knew this, as well as that there was a suit pending to foreclose the mortgage, and was familiar with what constituted the defense to that suit; that defendant, in order to protect plaintiff and others who had purchased lots from him, on August 11, 1892, made a written agreement with plaintiff, providing that defendant should deliver to two named persons the note of plaintiff, due May 4, 1893, and two notes by other parties, and the proceeds of certain sales of land should be also turned over to these parties, all to be held until the termination of the suit between defendant and Carstarphen, when so much of them as was necessary should be applied to the satisfaction of the judgment obtained by Carstarphen; that, in consideration of this action of the defendant, plaintiff agreed not to bring any suit for the purpose of canceling the note due May 4, 1893, or recover back the \$750 already paid, but reserved the right

to bring action on the bond for titles in the event defendant failed to pay whatever judgment was recovered in the suit brought by Carstarphen; that plaintiff has never paid or tendered the balance due on the purchase price of the land, and defendant is and has ever been ready to make to plaintiff good and sufficient titles to the land, according to the terms of the bond, upon the payment of the purchase price. Defendant prayed judgment against the plaintiff for the amount due on the note, which matured May 4, 1893. By an amendment plaintiff alleged that the agreement of August 11, 1892, was entered into in consequence of certain false and fraudulent statements in reference to the matter of the controversy between defendant and Carstarphen, as well as in reference to a plan which defendant had by which the property could be sold and a profit realized by plaintiff; that defendant purposely delayed the trial of the foreclosure suit until May 14, 1896, when a judgment was rendered for the full amount claimed, which defendant threatened to further resist; that, as the notes deposited under the agreement of August 11, 1892, have not been paid, the consideration of that agreement has entirely failed; that defendant is insolvent. Plaintiff offers to surrender the bond for titles, and prays for a cancellation of the note due May 4, 1893, for \$750, for a judgment against defendant for attorney's fees on account of bad faith, and for general relief. Defendant amended his answer by alleging that the note of plaintiff, due May 4, 1893, contained an agreement to pay attorney's fees; that the judgment in favor of Carstarphen has been all paid, except an amount equal to the sum due on the note of plaintiff; that Carstarphen has agreed that upon the payment of the note to defendant, the mortgage execution shall be marked "Satisfied;" and defendant tenders to plaintiff a warranty deed to the land embraced in the bond for titles, and a cancellation of the Carstarphen mortgage, whenever plaintiff will pay the note due May 4, 1893. The prayer of the amendment was for a judgment against plaintiff for \$750, besides interest and attorney's fees, and that upon payment of this judgment defendant make title free of all encumbrances to plaintiff to the property described in the bond for titles. When the case came on for trial the jury returned a verdict in favor of defendant against plaintiff for \$750, with interest and attorney's fees, and upon this verdict the court entered a decree that defendant recover of plaintiff the sum mentioned in the verdict, and that, upon defendant filing with the clerk a good and sufficient warranty deed to the property described in the bond for titles, execution issue on the judgment, and that upon payment of the judgment the title vest in plaintiff. The plaintiff made a motion for a new trial upon numerous grounds, which was overruled. The case is here upon a bill of exceptions sued out by the plaintiff assigning error upon the judgment overruling the motion for a new trial, and upon a ruling

in which an amendment by plaintiff was disallowed, which was the subject of exceptions *pendente lite*.

1. The evidence demanded a finding that plaintiff knew when he made the contract of purchase that there was an encumbrance upon the land. While he testified that he "did not know there was a mortgage on the property at the time of the trade," he admitted that he "knew from what Rodgers said that there was a balance due Carstarphen, and that there was an encumbrance of some kind on it, and Rodgers desired the money from [plaintiff] to remove the encumbrance." The evidence also demanded a finding that defendant had complied with the contract of August 11, 1892, and discharged his liability to Carstarphen, so that, upon the payment by plaintiff of the note due by him, defendant would be able to convey the property to him free from encumbrance. Plaintiff admitted that he had never paid or tendered to defendant the amount due on his note, which matured on May 4, 1893, but that, on the contrary, he had refused to pay the same at maturity, and had steadfastly persisted in that refusal. The evidence did not authorize a finding either that the original contract of purchase or the contract of August 11, 1892, was induced by fraud perpetrated by the defendant upon the plaintiff. Such being the case, the jury could not have done otherwise than to return a verdict refusing the plaintiff's prayer for rescission, and finding for the defendant on his answer in the nature of a cross bill, praying for judgment on the note due May 4, 1893.

2, 3. There was no error in refusing to permit the plaintiff to prove that the land declined in value after the time that the note for the purchase money matured. The plaintiff, having neither paid the note nor tendered the amount of the purchase money at its maturity, and demanded a title on that day, the subsequent decline in value was wholly immaterial to the present investigation. In the light of the fact that plaintiff knew at the time of the purchase that the property was encumbered, the fact that property with an encumbrance on it was ordinarily not marketable was likewise immaterial. The failure of the vendee, under a bond for titles, to obtain possession of the bargained premises, will not constitute a defense to a suit on the note for the purchase money, when it appeared, not only that he never desired possession, but also that he could have obtained possession at any time on demand.

4. During the progress of the trial the plaintiff offered an amendment, which the court refused to allow. This amendment alleged, in substance, that he was induced to make the contract of August 11, 1892, by reason of the statement that certain notes were to be turned over to the persons named therein, "to be by them deposited in the Union Savings Bank of Macon, Ga.," and that the same were unconditional notes, which would be paid at maturity, and plaintiff had been informed by the officer of the

bank that the notes were not in the possession of the bank; that after the contract above referred to was executed he was told by the maker of one or more of said notes, *viz.*, S. B. Barfield, that they were conditional notes, by the terms of which, in certain contingencies, he was to be released from the payment of one half of the amount of the purchase money as represented by said notes, and petitioner was also informed by said Dr. Barfield that said contingency had arisen, and that he (Barfield) had been released from one half of his purchase money by the defendant Rodgers; that, in truth and in fact, said notes were conditional notes; this was also a verbal agreement between H. L. Barfield and Rodgers, wholly unknown to plaintiff, Horne, at the time of making the second contract; that said notes were never paid by reason of said condition, unknown to plaintiff at the time of making the second contract of August 11, 1892; that the failure of the defendant to deposit the notes in the bank above referred to was such a violation of the agreement as to authorize a rescission, and that the representations of defendant that the notes were unconditional was a fraud upon plaintiff, in that, if he had known that the notes were conditional, he would not have entered into the contract; that plaintiff has never been in possession nor received any rents from the property, the possession and control of the property having been at all times either in defendant or Carstarphen. The court sustained a special demurrer to the amendment, and refused to allow the same. We see no error in this ruling. It not being alleged that the failure of the plaintiff to obtain possession was due to the fault of defendant, or that he ever demanded possession, the mere fact that he had never been in possession would not be a sufficient reason for a refusal to pay the purchase-money notes. There being no stipulation in the contract of August 11, 1892, that the notes therein referred to were to be deposited with the bank referred to in the amendment, and there being no allegation that a stipulation to that effect was left out by fraud, accident, or mistake, the plaintiff had no right to complain that such deposit was not made. If the amendment can be so construed as to contain a distinct averment that the notes referred to were conditional, it is still defective, for the reason that it does not set forth what the condition was, so that it might be determined whether it was of such a character as that it would so affect the value of the paper as security in the hands of the persons with whom it was deposited that injury would result to the plaintiff therefrom. The averment that, "in truth and fact, said notes were conditional notes," is not sufficient without a further averment setting forth what the condition was, so that it might be determined whether it was of a character liable to affect the value of the notes as security. All the other averments are merely to the effect that Dr. Barfield said that the notes were not in a contingency to be paid, that that

contingency had arisen, and that he had been released. What Dr. Barfield said was immaterial. There is no allegation in the amendment that Barfield had in fact been released. The terms of the notes should have been distinctly alleged, so that the court could have determined whether there was a condition in the contract, and what the character of the condition was. If the amendment should be so construed as to contain merely an averment that Dr. Barfield said "that, in truth and fact," the notes were conditional, then it is clear that the amendment was properly disallowed. It matters not, however, which is the proper construction to be placed on the language of the amendment, there was no error in sustaining the demurrer to the same.

5, 6. In one of the grounds of the motion for a new trial it was alleged, as a reason why the verdict should be set aside, that, when counsel for plaintiff arose to make his opening argument to the court and jury, the judge, without the consent of plaintiff, or his counsel, and without suspending the trial, left the courtroom, and remained out of sight of counsel and the jury, the greater portion of the opening argument, which lasted seventy-five minutes, and did not return until sent for by plaintiff's counsel. In a note to this ground the judge says it is true that he did leave the bench while counsel was addressing the jury without suspending the trial; that he cannot tell exactly how long he was absent; that the purpose for which he retired was to eat a lunch, and immediately upon eating a light lunch he returned to the courtroom, that the entire time he was absent from the courtroom he was in the hearing of counsel, but not in sight of counsel or the jury. The note concludes with the statement that no injury or inconvenience resulted to counsel or his client by the judge's absence. The first time that any question of this character came before this court was in the case of *Hayes v. State*, 58 Ga. 35. In that case it was held that "in the trial of a capital case, especially during the examination of a witness for the state, the judge should not retire beyond the bar, for even a brief absence, without ordering a suspension of business until his return." Judge Bleckley in the opinion says: "When, during the trial of a capital case, the judge leaves the bench, and withdraws beyond the bar, he should order a suspension of business until his return. His immediate presence tends to preserve the legal solemnity and security of trial, and upholds the majesty of law." A new trial was ordered in that case, but not solely on account of the absence of the judge. In *O'Shields v. State*, 81 Ga. 301, 6 S. E. 426, it was held that "where, during the progress of the argument to the jury in a criminal trial, the judge stated to defendant's counsel that he desired to step out for a little while, and asked if there were any objection; and, none being made, did go out of the courtroom, and remained out two or three minutes, allowing the argument to go

on in his absence, a new trial does not necessarily result from such action. The judge acted improperly in not suspending the trial during his absence, but no objection was made, no motion made to have a mistrial declared in consequence of his action, and it is not pretended that any harm resulted to defendant because of it." In *Pritchett v. State*, 92 Ga. 65, 18 S. E. 536, it was held that it was not proper for the presiding judge to absent himself from the courtroom during the trial of a murder case without suspending the trial, but that such conduct would not result in a new trial, "where it appears that he was absent only for a few moments, for a necessary purpose, during the argument of defendant's counsel; it not appearing that any injury resulted therefrom to the accused, or that a motion to have a mistrial declared was made." Attention was called in that case to the fact that in *Hayes's Case*, 58 Ga. 35, a new trial was granted, not alone on account of the absence of the judge, but also because of serious errors in the charge; and also to the fact that the ruling made is supported by the decision in *O'Shield's Case*, 81 Ga. 301, 6 S. E. 426. Until the present case, the three cases cited are all that are to be found in our Reports relating to this question, and from these we deduce the rule applicable in such cases to be: The mere absence of the judge during the progress of the trial, when no objection is made, will not necessarily require the granting of a new trial, when the absence is only for a few moments and for a necessary purpose; and, in order for such absence to become reversible error, it must appear, not only that objection was made to the judge's failure to suspend the trial, but that the absence of the judge resulted in some harm to the losing party. In obedience to this rule, we are constrained to affirm the judgment in this case. If it were an open question, we would hold that the presence of the judge at all stages of the trial is absolutely necessary to its validity, and that the absence of the judge from the trial without suspending the same, for any length of time, no matter how short, or for any purpose, however urgent, would vitiate the whole proceeding, whether objection was made by the parties interested or not, and whether injury resulted to anyone or not. The judge is such a necessary part of the court that his absence destroys the existence of the tribunal, and public policy demands that the tribunal authorized to pass upon the life, liberty, and property of the citizens should be constituted during the entire trial in the manner prescribed by law. The great weight of authority is in harmony with this view. The very definition of "trial" carries with it the idea of the superintendence of a judge. In a recent case, *Capital Traction Co. v. Hof*, 174 U. S. 1, 13, 43 L. ed. 873, 877, 19 Sup. Ct. Rep. 580, Mr. Justice Gray defines "trial by jury" to be: "A trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and advise them on 49 L. R. A.

the facts, and (except on acquittal of a criminal charge) to set aside their verdict if, in his opinion, it is against the law or the evidence." The supreme court of Wisconsin thus comments upon the absence of the judge, without suspending the trial, during the argument of counsel to the jury: "The presiding judge of a trial court is charged with the duty of trying the case from the opening to the close, and he ought not to abdicate his functions even for half an hour. During such an absence grave errors or abuses of privilege may occur, and this court may be left to the conflicting affidavits of over-zealous attorneys or parties in interest to determine what in fact took place." *Smith v. Sherwood*, 95 Wis. 558, 70 N. W. 682. In *Thompson v. People*, 144 Ill. 378, 32 N. E. 968, it was said that a judge had no more authority to leave the courtroom during the argument to the jury than while the evidence was being introduced or at any other stage of the trial, and that so doing was reversible error. In *O'Brien v. People*, 17 Colo. 561, 31 Pac. 230, it was held: "The presence of the judge is essential to the organization of the court. The arguments of counsel, as well as the taking of the evidence, are a part of the trial, and the judge cannot properly absent himself while such proceedings are being carried on. It is his duty to be present to superintend the proceedings, uphold the majesty of the law, and thus give protection and security to the parties interested or concerned in the trial, and also to see to it that counsel in their arguments do not travel outside the record, or transcend the limits of legitimate discussion." In *Turbeville v. State*, 56 Miss. 793, the court uses this language: "There can be no court without a judge, and his presence, as the presiding genius of the trial, is as essential during the argument as at any other time." See also *People v. Eckert*, 16 Cal. 111; *Shaw v. People*, 3 Hun, 272; *People v. Shaw*, 63 N. Y. 38; *Palin v. State*, 38 Neb. 802, 57 N. W. 743; *State v. Carnagy*, 106 Iowa, 483, 76 N. W. 805; *Meredeth v. People*, 84 Ill. 479; *State v. Smith*, 49 Conn. 376; *Hinman v. People*, 13 Hun, 266; *Blend v. People*, 41 N. Y. 604. Even in those cases where it was held that the absence of the judge would not necessarily cause a new trial, the practice was strongly disapproved of, as it was in the two Georgia cases. It is true that all of the cases cited are of comparatively recent date, but this is probably accounted for by the fact that in other states, as in Georgia, the practice of the judge absents himself from the courtroom while the trial is in progress is also of recent origin.

What we have said covers all of the assignments of error which we think are of sufficient consequence to require special mention. After a careful and patient examination of this somewhat voluminous record, we have reached the conclusion that not only the rulings complained of were free from error, but also that the evidence demanded the verdict rendered. In such a case, following the for-

mer rulings of this court, we will have to hold that the absence of the judge from the courtroom for the brief space of time indicated by his note to the motion for a new trial is not sufficient to reverse the judgment. With all possible respect for our learned brother of the circuit bench, who, so far as concerns the merits of the case, tried the same so fairly and correctly, we feel it our duty on the present occasion to say, as has been heretofore said by this court, that the judge should never leave the courtroom for any purpose, for any length of time, without suspending the trial. The rulings heretofore made by this court will not be extended in the slightest. If, in the present case, counsel had objected to the trial proceeding in the absence of the judge, or had upon the return of the judge to the bench made a motion for a mistrial, or if, notwithstanding a request by counsel to suspend, the judge had com-

pelled the counsel to proceed in his absence, the case would not have been controlled by the former decisions.

Counsel for defendant in error asked that damages be awarded against the plaintiff in error for bringing the case to this court for delay only. While the assignments of error in which complaint is made of the judge's rulings are without merit, still we think the complaint made in the ground of the motion for a new trial last dealt with authorized the plaintiff in error to bring the case here for adjudication. While we think the question is controlled by former decisions, the fact that it is so controlled is not so obvious as to authorize the awarding of damages for bringing the point here for adjudication.

Judgment affirmed.

All the Justices concur.

ILLINOIS SUPREME COURT.

A. RUHSTRAT, *Plff. in Err.*,
v.

PEOPLE of the State of Illinois.

(185 Ill. 133.)

1. A state's forbidding the use of the national flag for advertising purposes is an interference with the constitutional privileges and immunities of citizens of the United States.
2. The police power does not extend to the prohibition of the use of the national flag for advertising purposes.
3. When the police power is exerted for the purpose of regulating a useful business or occupation and the mode in which that business may be carried on or advertised, the legislature is not the exclusive judge as to what is a reasonable restraint upon the constitutional right of the citizen to pursue his calling or to exercise his own judgment as to the manner of conducting it.
4. An unconstitutional discrimination is made by the law which permits the use of the national flag for public or private exhibitions of art, but forbids its use, under penalty, for advertising purposes generally.

(*Cartwright, Ch. J., and Wilkin and Carter, JJ., dissent.*)

(April 17, 1900.)

ERROR to the Criminal Court for Cook County to review a judgment convicting defendant of violation of the statute prohibiting the use of the national flag for advertising purposes. *Reversed.*

Statement by **Magruder, J.:**

The plaintiff in error was prosecuted and

convicted for violation of an act of the legislature of Illinois, entitled "An Act to Prohibit the Use of the National Flag or Emblem of Any Commercial Purposes or as an Advertising Medium," approved April 22, 1899, in force July 1, 1899. Ill. Laws 1899, p. 234. The following is a copy of the act in question:

"Sec. 1. It shall be unlawful for any person, firm, organization, or corporation to use or display the national flag or emblem, or any drawing, lithograph, engraving, daguerreotype, photograph, or likeness of the national flag or emblem, as a medium for advertising any goods, wares, merchandise, publication, public entertainment of any character, or for any other purpose intended to promote the interests of such person, firm, corporation, or organization.

"Sec. 2. Nothing in this act shall be construed as affecting either public or private exhibitions of art, or shall in any way restrict the use of the national flag or emblem for patriotic purposes.

"Sec. 3. All prosecutions under the provisions of this act shall be brought by any person in the name of the people of the state of Illinois, against any person or persons violating any of the provisions of this act, before any justice of the peace of the county in which such violation is alleged to have taken place, or before any court of competent jurisdiction; and it is hereby made the duty of the state's attorney to see that the provisions of this act are enforced in their respective counties, and they shall prosecute all offenders on receiving information of the violation of any of the provisions of this act; and it is made the duty of the sheriffs,

NOTE.—The decision in the above case is without any direct precedent. It will be noticed that the reasons for the decision are based upon considerations applicable only to a state law, and not to a Federal law. An act of Congress limiting the uses to which the national flag might be put in order to protect it from any desecration or degrading use would seem certainly within the range of Federal authority.

gress limiting the uses to which the national flag might be put in order to protect it from any desecration or degrading use would seem certainly within the range of Federal authority.

deputy sheriffs, constables, and police officers to inform against and prosecute all persons whom there is probable cause to believe are guilty of violating the provisions of this act. One half of the amount recovered in any penal action under the provisions of this act shall be paid to the person filing the complaint in such action, and the remaining one half to the school fund of the county in which the said conviction is obtained.

"Sec. 4. All prosecutions under this act shall be commenced within six months from the time such offense was committed, and not afterwards.

"Sec. 5. Any persons violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than \$10 nor more than \$100 and costs, and in default of payment of said fine and costs imposed shall be imprisoned in the county jail at the rate of one day for each dollar of fine and costs imposed."

Plaintiff in error, A. Ruhstrat, and his partner, Allen S. Curlett, are copartners under the firm name of Ruhstrat & Curlett in the wholesale and retail cigar business in the city of Chicago. They used pictures of the national flag upon cigar-box labels for the purpose of advertising and selling certain brands of their cigars by means of such advertisement. Plaintiff in error was arrested for a violation of said act, and, on trial before a justice of the peace, was fined \$50 and costs. He took an appeal to the criminal court of Cook county, and, upon trial of the case in the latter court he was found guilty and fined \$10. Motions for a new trial and in arrest of judgment were made and overruled. Judgment was rendered upon the finding of the court, a jury having been waived, and plaintiff in error was fined \$10 and costs. The present writ of error is prosecuted from this judgment of the criminal court of Cook county. Specimens of the labels used by the plaintiff in error upon his cigar boxes are in the record. One of these labels is a pictorial representation, with a female head in the center and a picture of the American flag in the upper left-hand corner. Another of the labels is a pictorial representation of the likeness of Nansen, the explorer, in the center of a wreath, around one side of which is entwined an American flag. Another label is a pictorial representation, with a likeness of President Lincoln in the center, and a view of the capitol building at Washington in the distance, and upon the right hand of the representation is a picture of the American flag. Still another label is a pictorial representation with a female figure in the center, holding in her right hand a shield containing upon it a picture of the American flag. The plaintiff in error, upon the trial below, submitted to the court, to be held as law in the decision of the case, certain propositions to the effect that the act in question was illegal and void, as being in violation of the Constitutions of the state of Illinois and of the United States. These propositions were refused, and exception was

taken to the refusal of the same. The reasons assigned in support of the motions for a new trial and in arrest of judgment were also the alleged invalidity of the act as being in conflict with the Illinois and Federal Constitutions.

Messrs. Hoffheimer & Pfau, for plaintiff in error:

The flag is the property of the people of the United States, and is emblematic of national sovereignty as distinguished from state sovereignty.

U. S. Rev. Stat. §§ 1791, 1792.

The nation is a sovereign power, separate and distinct from state sovereignty.

Lane County v. Oregon, 7 Wall. 71, 10 L. ed. 101; *The Collector v. Day*, 11 Wall. 113, *sub nom. Buffington v. Day*, 20 L. ed. 122; *Wilson's Works*, 7, 8.

The act is in conflict with the 14th Amendment to the Federal Constitution, and article 2 of the Constitution of the state of Illinois.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343; *Slaughter-House Cases*, 16 Wall. 113, 21 L. ed. 420; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62.

The passage of the flag law cannot be justified under the police powers of the legislature.

Tiedeman, Pol. Power, p. 12, § 3; *Re Jacobs*, 98 N. Y. 108, 50 Am. Rep. 636; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343; *Civil Rights Cases*, 109 U. S. 11, 27 L. ed. 838, 3 Sup. Ct. Rep. 18; *Ex parte Whitwell*, 98 Cal. 73, 19 L. R. A. 727, 32 Pac. 870; *Cooley*, Const. Lim. 6th ed. pp. 606, 607, 744; *Fraser v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Ho Ah Kow v. Numan*, 5 Sawy. 552, Fed. Cas. No. 6,546; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

The flag law is unconstitutional and void in that it deprives the citizens of the state of Illinois of the equal protection of the laws. It is class legislation.

Millett v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; *Harding v. People*, 160 Ill. 459, 32 L. R. A. 445, 43 N. E. 624.

Messrs. Charles S. Deneen and F. L. Barnett, for defendant in error:

The flag law act does not conflict with the Federal Constitution. State enactments under police power are supreme unless there is a grant of exclusive authority to Congress.

Slaughter-House Cases, 16 Wall. 77, 21 L. ed. 409; *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717; *First Nat. Bank v. Kentucky*, 9 Wall. 353, 19 L. ed. 701; *New York ex rel. Bank of Commerce v. Tax Comrs.* 2 Black, 620, 17 L. ed. 451; *Mugler v. Kansas*, 123 U. S. 664, 31 L. ed. 211, 8 Sup. Ct. Rep. 273; *Patterson v. Kentucky*, 97 U. S. 504, 24 L. ed. 1116.

The law must be presumed to be consti-

tutional. All doubts must be resolved in its favor.

State v. Holden, 14 Utah, 71, *sub nom. Holden v. Hardy*, 37 L. R. A. 106, 46 Pac. 756; *Cooley*, Const. Lim. 5th ed. 202; *Newland v. Marsh*, 19 Ill. 384; *Chicago, D. & V. R. Co. v. Smith*, 62 Ill. 271.

Magruder, J., delivered the opinion of the court:

The provisions of the Constitution of Illinois which the terms of the act of April 22, 1899, known as the "Flag Law," are alleged to contravene, are §§ 1, 2, and 4 of article 2, and § 22 of article 4. Section 1 of article 2 is as follows: "All men are by nature free and independent, and have certain inherent and inalienable rights—among these are life, liberty, and the pursuit of happiness. To secure these rights and the protection of property, governments are instituted among men, deriving their just powers from the consent of the governed." Section 2 is as follows: "No person shall be deprived of life, liberty, or property without due process of law." Section 4 of the same article provides that "every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that liberty," etc. Section 1 of article 14 of the Amendments to the Constitution of the United States is as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The expression, "life, liberty, and the pursuit of happiness," is general in its character, and includes many rights which are inherent and inalienable. Many of the rights referred to in this expression are included in the general guaranty of "liberty." The happiness here referred to may consist in many things or depend on many circumstances, but it unquestionably includes the right of the citizen to follow his individual preference in the choice of an occupation. *Black*, Const. Law, p. 404. "The right of every man to choose his own occupation, profession, or employment, though not expressly guaranteed by the Constitution, is included in the right to the pursuit of happiness." *Id.* p. 411.

In *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257, the general proposition that the enjoyment by the citizen, upon terms of equality with all others in similar circumstances, of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is a general part of his rights of liberty and property as guaranteed by the Fourteenth Amendment, was assented to by the Supreme Court of the United States as embodying a sound principle of constitutional law. In the latter case it was also

held that, although the power and discretion which a state legislature has in the matter of promoting the general welfare, and of employing means to that end, are very large, yet such power must be so exercised as not to impair the fundamental rights of life, liberty, and property. In *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427, it was said: "The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with certain inalienable rights, and that among these are life, liberty, and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen." It was also said in this case that "the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States." It was also there said: "If it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers, which, as already intimated, is a material part of the liberty of the citizen." *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652. In *Braceville Coal Co. v. People*, 147 Ill. 60, 22 L. R. A. 340, 35 N. E. 62, we said (page 71, 147 Ill., page 342, 22 L. R. A., and page 63, 35 N. E.): "Liberty," as that term is used in the Constitution, means, not only freedom of the citizen from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare." *Fraser v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343; *Live Stock Dealers' & Butchers' Asso. v. Crescent City L. S. L. & S. H. Co.* 1 Abb. (U. S.) 388, Fed. Cas. No. 3408; *Slaughter-House Cases*, 16 Wall. 26, 21 L. ed. 394; *Godcharles v. Wigman*, 113 Pa. 431, 6 Atl. 354; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285.

The plaintiff in error was engaged in the wholesale and retail cigar business. This was certainly a lawful and respectable business. Under the authorities referred to and under the interpretation of the Constitution there made, plaintiff in error had not only the right to choose the business in which he was engaged as his occupation, but he had the right to pursue and carry on that business in any way and by any methods which were lawful and proper. Included in "the

right to choose one's occupation is the right to be free from unlawful interference or control in the conduct of it." Black, Const. Law, p. 412. In these days of commercial enterprise, advertising is an important factor in business pursuits. It cannot be denied that the plaintiff in error had a right to advertise his business in any legitimate manner, so as to attract the attention of the public. Nor can it be denied that the plaintiff in error had the right to design and make use of a trademark. The use of trademarks is as old as commerce itself. The conventional trademark is a part of what is called "the symbolism of commerce." Browne, Trademarks, 2d ed. §§ 1, 26. It is allowable to use a picture as a trademark, and a picture made up of many objects in many colors may be a trademark. Id. §§ 258, 259. Browne, in his work on Trademarks (§ 265), says: "Color may be of the essence of a mark of manufacture or commerce, known as a 'trademark.' National flags are sometimes blended with other objects to catch the eye. They are admirably adapted to all purposes of heraldic display, and their rich, glowing colors appeal to feelings of patriotism and win purchasers of the merchandise to which they are affixed. . . . One flag printed in green may catch the eye of the son of the Emerald Isle. . . . Another flag, with stars on a blue field and stripes of alternative red and white, may secure a preference for the commodity upon which it is stamped." The right of the citizen to pursue the calling which he has chosen, and to advertise his business in a legitimate way by the use of labels or trademarks, is not improperly exercised by making a picture of the national flag a part of such labels or trademarks, unless thereby the public safety, welfare, or comfort is interfered with.

It is claimed on the part of the People that the flag law in question was enacted by the state legislature in the exercise of its police powers. The law is justified upon the alleged ground that it is an enactment under and by virtue of the police power of the state, and that, being enacted under and by virtue of that power, the courts cannot exercise a supervision over the wisdom and judgment of the legislature in its passage. It is claimed that the law tends to elevate the morals and promote the welfare of the public, and that, as such, it is a valid exercise of legislative power. The police power is limited to enactments which have reference to the public health or comfort, the safety or welfare, of society. Laws which impose penalties on persons, and interfere with the personal liberty of the citizen, cannot be constitutionally enacted, unless the public health, comfort, safety, or welfare demands their enactment. It is for the legislature to determine when an exigency exists for the exercise of this power, but what are the subjects of its exercise is clearly a judicial question. The exercise of legislative discretion is not subject to review by the courts when measures adopted by the legislature are calculated to protect the public health and secure

the public comfort, safety, or welfare; but the measures so adopted must have some relation to the ends thus specified. *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454. The legislature has no power under the guise of police regulations, to arbitrarily invade the personal rights and personal liberty of the individual citizen. Its determination upon this question is not final or conclusive. If it pass an act ostensibly in the exercise of the police power, but which in fact interferes unnecessarily with the personal liberty of the citizen, the courts have a right to examine the act, and see whether it relates to the objects which the exercise of the police power is designed to secure, and whether it is appropriate for the promotion of such objects. When the police power is exerted for the purpose of regulating a useful business or occupation, and the mode in which that business may be carried on or advertised, the legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue his calling, and to exercise his own judgment as to the manner of conducting it. The general right of every person to pursue any calling, and to do so in his own way, provided that he does not encroach upon the rights of others, cannot be taken away from him by legislative enactment. *Tiedeman*, Pol. Power, § 3; *Re Jacobs*, 98 N. Y. 108, 50 Am. Rep. 636; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343; *Cooley*, Const. Lim. 6th ed. pp. 606, 607, 744; *Ex parte Whitwell*, 98 Cal. 73, 19 L. R. A. 727, 32 Pac. 872; *Frorer v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454. In *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273, it was said: "If, therefore, a statute, purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." In *Eden v. People*, 161 Ill. 296, 32 L. R. A. 659, 43 N. E. 1108, we said (page 308, 161 Ill., page 1110, 43 N. E., and page 663, 32 L. R. A.): "If the act were one calculated to promote the health, comfort, safety, and welfare of society, then it might be regarded as an exercise of the police power of the state. In *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611, it was held that, if the law prohibits that which is harmless in itself, or requires that to be done which does not tend to promote the health, comfort, safety, or welfare of society, it will in such case be an unauthorized exercise of power, and it will be the duty of the courts to declare such legislation void."

It is difficult to see how the flag law of April 22, 1899, tends in any way to promote the safety, welfare, or comfort of society. The use of a likeness of the flag upon a label or as part of the trademark of a business man in the lawful prosecution of his business

cannot be regarded otherwise than as an act which is harmless in itself. It may violate the ideas which some people have of sentiment and taste, but the propriety of an act, considered merely from the standpoint of sentiment and taste, is a matter about which men of equal honesty and patriotism may differ. The act in question is severe in its terms. It makes it the duty of the state's attorney to prosecute all persons guilty of a violation of the provisions of the act, and makes it the duty of sheriffs, deputy sheriffs, constables, and police officers to inform against all persons "whom there is probable cause to believe are guilty of violating the provisions of this act. One half of the amount recovered in any penal action under the provisions of this act shall be paid to the person filing the complaint in such action, and the remaining one half to the school fund of the county. . . . Any person violating the provisions of this act shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than \$10, nor more than \$100 and costs, and in default of payment of said fine and costs imposed shall be imprisoned in the county jail," etc. What is the offense for which these penalties are imposed? The using or displaying of the national flag or emblem, or any drawing or likeness of the same, "as a medium for advertising any goods, wares, merchandise, publication, public entertainment of any character, or for any other purpose intended to promote the interests of such person, firm, corporation, or organization" so using or displaying the same. Section 2 of the act provides that the use of the national flag or emblem for patriotic purposes shall not in any way be restricted. It is not altogether clear that a person might not make use of or display the national flag or emblem for a purpose intended to promote his own interests, and yet, at the same time, for an entirely patriotic purpose. It is not clear that the prohibition leveled against the use or display of the flag, tends in any way to elevate the morals or promote the welfare of the public.

The flag is used, in the prosecution of commerce upon the high seas, as a symbol of nationality. The nationality of a ship is determined by the flag which it carries. A ship, navigating under the flag and pass of a foreign country, is to be considered as bearing the national character of the country under whose flag she sails. Under what is called in international law "the law of the flag," a shipowner who sends his vessel into a foreign port gives notice by his flag to all who enter into contracts with the shipmaster that he intends the law of that flag to regulate those contracts, and that they must either submit to its operation or not contract with him or his agent at all. 1 Bouvier, Law Dict. (Rawle's Rev.) pp. 799, 800. It is a doctrine of international law that a ship becomes hostile so soon as she hoists the enemy's flag; and, while the cargo of the ship does not necessarily take character from the flag, yet the general rule is that the goods under such flag follow the fate of the vessel. 49 L. R. A.

11 Am. & Eng. Enc. Law, p. 480, note 3. It is difficult to see why, if, in the prosecution of foreign commerce or trade, the flag is used to protect a ship and cargo and designate its character, it should be a desecration of the same flag to use a likeness of it upon a label or trademark in the prosecution of domestic trade or business.

A flag is emblematic of the sovereignty of the power which adopts it. The American flag is emblematic of the sovereignty of the United States. Congress, by §§ 1791 and 1792 of the Revised Statutes of the United States, has provided as follows: "The flag of the United States shall be thirteen horizontal stripes, alternate red and white; and the union of the flag shall be thirty-seven stars, white in a blue field. On the admission of a new state into the Union, one star shall be added to the union of the flag; and such addition shall take effect on the fourth day of July then next succeeding such admission." In *The Collector v. Day*, 11 Wall. 113, *sub nom. Buffington v. Day*, 20 L. ed. 122, it was said: "The general government and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. The former in its appropriate sphere is supreme; but the states within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the states." The state of Illinois has never adopted a flag emblematic of its sovereignty. The flag is the flag of the United States as a sovereignty. The United States, acting through its Congress, has adopted a flag emblematic of national sovereignty. Presumably, the national flag was adopted for the use of the citizens of the United States. There is a difference between the privileges and immunities belonging to the citizens of the United States as such, and those belonging to the citizens of each state as such. The privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the national government, the provisions of its Constitution, or its laws and treaties made in pursuance thereof; and it is these rights which are placed under the protection of Congress by the Fourteenth Amendment. *People ex rel. Akin v. Loeffler*, 175 Ill. 585, 51 N. E. 785; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394. The right to use or display the flag would seem to be a privilege of a citizen of the United States, rather than the privilege of a citizen of any one of the states. The national government, in the exercise of its inherent power to establish a flag or emblem symbolic of national sovereignty, has passed §§ 1791 and 1792, above referred to, and has thereby taken jurisdiction of the subject-matter of a national flag, and has legislated upon it. Congress has passed no legislation restricting the use of the flag, or confining its use to any particular purpose. It would seem that, if it had been the inten-

tion of Congress to restrict or confine such use, some provision to that effect would have been embodied in the act prescribing and describing the national flag.

The use of the flag of the United States, as embodied in advertising sheets and placards and labels, and in common-law trademarks, has received the unqualified approval of the whole commercial world. It has also received the sanction of those having in charge the execution of the trademark laws of the United States. The usage and practice of employing a flag for commercial purposes have been indulged in by citizens of the United States with the knowledge of the national government. The absence of congressional prohibition against the usage and practice thus indulged in with the knowledge of the general government has created a "privilege" in the citizen of the United States to continue such use until withdrawn by the competent authority. An act of legislation, passed by a particular state, which deprives the citizen of such privilege, contravenes that clause of the amendment to the national Constitution which forbids any state to abridge the privileges and immunities of a citizen of the United States. If the state legislature can restrict the use of the national flag, and permit its use for one purpose and prohibit its use for another purpose, it would have the right to prohibit its use altogether within the limits of the state. But it cannot be pretended that the state of Illinois has authority to prohibit the use of the national flag altogether. It necessarily follows that it has no authority to prohibit its use for certain purposes. We are of the opinion that this law is unconstitutional, not only as infringing upon the personal liberty guaranteed to the citizen by both the Federal and state Constitutions, but also as depriving a citizen of the United States of

the right of exercising a privilege impliedly, if not expressly, granted to him by the Federal Constitution.

The act is also unduly discriminating and partial in its character. It exempts from penalties imposed by the act persons who may choose to make use of the national flag or emblem for either public or private exhibitions of art. The exhibitor who engages in public or private exhibitions of art may do so, not merely for the public benefit, but for the promotion of his own interests. By thus excluding artists or exhibitors from the inhibitions of § 1 of the act, the act thereby creates a class or classes of persons who are exempted from the penalties embraced therein. Legislation of this kind has frequently been condemned by the courts in this country. The legislature clearly has no power to deny to plaintiff in error the right to use the national flag to advertise his business, or, in other words, to deny to all persons following particular occupations the right to use the national flag, and at the same time to permit artists or art exhibitors to use the same. The manner in which the act thus discriminates in favor of one class of occupations, and against all others places it in opposition to the constitutional guaranties hereinbefore referred to. *Willert v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454.

For the reasons herein set forth, *the judgment of the Criminal Court of Cook County is reversed*, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed. *Reversed and remanded.*

Cartwright, Ch. J., and Wilkin and Carter, JJ., dissent.

KANSAS SUPREME COURT.

STATE of Kansas, Appt.,

v.

John ROOK.

(.....Kan.....)

*1. The statute of limitations, as a defense to an information for crime, need not be specially pleaded, nor is it to be tried in advance of the hearing of the main issue, and therefore matter in support of a plea of the statute of limitations may be given in evidence under the issue of not guilty.

*Headnotes by DOSTER, Ch. J.

NOTE.—The decision in the above case as to the effect of the discharge of an accused person on a motion to quash to preclude a review of that decision on appeal on the ground that he has been already placed in jeopardy and discharged is a novel one.

For appeal from an order discharging defendant on a plea of former jeopardy, see *State v. Hager* (Kan.) 48 L. R. A. 254.

49 L. R. A.

2. A defendant in a criminal case cannot be said to be in "jeopardy," so as to entitle him to plead a former acquittal or conviction to a subsequent trial for the same offense, unless he has been arraigned, or waived arraignment, and pleaded not guilty, or had such plea entered for him; and therefore, when a trial has been had without an arraignment of the accused or a waiver of it by him, and without a plea of not guilty or the entry of it for him, he cannot be said to have been in "jeopardy."

3. When a defendant in a criminal case has not been in "jeopardy," error of the court in ordering his discharge may be made "a question reserved by the state," under the statute (Gen. Stat. 1897, chap. 83, § 30), and an appeal had to this court upon such reserved question.

4. An information examined and found to state a concealment by the defendant, so as to avoid the bar of the statute of limitations.

(January 6, 1900.)

APPEAL by the state from an order of the District Court for Franklin County quashing an indictment charging defendant with breaking and entering a barn in the night-time. *Reversed.*

The facts are stated in the opinion.

Messrs. E. L. Branson and O. A. Smart, for appellant:

The allegations in the information as to concealment are as follows: "That ever since the commission of the offense herein charged the defendant has continuously so concealed himself that process could not be served upon him."

The allegation of a former commencement of a prosecution was sufficient.

A prosecution is commenced when a complaint is filed and a warrant issued, and an officer uses due diligence to serve the same.

Re Clyne, 52 Kan. 448, 35 Pac. 23; *Re Griffith*, 35 Kan. 377, 11 Pac. 174.

Any words which include the exception with certainty are sufficient. The precise words of the statute need not be used, it being sufficient if the words used clearly accomplish the purpose, and the averment negating an exception may, by reference to the statute specifying the averment, be sufficient.

10 Am. & Eng. Enc. Law, p. 581; *State v. Hayes*, 59 Kan. 61, 51 Pac. 905; 1 Bishop, New Crim. Proc. § 405; Wharton, Crim. L. 6th ed. § 446.

The allegation of concealment should not be more specific, because it would in this case, and frequently in many cases, be impossible to allege the facts in detail constituting concealment. Concealment of a defendant is a matter peculiarly within his own knowledge, and comes within the rule requiring less particularity than in other cases.

6 Enc. Pl. & Pr. 271; Maxwell, Code Pl. 1st ed. 13, 14; Heard, Civil Pl. 265; *State v. Hayes*, 59 Kan. 61, 51 Pac. 905; *State v. Smith*, 13 Kan. 295; *State v. Bancroft*, 22 Kan. 199; *Ulmer v. State*, 14 Ind. 52.

Gen. Stat. 1897, chap. 100, § 362, provides for an increased punishment upon a subsequent conviction of a felony; prior conviction should be alleged in the information.

Underhill, Crim. Ev. pp. 569 *et seq.*; 10 Enc. Pl. & Pr. 489; 10 Am. & Eng. Enc. Law, p. 569; 1 Bishop, New Crim. L. 959-963; Kelley, Crim. Law & Pr. § 615; *Re Miller*, 110 Mich. 676, 34 L. R. A. 398, 68 N. W. 990.

Concealment by defendant, so that process cannot be served upon him, constitutes a frequent ground for attachment.

Hoggett v. Emerson, 8 Kan. 262; Drake, Attachm. 6th ed. § 49; *Bennett v. Avant*, 2 Sneed, 152; *Fitch v. Waite*, 5 Conn. 117.

It is concealment to avoid service of process.

Young v. Nelson, 25 Ill. 565; *North v. McDonald*, 1 Biss. 57, Fed. Cas. No. 10,312.

Messrs. A. H. Case and C. B. Mason, for defendant:

This action was barred on the 27th day of 49 L. R. A.

February, 1898, more than one year before this action was commenced.

Kan. Code 1897, 402, § 32.

The exception, "must be commenced within two years after its commission," is not complied with so as to save the statute by the commencement of an action before a justice of the peace, defendant's name being unknown, warrant issued, and not served.

Re Griffith, 35 Kan. 381, 11 Pac. 174; *People v. Clark*, 33 Mich. 120; *Bell v. Dart*, 54 Ill. 526; *United States v. Ballard*, 3 McLean, 469, Fed. Cas. No. 14,507; *United States v. White*, 5 Cranch, C. C. 368, Fed. Cas. No. 16,678.

The exception in § 33 of the Code is: "If any person who has committed an offense . . . so conceals himself that process cannot be served upon him, . . . the time of concealment is not to be included in computing the period of limitation." This we take to mean a concealment within the state.

Hoggett v. Emerson, 8 Kan. 262; *Frey v. Aultman*, 30 Kan. 181, 2 Pac. 168; *Myers v. Center*, 47 Kan. 324, 27 Pac. 978.

The statute of limitation was pleaded, the court heard the evidence, the defendant was acquitted and discharged. Can the state appeal from such discharge?

State v. Moon, 45 Kan. 146, 25 Pac. 614.

The question whether an offense was barred by the statute of limitations cannot properly be raised by demurrer, by instruction, or motion for a new trial, but should be specially pleaded.

State v. Hussey, 7 Iowa, 409; *State v. Groome*, 10 Iowa, 311; *United States v. White*, 5 Cranch, C. C. 60, Fed. Cas. No. 16,675; *State v. Howard*, 15 Rich. L. 282; *United States v. Cook*, 17 Wall. 168, 21 L. ed. 538; *State v. Hobbs*, 39 Me. 212; *People v. Van Santvoord*, 9 Cow. 660; *State v. Rust*, 8 Blackf. 195.

You cannot prejudice a defendant by proof of particular acts of crime other than the one for which he is being tried, unless the acts have been committed in the preparation for the crime, or the actual doing of the crime, or in concealing it or its fruits.

State v. Boyland, 24 Kan. 186; *State v. Thurtell*, 29 Kan. 148; *State v. Bonsor*, 49 Kan. 758, 31 Pac. 736; *Stevens v. State*, 50 Kan. 712, 32 Pac. 350; Bishop, Crim. Proc. § 1124.

Doster, Ch. J., delivered the opinion of the court:

This is an appeal by the state from an order quashing an information against the appellee, John Rook, for a felony, and upon a question reserved by the state upon an order sustaining the appellee's plea of the statute of limitations, and discharging him from custody. On the 20th of March, 1899, the county attorney of Franklin county filed an information against the appellee for a burglary alleged to have been committed on the 26th day of February, 1896. As a reason for delaying the prosecution beyond the

two-years period of limitation, the information contained the following averment: "And I, said county attorney, give further information that a prosecution of the offense herein charged was commenced on the 7th day of March, A. D. 1896, and within two years after the commission of said offense, before George W. Batdorf, a justice of the peace in and for the township of Franklin, in the county and state aforesaid, against this defendant, said defendant's name being at that time unknown, and the fact of defendant's name being unknown was stated in the complaint filed and warrant issued in the said prosecution; that ever since the commission of the offense herein charged the defendant has continuously so concealed himself that process could not be served upon him." To this information the appellee filed a motion to quash, for the reason that the offense charged was shown to have been committed without the statutory period for the commencement of the prosecution. At the same time he also filed a special plea of the two-years statute of limitations. The motion to quash and the special plea were heard and considered together. No evidence in support of the plea or in opposition to it was introduced, but in argument to the court, and for the purpose of evidence to be considered in connection with the plea, the county attorney made the following statement: "If the court will permit me to make a suggestion, I will just state frankly what we have got. We expect to show that this man was pursued about twenty-four hours after the stuff was taken, and chased down in Linn county for a considerable distance; that he abandoned his team and wagon and the stolen property, and took across the field to the woods, and, so far as we know, has never been seen since, by anyone that we know of, until about the time of his arrest; that a warrant was placed in the hands of the officers at Topeka, who went to his residence, and were not able to find him until about the time of his arrest." Following the quotation of this statement, the bill of exceptions contains the following recitals: "Thereupon the court announced that the said facts, if proved, would not amount to a concealment, and that the court would so instruct the jury if the facts went to the jury, and the court held that, under the facts stated by the state, the action was barred; and further held that the motion to quash should be sustained, and sustains the same; to which ruling and finding the state excepts, reserves the question, and stands upon the information. The court thereupon orders the defendant discharged from custody, to which order the state excepts."

We have delayed the decision of this case to give consideration to a question involved in it, but which was not argued by counsel, and that is the effect of the appellee's discharge, after the trial by the court of his plea of the statutory bar, upon the right of the state to present and have determined the question reserved by it, to wit, the claimed error of the discharge. While the statute

(Gen. Stat. 1897, chap. 83, § 30) gives to the state a right of appeal "upon a question reserved by the state," yet what questions may be reserved by it, or what, as a matter of specific definition, "a question reserved by the state" is, have never been definitely settled. A uniform line of decisions has maintained the proposition that no error, however flagrant, committed by the court against the state, can be reserved by it for decision by the supreme court when the defendant has once been placed in jeopardy and discharged, even though the discharge was the result of the error committed; this, for the reason that the accused, having been once in jeopardy, cannot be retried after reversal of the case upon the state's appeal, and the questions presented, being therefore moot in their nature, will not be considered by the court. *State v. Carmichael*, 3 Kan. 102; *Olathe v. Adams*, 15 Kan. 391; *Oswego v. Belt*, 16 Kan. 480; *State v. Crosby*, 17 Kan. 396; *Junction City v. Keefe*, 40 Kan. 275, 19 Pac. 735; *State v. Moon*, 45 Kan. 145, 25 Pac. 614; *State v. Lee*, 49 Kan. 570, 31 Pac. 147. In *Junction City v. Keefe*, 40 Kan. 275, 19 Pac. 735, a very general statement of the meaning of the phrase, "question reserved by the state," was made. It was there remarked: "We believe the phrase, 'question reserved by the state,' is any exception embodied in a bill of exceptions, where a defendant has been discharged for any cause upon a trial on the merits, and the two exceptions named *supra*." The exceptions referred to are judgments for defendants quashing indictments or informations, and orders arresting the judgment. For the purposes of this case, and also many others, the above definition of a "question reserved by the state" is too general, in that it does not also define the meaning of the phrase, "trial upon the merits." In the case under consideration, the appellee, by his plea of the statute of limitations, raised a question which, legally speaking, went to the merits of his case. Technically, it did not go to the question of his guilt or innocence, but it went to the merits of his claim of right to an acquittal or discharge. The plea of the statutory bar need not have been specially made by him. It could have been made as well under the plea of not guilty. While some of the cases countenance the making of pleas of statutory limitation as special defenses, and countenance trials upon them in advance of the hearing of the main issue, yet the general and better practice is to involve such pleas under the issue of not guilty. 1 Bishop, New Crim. Proc. § 799; Wharton, Crim. Pl. 8th ed. § 317. Such is the requirement of practice in this state. *Re Stewart*, 60 Kan. 787, 57 Pac. 976. In case the special plea of the statute of limitations has been heard in advance of the trial of the main issue, and has been denied, the accused is not precluded from again relying on the same facts under the plea of not guilty. *Thompson v. State*, 54 Miss. 740. It would seem, therefore, that a question material to the defense—one that could have been prop-

erly involved under the general issue—had been submitted to decision, and upon it a finding had been made in appellee's favor, and his discharge had been ordered. It will be observed that the trial of this question was to the court without a jury, and also that it was upon an agreed statement of facts, or, what was equivalent thereto, a statement of facts by the county attorney, which, for the purposes of the legal question that was to arise thereon, was accepted as correct. Trials of misdemeanors upon agreed statements have several times been had in this state. *Olathe v. Adams*, 15 Kan. 391; *Oscego v. Belt*, 16 Kan. 480; and *State v. Lee*, 49 Kan. 570, 31 Pac. 147. As to whether a case of felony, such as the one under consideration, may be heard by the court without a jury, either upon evidence or agreed statement, we have no concern. The defendant in this case is not before us raising the contention.

A fact material to a determination of the question whether the appellee has been in jeopardy, so as to prevent the consideration by us of the point reserved by the state, is now to be noticed. The record nowhere shows that the appellee was arraigned, or that he waived arraignment, and pleaded not guilty, or that he refused to plead, and had the plea of not guilty entered for him. This fact, we think, makes this case an exception to those heretofore decided. Cases of felony are uniformly triable to a jury, and, therefore, decisions as to the point of time in the progress of the case at which what is called "jeopardy" attaches have relation to other circumstances evidencing jeopardy than those in the case before us. Some of the cases hold that jeopardy begins when the jury is sworn to try the case; others, that it begins when the jury is "charged,"—that is, when the jury, as was formerly the practice, were preliminarily informed of the charge against the prisoner. None of these is applicable, because in this case there was no jury, and therefore no swearing or "charging" them. We are not, however, without authority upon the question. In the case of *Weaver v. State*, 83 Ind. 289, it was held that until a defendant entered his plea of not guilty, or, upon his refusal to plead, it had been entered for him, he could not be regarded as in jeopardy. In this case the court, quoting from Bishop's Criminal Law, said: "Not only must the tribunal be made complete by the impaneling of the jury, as already explained, in order to produce the legal jeopardy of which we are treating, but all other preliminary things of record necessary to sustain the verdict of not guilty, if rendered, must be done." Under the General Code of this state, the preliminary things necessary to sustain the verdict of guilty, if rendered, which ought to appear of record, are the arraignment of the defendant and the entry of his plea to the indictment. Those preliminary things did not appear of record in this case at the time of the first impanelment and swearing of the jury to try the cause, and therefore it would

seem that the appellant was not put in legal jeopardy. 1 Bishop, Crim. L. § 1020.

It is true that defendants, even in cases of felony, may waive formal arraignment, and it is perhaps true that an accused person, submitting to trial without arraignment, will be deemed to have waived it; but the calling upon the defendant to plead, and his plea, made by himself or entered for him, would seem to be a necessity. "The right of arraignment on a criminal trial may in some cases be waived, but a plea is always essential. The court cannot supply an issue after verdict, where there has been no plea, notwithstanding that the defendant consented to go to trial." Wharton, Crim. Pl. 8th ed. § 409. In *Newsom v. State*, 2 Ga. 60, it was ruled that "a case is submitted when the prisoner has been arraigned,—the plea of not guilty filed,—and the jury impaneled and sworn." In *Douglass v. State*, 3 Wis. 820, it was ruled that "an arraignment may, in minor offenses, be waived by the defendant, but a plea is necessary to form an issue. An issue in a criminal case cannot be supplied so as to correspond with the verdict, where there has been no issue joined, and a verdict in a criminal case, where there has been neither arraignment nor plea, is a nullity, and no judgment can be rendered thereon." This statement of the law was reaffirmed in *Davis v. State*, 38 Wis. 487.

The appellee not having been in jeopardy, we are not precluded from an examination of the claims of error made upon the appeal by the state. As to whether the matters stated by the county attorney in avoidance of the appellee's plea of the statute of limitations would be sufficient to evidence a concealment, and therefore to take the case out of the statute, it will not be necessary to express an opinion, nor, indeed, should it be done by us. The motion to quash the information was, we think, improperly sustained. The information stated, in sufficient language, one of the exceptions to the running of the statute of limitations. The statute reads: "If any person who has committed an offense is absent from the state, or so conceals himself that process cannot be served upon him, or conceals the fact of the crime, the time of absence or concealment is not to be included in computing the period of limitations." Gen. Stat. 1897, chap. 102, § 33. The information alleged, in positive terms, "that, ever since the commission of the offense herein charged, the defendant has continuously so concealed himself that process could not be served upon him." Whether, in cases of concealment, it is necessary to institute a prosecution within the statutory period of two years,—that is, whether it is necessary within that time to file a complaint and procure the issuance of a warrant,—may be doubted. The counsel for the state has argued the case as though such might be a requisite, and possibly some of the language of the opinion in *Re Clyde*, 52 Kan. 441, 35 Pac. 23, may lend countenance to such view. However, if such meaning was intended, the soundness of that case is

that respect may be questioned. Be this as it may, the information in this case avers that a prosecution was instituted within the necessary time by the filing of a complaint and the issuance of a warrant. The language of the information as to the appellee concealing himself is fully as specific as the language of the statute declaring the exception, and this is certainly sufficient. A similar information, under a similar statute, was held good in *Ulmer v. State*, 14 Ind. 52.

In our judgment, the court erred in quashing the information and in discharging the defendant.

The case will therefore be reversed, with directions for proceedings in the court below in accordance with this opinion.

All the Justices concur.

John W. CLARK, *Plff. in Err.*,
v.
Calvin J. SKEEN *et al.*

(.....Kan.....)

*1. A stipulation in an instrument for the payment of a certain sum of money, payable with current exchange on a place other than the place of payment, is not destructive of negotiability.

2. A note for the payment of a certain sum at a fixed date is not rendered non-negotiable by a stipulation that upon default in the payment of interest the whole amount shall become due, at the option of the holder, and then draw a greater rate of interest.

(March 10, 1900.)

ERROR to the District Court for Barber County to review a judgment in favor of defendants in an action brought to recover the amount alleged to be due on certain promissory notes. *Reversed.*

Statement by Johnston, J.:

Action to recover upon a promissory note for \$3,000, and the interest coupons attached thereto, executed by Calvin J. Skeen, Sarah C. Skeen, Garlie Lane, and Myron J. Lane in favor of the Jarvis-Conklin Mortgage Trust Company, and to foreclose a mortgage given by the same parties, to secure the payment of the note, on real estate in Barber county. The following is a copy of the promissory note, omitting signatures and indorsements. "Five years after date, for value received, we promise to pay to the order of the Jarvis-Conklin Mortgage Trust Company, at its office in Kansas City, Missouri, three thousand (\$3,000) dollars, lawful money of the United States, with interest thereon at the rate of six per cent per annum, payable semi-annually on the first days of January and July in each year, according to the tenor and

effect of the interest notes of even date herewith and hereto attached. Both principal and interest payable with New York exchange. This note is to draw interest from date at the rate of twelve per cent per annum if either principal or interest remain unpaid ten days after due. At the option of the legal holder, after any of said interest notes remain due and unpaid ten days, the whole of the principal and interest may be declared immediately due and payable. This note is given for an actual loan of the above amount, and is secured by a mortgage deed of even date herewith, which is a first lien on the property therein described. Dated at Kansas City, Mo., July 2, 1888." The note and interest coupons were duly signed, and are alleged to have been indorsed and duly transferred before maturity for a valuable consideration, to John W. Clark, the plaintiff in this action. The defendants denied and contested the transfer to and ownership by Clark of the note and mortgage, and also set up a counterclaim for damages alleged to have arisen from the failure of the payee of the note to promptly pay over the proceeds of the loan. A trial was had with a jury, resulting in a verdict in favor of the defendants. The plaintiff complains, and assigns numerous errors on the rulings made by the trial court.

Messrs. Beardsley & Gregory, for plaintiff in error:

The note sued on is a negotiable note.

The provision that in case of default a note can be declared due by the holder does not render it non-negotiable.

De Hass v. Roberts, 59 Fed. Rep. 855, Affirmed in 28 U. S. App. 559, 30 L. R. A. 189, 70 Fed. Rep. 227, 17 C. C. A. 79; *Holden v. Clark*, 16 Kan. 346; *Markey v. Corey*, 108 Mich. 184, 36 L. R. A. 117, 66 N. W. 493; *Wilson v. Campbell*, 110 Mich. 580, 35 L. R. A. 544, 68 N. W. 278; *Dobbins v. Oberman*, 17 Neb. 163, 22 N. W. 356; *National Bank v. Dean*, 86 Iowa. 656, 53 N. W. 338; *O'Keeffe v. First Nat. Bank*, 49 Kan. 348, 30 Pac. 473.

The fact that after default it was to draw a greater rate of interest from date does not render it non-negotiable.

Parker v. Plymell, 23 Kan. 402; *De Hass v. Roberts*, 59 Fed. Rep. 855, 28 U. S. App. 559, 30 L. R. A. 189, 70 Fed. Rep. 227, 17 C. C. A. 79; *Crump v. Berdan*, 97 Mich. 293, 56 N. W. 559; *Hope v. Barker*, 112 Mo. 338, 20 S. W. 567; *Merrill v. Hurley*, 6 S. D. 592, 62 N. W. 958; *Gilmore v. Hirst*, 56 Kan. 626, 44 Pac. 603; *Robinson Female Seminary v. Campbell*, 60 Kan. 60, 55 Pac. 276; *Berry v. Berry*, 57 Kan. 691, 47 Pac. 837.

The provision that the note should be payable with New York exchange does not render it non-negotiable.

Dan. Neg. Inst. §§ 54, 54a; Randolph, Com. Paper, § 200; Tiedeman, Com. Paper, § 28a; *Smith v. Kendall*, 9 Mich. 241, 80 Am. Dec. 83; *Bullock v. Taylor*, 39 Mich. 137, 33 Am. Rep. 356; *Leggett v. Jones*, 10 Wis. 34; *Morgan v. Edwards*, 53 Wis. 609, 40 Am. Rep. 781, 11 N. W. 21; *Hill v. Todd*, 29 Ill. 101; *Clauser v. Stone*, 29 Ill. 114, 81 Am.

*Headnotes by JOHNSTON, J.

NOTE.—As to provision for exchange as affecting negotiability of instrument, see also *Culbertson v. Nelson* (Iowa) 27 L. R. A. 222, and note.
49 L. R. A.

Dec. 299; *Whittle v. Fond du Lac Nat. Bank*, (Tex. Civ. App.) 26 S. W. 1106; *Orr v. Hopkins*, 3 N. M. 25, 1 Pac. 181; *Bradley v. Lill*, 4 Bias. 473, Fed. Cas. No. 1,783; *Grutacay v. Woulluse*, 2 McLean, 581, Fed. Cas. No. 5,854; *Price v. Teal*, 4 McLean, 201, Fed. Cas. No. 11,417; *Hastings v. Thompson*, 54 Minn. 184, 21 L. R. A. 178, 55 N. W. 968.

The writing on the back of the note, while it is in such a form as is generally known as a special indorsement, when placed upon negotiable paper plainly constitutes an assignment, even if the note in question be considered non-negotiable.

Loudermilk v. Loudermilk, 93 Ga. 443, 21 S. E. 77; *Merchants' & M. Nat. Bank v. Barnes*, 18 Mont. 335, 45 Pac. 219.

Anything showing an intention to transfer is an assignment, even if it be only delivery, or an oral assignment.

Bentley v. Standard F. Ins. Co. 40 W. Va. 729, 23 S. E. 587; *Story*, Promissory Notes, § 128, and cases cited; *Parker v. Riddle*, 11 Ohio, 102; *Haber v. Brown*, 101 Cal. 445, 35 Pac. 1037.

A negotiable promissory note, as well as every other kind of note, may be transferred by delivery merely.

Washington v. Hobart, 17 Kan. 277; *Williams v. Norton*, 3 Kan. 295; *McCrum v. Corby*, 11 Kan. 470; *Weeks v. Medler*, 20 Kan. 65.

Delivery is presumed from possession.

Randolph, Com. Paper, § 217; *Barrick v. Austin*, 21 Barb. 241; 19 Am. & Eng. Enc. Law, p. 53; *Brooks v. James*, 16 Wash. 335, 47 Pac. 751; *Carnahan v. Lloyd*, 4 Kan. App. 605, 46 Pac. 323, and cases cited; *O'Keeffe v. First Nat. Bank*, 49 Kan. 349, 30 Pac. 473.

Messrs. W. W. S. Snoddy and E. C. Wilcox for defendants in error.

Johnston, J., delivered the opinion of the court:

In the course of the trial the district court, in ruling upon the testimony and instructing the jury, held that the note copied in the foregoing statement is not a negotiable instrument; and the determination of this question will dispose of, or render unimportant, a number of other questions discussed by plaintiff in error. The negotiability of the paper appears to have been challenged on two grounds, and the first is that it contains a stipulation that upon default in the payment of interest the whole amount shall become due, and then draw a greater rate of interest. Stipulations like these are not inconsistent with negotiability. According to mercantile law, negotiable paper is required to be certain as to time and amount; but the note in question, as will be observed, fixes a certain time for payment, and the fact that it may become due at an earlier time depends upon the maker himself. Stipulations somewhat similar were contained in the notes and mortgages under consideration in *Holden v. Clark*, 16 Kan. 346; and yet it was held that the paper was negotiable, and that an innocent and bona fide purchaser took the same freed from the equities existing between the original parties. In *Carlton v. Kenealy*, 49 L. R. A.

12 Mees. & W. 139, it was held that a note payable in instalments, subject to a condition that upon default being made in the payment of the first instalment the greater amount should become due, is negotiable; and in deciding the case it was said that "almost every note payable in instalments has such a condition. It is not a contingency. It depends upon the act of the maker himself, and on his default it becomes a promissory note for the whole amount." In *Dobbins v. Oberman*, 17 Neb. 163, 22 N. W. 356, the note contained a provision that it should be due at a stated time, and might become due earlier, on the happening of a certain event. The instrument was held negotiable, and in deciding it the court stated: "It matters not, then, that it also contains a promise to pay sooner than the general date of payment, upon the happening of an uncertain event." In *Wilson v. Campbell*, 110 Mich. 580, 35 L. R. A. 544, 68 N. W. 278, it was held that a note for the payment of a certain sum at a fixed date is not rendered non-negotiable by a provision that it may become due sooner, at the option of the holder, on default in the payment of interest, nor by the fact that a mortgage securing it contains a similar provision in regard to a default in the payment of taxes. The same question was before the Supreme Court of the United States in *Chicago R. Equipment Co. v. Merchants' Nat. Bank*, 136 U. S. 269, 34 L. ed. 349, 10 Suf. Ct. Rep. 999, where it was held that a recital that the note in suit was one of a series, and that in default of payment on any one of the series the note in suit should become due, did not render the note non-negotiable; the same containing a promise to pay at a certain definite date, at which it became due at all events. See also, *De Hass v. Roberts*, 59 Fed. Rep. 853; *National Bank v. Dean*, 86 Iowa, 656, 53 N. W. 338; *Walker v. Woollen*, 54 Ind. 164; *Cota v. Buck*, 7 Met. 588; *Ernst v. Steckman*, 74 Pa. 13, 15 Am. Rep. 542; *Markey v. Corey*, 108 Mich. 184, 36 L. R. A. 117, 66 N. W. 493; *Randolph*, Com. Paper, § 114; *Dan. Neg. Inst.* § 48. The fact that it was to draw a greater rate of interest after default does not destroy the negotiable quality of the paper. In *Parker v. Plymell*, 23 Kan. 402, the note contained a promise to pay interest after maturity, but stipulated that if the note was not paid at maturity the same should bear interest at 12 per cent from date, and it was held that this provision did not render the note non-negotiable. *Gilmore v. Hirst*, 56 Kan. 626, 44 Pac. 603, was a case where the note contained a stipulation that if the interest was not paid when due it should become principal, and draw 8 per cent interest, and it was held that the stipulation for the payment of interest on interest did not render the note non-negotiable. See also *De Hass v. Roberts*, 59 Fed. Rep. 853; *Hope v. Barker*, 112 Mo. 338, 20 S. W. 567.

The second ground of attack upon the negotiability of the note is that it was made payable with New York exchange. There is considerable division of judicial opinion as

to the effect of such a stipulation, but we are better satisfied with those authorities holding that it is not destructive of negotiability. It is a general rule that one of the essential qualities of commercial paper is that the amount to be paid must be fixed and certain, and the reason for this rule is that parties to such paper may know the amount necessary to discharge it. The spirit of the rule requiring precision, however, applies rather to the principal amount than to incidental additions of interest or exchange. In *Seaton v. Scoville*, 18 Kan. 433, 26 Am. Rep. 779, 21 Am. Rep. 212, this court held that a note otherwise negotiable was not rendered non-negotiable by a stipulation to pay costs of collection, including reasonable attorney's fees. Although that stipulation is not analogous to the one we are considering, some of the courts place it on the same footing with a provision for the payment of exchange, and hold that both of them introduce such an element of uncertainty as to deprive the instrument of the negotiable attribute. In discussing the effect of such a stipulation, Daniel, Neg. Inst. 4th ed. § 54a, says that "instruments payable with exchange have been generally treated as commercial instruments by the business world and the courts; that a fair construction of the statute of Anne, upon which many of the modern statutes are modeled, and which has been deemed by some of the courts only declaratory of the common law, does not necessarily impeach as a note an instrument so payable; and that the spirit of the rule requiring precision in the amount of negotiable instruments applies rather to principal amount than to the ancillary and incidental additions of interest or exchange." The current rate of exchange between two places at a particular time may be said to be a matter of common knowledge, or at least easily ascertainable by anyone. However, the exchange may be treated as incidental to the principal amount, and as a means of transmitting the amount due to the payee. In *Bullock v. Taylor*, 39 Mich. 137, 33 Am. Rep. 356, Judge Cooley, in discussing the matter of the payment of exchange or express, said: "By the agreement, as well as by the terms of the notes, they were made payable at East Saginaw, and it therefore became the duty of the promisors to be at any expense necessary in the transmission of the money to that place. Whether they sent by draft or by express, the expense would equally fall upon them, and an express promise to pay it could add nothing to their liability." In *Morgan v. Edwards*, 53 Wis. 609, 40 Am. Rep. 781, 11 N. W. 23, it is said that "a note is payable in lawful money of the United States, which is at par in every portion of the country. If a note is payable in Milwaukee, with exchange

on New York, it requires precisely the same sum of money to pay it as would be required had it been made payable in New York. The exchange is the cost of drawing a bill, and transmitting the money to New York to meet it. In *Leggett v. Jones*, 10 Wis. 35, the note was made payable at the Dodge County Bank, with exchange on New York. Had the note been payable in New York, no one would claim that there was any uncertainty in the amount, although the maker would necessarily have been subjected to the expense (uncertain in amount) of providing funds there to meet it. It is precisely that expense which constitutes and governs the cost of exchange. Hence the same sum of money which would have been required to pay the note in New York would have paid it at the Dodge County Bank, including the exchange according to its terms. . . . Hence it may well be said that the uncertainty in the amount due on a note which stipulates for the payment of exchange between two points is rather apparent than real and substantial." See also *Smith v. Kendall*, 9 Mich. 242, 80 Am. Dec. 83; *Johnson v. Friebie*, 15 Mich. 286; *Bradley v. Lill*, 4 Biss. 473, Fed. Cas. No. 1,783; *Hastings v. Thompson*, 54 Minn. 184, 21 L. R. A. 178, 55 N. W. 968; *Hill v. Todd*, 29 Ill. 101; *Whittle v. Fond du Lac Nat. Bank* (Tex. Civ. App.) 26 S. W. 1106; *Orr v. Hopkins*, 3 N. M. 25, 1 Pac. 181; *Leggett v. Jones*, 10 Wis. 35. In *Randolph, Com. Paper*, § 200, in speaking of the provision for exchange, it is said that "such a provision is valid, at least if it be not used as a subterfuge to avoid the usury laws." See also *Tiedeman, Com. Paper*, § 28a; *Dan. Neg. Inst.* § 54.

Our conclusion is that the note in question is negotiable, and, in answer to some of the points raised in the case, it may be said that the possession of such a note, properly indorsed, is prima facie evidence that the holder is the owner thereof; that he acquired it in good faith, for value, in the usual course of business, before maturity, and without notice of any circumstance that would impeach its validity. And where the defendant, who is the maker of the note, claims that the plaintiff does not so hold it, the burden is upon him to prove his claim. *Mann v. Second Nat. Bank*, 34 Kan. 746, 10 Pac. 150; *First Nat. Bank v. Emmitt*, 52 Kan. 603, 35 Pac. 213; 4 Am. & Eng. Enc. Law, 2d ed. p. 318. There is some criticism of other instructions, but, as the note is held to be negotiable, the questions are not likely to arise upon another trial; and the same is true as to rulings upon the testimony.

The judgment will be reversed, and the cause remanded for a new trial.

All the Justices concur.

TEXAS SUPREME COURT.

Rube HALBERT *et al.*, *Appts.*,
v.

SAN SABA SPRINGS LAND & LIVE-
STOCK ASSOCIATION.

(89 Tex. 230.)

Ninety full days must expire after the adjournment of the legislature before the taking effect of an act passed by it, unless an emergency clause is added, under Const. 1876, art. 3, § 39, providing that no law shall take effect or go into force "until ninety days after the adjournment of the session at which it is enacted."

(February 17, 1896.)

NOTE.—Rule as to first and last days in computation of time.

- I. General rule as to inclusion or exclusion.
- II. Early rule as to which day is counted.
- III. The modern common-law doctrine.
 - a. General rules.
 - b. Application and reasons for.
- IV. The statutory rule.
 - a. Statement and effect of.
 - b. Application of.
- V. Construction of particular provisions as to time.

- a. Difference in language of provisions.
- b. "From" or "after" a day or event.
- c. "Before" a day or event.
- d. "Within" a designated period.
- e. "Between" designated dates or events.
- f. "Until" a designated time or event.
- g. Notice without reference to terminal.

- h. "At least" prefacing period of time.
- VI. The rule when Sunday or a holiday is the first or last day.

- a. At common law.
- b. The statutory rule.

- VII. Application of rules with reference to subject-matter and surrounding circumstances.

- a. General rule.
- b. To contracts.
 1. General and miscellaneous.
 2. Negotiable instruments.
 3. Insurance policies.
 4. Leases and rental contracts.
- c. To statutes of limitations.
 1. In civil actions.
 2. In criminal prosecutions.
- d. To provisions for time in civil actions.
 1. General statement as to.
 2. Service and return of process.
 3. Pleading.
 4. Notices of trial.
 5. Notices, motions, and proceedings in general.
 6. Attachment, replevin, and arrest.
 7. Rendition and docketing of judgments.
- e. To provisions for time in criminal cases and penal actions.
- f. To provisions for time in proceedings for review.
 1. Motions for new trial.
 2. Appeal, error, review.
 3. Steps taken to perfect appeal.

QUESTION certified by the Court of Civil Appeals for the Fourth Supreme Judicial District arising in an appeal by defendants from a judgment of the District Court for Sutton County in favor of plaintiff in an action brought to recover possession of certain sheep and goats.

The facts are stated in the opinion.

Messrs. S. G. Tayloe, L. N. Halbert, and Cochran & Hill, for appellants:

At the time appellee filed its articles of incorporation in the department of state there was no law of Texas permitting the formation of corporations for the purposes specified in its charter, the law authorizing the creation of corporations for the purposes

VII.—continued.

g. To executions.

1. Notices and sale under, generally.

2. Redemption from sale under.

h. To sales under mortgages and trust deeds.

i. To mechanic's liens.

j. To taxes.

1. Assessment and collection.

2. Redemption from tax sales.

k. To eminent domain.

l. To matters of administration of estates.

m. To proceedings to dispossess tenant or distrain for rent.

n. To bankruptcy and insolvency laws.

o. To poor-debtor acts.

p. To provisions for recording and filing instruments.

q. To enactment and taking effect of statutes and resolutions.

r. To elections and offices.

s. Miscellaneous provisions for time.

VIII. Conclusion.

I. General rule as to inclusion or exclusion.

The general rule adopted under the old common law, as well as by the more modern cases and under the statutes, is that, in the computation of time one day, either the first or the last, is included and the other excluded. *Reed v. Sexton*, 20 Kan. 195; *Re Senate Resolution*, 9 Colo. 632, 21 Pac. 475; *Sanders v. Norton*, 4 T. B. Mon. 464; *Mitchell v. Woodson*, 87 Miss. 567; *Gillespie v. White*, 16 Johns. 117; *Small v. Edrick*, 5 Wend. 137; *Columbia Turnp. Road v. Haywood*, 10 Wend. 422; *Irving v. Humphrey*, Hopk. Ch. 304; *Re Carhart*, 2 Dem. 627; *Kling v. Goodenough*, 2 Ad. & Kl. 463.

And this is the general rule whether the computation is from the event or act or from the day of the event. *Sanders v. Norton*, 4 T. B. Mon. 464.

Where any particular number of days not expressed to be clear days is prescribed, time is to be computed not to exclude both days, but to exclude the one and include the other. *State ex rel. Lewis v. Eggleston*, 34 Kan. 714, 10 Pac. 3; *Walsh v. Boyle*, 30 Md. 262; *State, Stroud, Prosecutor, v. Consumers' Water Co.* 56 N. J. L. 422, 28 Atl. 578.

And where a statute requires an act to be performed a certain number of days prior to a day named, or within a definite period after a day or event specified, or where time is to be computed either prior or subsequent to a day named, the rule is to exclude one day of the

named in said charter having been repealed prior to the execution and filing of said articles of incorporation, and said charter was without authority of law, illegal, and void.

Tex. Rev. Stat. 1879, art. 566, subd. 27; Tex. Const. 1876, art. 3, § 39; *O'Connor v. Towns*, 1 Tex. 107; *Hollis v. Francois*, 1 Tex. 118; *Burr v. Lewis*, 6 Tex. 76; *Lubbock v. Cook*, 49 Tex. 96; *Sheets v. Selden*, 2 Wall. 177, 17 L. ed. 822; *Sutherland, Stat. Constr.* §§ 111, 112; *State v. Mounts*, 36 W. Va. 179, 15 L. R. A. 243, 14 S. E. 407; *Hyde v. White*, 24 Tex. 137; *Young v. Van Benthuyssen*, 30 Tex. 768; *Smith v. Dickey*, 74 Tex. 61, 11 S. W. 1049; *Hill v. Kerr*, 78 Tex. 213, 14 S. W. 568; *Linhart v. State*, 33 Tex. Crim. Rep. 504, 27 S. W. 260; *Hammons v. State*, 35 Tex. Crim. Rep. 17, 29 S. W. 780; *Griffith v. Bogert*, 18 How. 158, note in 15 L. ed. 307; *Bemis v. Leonard*, 118 Mass. 507, 19 Am. Rep. 470.

designated period and include the other. *Stebbins v. Anthony*, 5 Colo. 348; *Re Senate Resolution*, 9 Colo. 632, 21 Pac. 475.

In the above case, *Small v. Edrick*, 5 Wend. 158; *Columbia Turnp. Road v. Haywood*, 10 Wend. 423; *Thomas v. Aflick*, 16 Pa. 14, *infra*, VII. d, 5; and *Early v. Doe, ex dem. Homans*, 16 How. 615, 14 L. ed. 1081,—were distinguished upon the ground that in those cases the language of the statute was different.

This rule, however, is subject to many exceptions, growing out of the language of the provisions for the period of time to be computed, and arising from peculiar facts and circumstances of the particular cases to which the rule is sought to be applied. And the question as to which of the first and last days of a period of time shall be included in the computation, and which shall be excluded, has not only given rise to much conflict of authority, but has also been determined differently and on different theories in different periods and jurisdictions; and this question, like the general one of inclusion of one day and exclusion of the other, has been variously decided with a view to the language of the particular provision for the period to be computed, and the peculiar facts and circumstances surrounding the particular case with reference to which the computation is to be made.

II. Early rule as to which day is counted.

The rule of the older cases supported and retained by some of the more modern ones was that where a computation of time was to be made from an act done or from the time of an act, the day when the act was done was to be included. *Priest v. Tarlton*, 3 N. H. 93; *Spencer v. Champion*, 13 Conn. 11; *Swift v. Tousey*, 5 Ind. 196; *Jacobs v. Graham*, 1 Blackf. 392; *Leavenworth Coal Co. v. Barber*, 47 Kan. 20, 27 Pac. 114; *Lebus v. Wayne-Ratterman Co.* 14 Ky. L. Rep. 794, 21 S. W. 652; *Butler v. Fessenden*, 12 Cush. 78; *Cunningham v. Phillips*, *Tappan (Ohio)* 132; *Lubbock v. Cook*, 49 Tex. 96; *Griffith v. Bogert*, 18 How. 158, 15 L. ed. 307; *Arnold v. United States*, 9 Cranch, 104, 3 L. ed. 671; *Glassington v. Rawlins*, 3 East, 407; *Bellasis v. Hester*, 1 Ld. Raym. 280; *Castle v. Purditt*, 3 T. R. 623; *Norris v. Hurdred de Gautris*, 2 Rolle Abr. 520.

In *Swift v. Tousey*, 5 Ind. 196, *supra*, it was said that *Hathaway v. Hathaway*, 2 Ind. 513, *infra*, VII. b, 1, based on the authority of the late English decisions, must be regarded as directly overruling the former cases on the subject.

49 L. R. A.

On motion for rehearing.

It is a rule of the English common law, well and firmly settled since the case of *Mercer v. Ogilvie*, 3 Paton, 434, that when a given number of days is required to elapse between one act and another the day of the one is excluded and the day of the other included.

Bemis v. Leonard, 118 Mass. 502, 19 Am. Rep. 470; 26 Am. & Eng. Enc. Law. pp. 3-14; *Sutherland, Stat. Constr.* §§ 111, 112; *Cressey v. Parks*, 75 Me. 387, 46 Am. Rep. 406.

So generally recognized is this rule, says Mr. Sutherland (*Stat. Constr.* p. 137), "that it requires no particular words for its application."

The rule of computing time by excluding one and including the other day of the specified period is the rule adopted in other jurisdictions for determining, under constitu-

As a general rule, except where it was necessary in order to settle which of two acts done on the same day was to prevail, the law took no notice of part of a day, and the first day to be counted was the day any part of which was occupied in a particular business, which was to endure for a certain number of days in order to fulfil any requirement of the law. *Migotti v. Colvill*, L. R. 4 C. P. Div. 233, 48 L. J. C. P. N. S. 695, 40 L. T. N. S. 747, 27 Week. Rep. 744, 14 Cox C. C. 305.

And the rule of computation was to include the first day and exclude the last. *Thomas v. Aflick*, 16 Pa. 14; *Loosse v. Vogel*, 80 Ala. 308; *Bailey v. Lubke*, 8 Mo. App. 57.

In the computation of time from a date or from a day of a date, the day of the date was to be excluded; but where a computation was to be made from an act done, or from the time of an act, the day in which the act was done was to be included. *Re Soldiers' Voting Bill*, 45 N. II. 607; *Lefavour v. Bartlett*, 42 N. H. 555; *Bell v. Adams*, 10 N. H. 181; *Blake v. Crowninshield*, 9 N. H. 304; *Frankfort v. Farmers' Bank*, 20 Ky. L. Rep. 1635, 49 S. W. 811; *Moor v. Covington City Nat. Bank*, 80 Ky. 305; *Long v. Hughes*, 1 Duv. 387; *Handley v. Cunningham*, 12 Bush, 403; *Wood v. Com.* 11 Bush, 220; *Chiles v. Smith*, 13 B. Mon. 460; *White v. Crutcher*, 1 Bush, 472; *Flint v. Sawyer*, 30 Me. 226; *Perry v. Provident L. Ins. & Invest. Co.* 99 Mass. 162; *Atklas v. Sleeper*, 7 Allen, 487; *Gorham v. Wing*, 10 Mich. 486; *McCulloch v. Hopper*, 47 N. J. L. 189, 54 Am. Rep. 146; *Orth v. McCook* (Ohio) 14 West. L. Month. 215; *Wayne v. Duffy*, 1 Phila. 367; *Hampton v. Erenzeller*, 2 Browne (Pa.) 18; *Lubbock v. Cook*, 49 Tex. 96; *Burr v. Lewis*, 6 Tex. 76; *Bellasis v. Hester*, 1 Ld. Raym. 280; *Howard's Case*, 1 Ld. Raym. 430; *Clayton's Case*, 5 Coke, 1, 1 Bulst. 177.

When an act was to be performed within a particular period from or after a specified day, the proper method of computing time was to exclude the day named and include the day on which the act was to be done. *Ewing v. Bailey*, 5 Ill. 420; *Harper v. Ely*, 56 Ill. 179; *Goode v. Webb*, 52 Ala. 452; *Lang v. Phillips*, 27 Ala. 312; *English v. Williamson*, 34 Kan. 212, 8 Pac. 214; *Savage v. State*, 18 Fla. 970; *Rigelow v. Willison*, 1 Pick. 485; *Fuller v. Russell*, 6 Gray, 128; *Rand v. Rand*, 4 N. H. 267; *Thomas v. Aflick*, 16 Pa. 14; *Best v. Polk*, 18 Wall. 112, *sub nom.* *Best v. Doe, ex dem. Polk*, 21 L. ed. 805.

Unless it appeared that a different computa-

tional and statutory provisions, the time "at" which an act of the legislature becomes operative.

23 Am. & Eng. Enc. Law, pp. 213-219, and notes; Sutherland, Stat. Constr. 111, 112, and notes; Bishop, Written Laws, 107; *State v. Mounts*, 36 W. Va. 179, 15 L. R. A. 243, 14 S. E. 407; Cooley, Const. Lim. p. 61.

The Constitution having been framed in the light of the common law of England, and by its express language having kept in force as the rule of the decision that great system of laws, should we not read its provisions by the light they afford? We think so.

Ryan v. Porter, 61 Tex. 108.

By the first statute the computation was to be made from "after the day of the adjournment," and by the Constitution it is changed so as to be made from "after the adjournment," omitting the words "the day of" before the words "the adjournment."

tion was intended. *Goode v. Webb*, 52 Ala. 452.

And the full time was to be given exclusive of such day or date. *Engliah v. Williamson*, 34 Kan. 212, 8 Pac. 214.

The rule was that the words, "from the day of the date," in a provision for a period of time, excluded the day, while, "from the date," included it. *Howard's Case*, 2 Salk. 625.

But when time was to be computed from the time of an act done the day on which the act was done was to be excluded. *Gorham v. Wing*, 10 Mich. 486.

A distinction was made in the computation of time from an act done and from the day of the date of an instrument; the day of the date of the instrument was excluded in the computation, and the day upon which the act was done was included. *Dickinson v. Lee*, 2 Coldw. 615.

And in cases that depended, not upon writings dated, but upon time to be reckoned from an act done, the time was reckoned by including the day on which the act was done. *Norris v. Hundred of Gawtry*, *Hobart*, 139, *Brownlow & G.* 156.

The computation of time from the date of a deed, commenced on the day the deed was dated, including that day. *Seignoret v. Noguire*, 2 Ld. Raym. 1241.

And the words "from the date," when used to pass an interest conveyed from one to another, as in a lease for years, included the day of the date; but in matters of account, where no interest was designed to be passed, the day of the date was excluded. *Hatter v. Ash*, 1 Ld. Raym. 85.

And where a note or other obligation was payable in a certain number of days from date the day of the date was always excluded in the computation of the time. *Avery v. Stewart*, 2 Conn. 69, 7 Am. Dec. 240.

Where the computation of time was to be made from an act done, the day on which the act was performed was included, because the act was the terminus *a quo* the computation was to be made, there being in contemplation of law no fractions of a day, and therefore the terminus was to be considered as commencing the first moment of the day; but where the expression was "from the date" the rule was that if a present interest was to commence from the date, the day of the date was included, but if it was used merely to fix a terminus from which to compute time, the day was in all cases excluded. *Pearpoint v. Graham*, 4 Wash. C. C. 232, Fed. Cas. No. 10,877.

So, in *Taylor v. Jacoby*, 2 Pa. 495, 45 Am. 49 L. R. A.

"Where the computation is to be made from an act done, the day on which the act is done is to be included."

Arnold v. United States, 9 Cranch, 104, 3 L. ed. 671.

Mr. W. W. Hermon, for appellee:

Such a construction should be given as would operate most to the ease of the parties entitled to favor, and by which rights would be secured and forfeitures avoided.

O'Connor v. Towns, 1 Tex. 114.

If there is any doubt in the minds of the court such doubt should be solved in favor of appellee, for thereby the court would secure the rights of appellee and avoid the forfeiture of its charter.

In case of days of grace three entire days are meant.

Watkins v. Willis, 58 Tex. 523; *Young v. Van Benthuysen*, 30 Tex. 768.

To obviate the injustice of a rule which

Dec. 615, the rule was stated that the words, "from or after the date or the day of the date," include the day, when they are used in a conveyance to create an estate, but that they exclude it when they are used in an instrument to perpetuate the evidence of a debt.

And in *Mound City Mut. L. Ins. Co. v. Twinling*, 19 Kan. 340, it was said to be the general rule that if time is to be computed from an act, or from an act done, a year would terminate at the close of the 365th day, but where time is to be computed from a date, or from the day of the date, the year would terminate only at the close of the 366th day. But the question was one as to whether or not insurance premiums were paid in season, and not one of first and last days.

So, in *Demis v. Leonard*, 118 Mass. 502, 19 Am. Rep. 470, it was said that all the cases in which the day of the date or of an act is excluded are founded upon some statute or contract in which there is language, "from the time," or the like equivalent to "from the day" or "from the date."

But while, in a majority of cases where time was to be computed from some event or act done, the day within which the event transpired or the act was done was included, it was excluded whenever such exclusion would prevent an estoppel or save a forfeiture. *Dwelling-House Ins. Co. v. Osborn*, 1 Kan. App. 197, 40 Pac. 1099; *Windsor v. China*, 4 Me. 298; *State ex rel. Heltemeyer v. Gasconade County Ct.* 33 Mo. 102; *Dowell v. Vinton*, 1 Tex. App. Civ. Cas. (White & W.) § 327.

See also early English and American cases applying this doctrine, *infra*, VII.

III. The modern common-law doctrine.

a. General rules.

In *Seward v. Hayden*, 150 Mass. 158, 5 L. R. A. 844, 22 N. E. 620, it was said that the distinction between computation from a day or a date and computation from an act done or from an event, made by many of the earlier cases, does not rest upon a sound principle, and is no longer recognized in most jurisdictions.

And in *Blake v. Crowninshield*, 9 N. H. 304, and *Elder v. Bradley*, 2 Sneed, 247, it was said that the tendency of the modern cases is to exclude the day of an act or an event in the computation of time, unless for a special reason it is necessary to include it.

And the general rule now is that in computing time, whether from the date or the day of

would compel parties at their peril to know and obey a law of which, in the nature of things, they could not possibly have heard, the Constitution gives to all parties the full constitutional period in which to become acquainted with the terms of the statutes which are passed, except when the legislature has otherwise directed.

Cooley, Const. Lim. p. 188; *Smith v. Cassidy*, 9 B. Mon. 192, 48 Am. Dec. 420; *Weeks v. Hull*, 19 Conn. 376, 50 Am. Dec. 252.

Suppose the Constitution of Texas had said that no law shall go into effect until one day after the adjournment of the legislature. Then if the law should go into effect the first moment of the day following the adjournment of the legislature there would be no time at all between the day of the adjournment of the legislature and the day when the law would go into effect, and the intention of the

Constitution to give one day would be disregarded and set at naught. The same rule applies to the case when ninety days are allowed as to the case where one day would be given.

Warren v. Slade, 23 Mich. 5, 9 Am. Rep. 70; *Price v. Hopkin*, 13 Mich. 326; *Biggs v. McBride*, 17 Or. 640, 5 L. R. A. 115, 21 Pac. 879; *American Salt Co. v. Heidenheimer*, 80 Tex. 347, 15 S. W. 1039; *Hill v. Faison*, 27 Tex. 431; *Stephenson v. Texas & P. R. Co.* 42 Tex. 169.

Brown, J., delivered the opinion of the court:

The court of civil appeals has certified to this court the following statement and question: "On June 29th, 1885, the San Saba Springs Land & Live-Stock Association was chartered by the state of Texas, the purpose

the date, or from a certain act or event, the day of the date or event is to be excluded. *Bemis v. Leonard*, 118 Mass. 502, 19 Am. Rep. 470; *Fuller v. Russell*, 6 Gray. 128; *Evans v. Bowers*, 13 Colo. 511, 22 Pac. 812; *Teucher v. Hiatt*, 23 Iowa, 527, 92 Am. Dec. 440; *Seward v. Hayden*, 150 Mass. 158, 5 L. R. A. 844, 22 N. E. 629; *Arnold v. Nye*, 23 Mich. 286; *McCulloch v. Hopper*, 47 N. J. L. 189, 54 Am. Rep. 146; *Vandenburgh v. Van Rensselaer*, 6 Paige, 147; *Phelan v. Douglass*, 11 How. Pr. 193; *Judd v. Fulton*, 10 Barb. 117; *Roman v. Liswell*, 6 Cow. 659; *Cornell v. Moulton*, 3 Denio, 12; *Ex parte Dean*, 2 Cow. 605, 14 Am. Dec. 521; *Seaman v. Eager*, 18 Ohio St. 209; *Kimm v. Osgood*, 19 Mo. 60; *Re Goswiler*, 3 Penr. & W. 200; *McCready v. McGovern*, 1 Kulp, 474; *Hood v. Loughery*, 24 Pittsb. L. J. 139; *Cromellin v. Brink*, 20 Pa. 523; *Boyer v. Northern C. R. Co.* 1 Pearson (Pa.) 113; *Re Simpson*, 20 Pitts. L. J. N. S. 402; *Smith v. Dickey*, 74 Tex. 61, 11 S. W. 1049; *Lubbock v. Cook*, 49 Tex. 96; *Spear v. State*, 2 Tex. App. 246; *Hunter v. Lanlus*, 82 Tex. 677, 18 S. W. 201; *Young v. Higgon*, 6 Mees. & W. 53, 8 Dowl. P. C. 212.

Unless it appears that a different computation was intended. *Lubbock v. Cook*, 49 Tex. 96; *Burr v. Lewis*, 6 Tex. 76; *Hunter v. Lanlus*, 82 Tex. 680, 18 S. W. 201.

Or unless there be some special provision requiring a definite mode of computation. *Rex v. Cumberland*, 4 Nev. & M. 378, 1 Harr. & W. 16; *King v. Goodenough*, 2 Ad. & El. 463.

In *Bemis v. Leonard*, 118 Mass. 502, 19 Am. Rep. 470, *supra*. It was said that *Wheeler v. Bent*, 4 Pick. 167, *infra*, VII. f. 2, was decided summarily and without argument, and that it might be difficult to reconcile it with the words of the statute or the decisions of other courts. And *Butler v. Fessenden*, 12 Cush. 73, *supra*, II. was explained, the court saying that the point adjudged in that case was that by the settled practice in computing the time of service before the return day of process the day of service is included. And the statement in *Atkins v. Sleeper*, 7 Allen, 487, repeated in *Perry v. Provident L. Ins. & Invest. Co.* 99 Mass. 162, *supra*, II., that where time is computed from an act done the general rule is to include the day, was said to be *dictum*, and aside from the decision of the court in each case, as in the first the computation was to be made from a certain day and was held to exclude that day, and in the second whether the day was included or excluded made no difference in the result, and that it is supported by none of the authorities cited except upon 49 L. R. A.

grounds which have been expressly repudiated in *Bigelow v. Willson*, 1 Pick. 485, *infra*.

The rule is to exclude the first day, and include the last. *York's Case*, 1 Abb. (U. S.) 503, Fed. Cas. No. 18,139; *Re Fortner*, 2 Harr. (Del.) 461; *Morrison v. Morrison*, 3 Del. Co. Rep. 31, 3 Lanc. L. Rev. 272; *Winston v. State*, 32 Tex. Crim. Rep. 59, 22 S. W. 138; *Supreme Council A. L. of H. v. Gootee*, 61 U. S. App. 617, 89 Fed. Rep. 941, 32 C. C. A. 436; *Rex v. Cumberland*, 4 Nev. & M. 378, 1 Harr. & W. 16; *King v. Goodenough*, 2 Ad. & El. 463.

Though each case depends upon the reason of the thing according to the circumstances. *Teucher v. Hiatt*, 23 Iowa, 527, 92 Am. Dec. 440.

And the rule excluding the first day from the computation of a period of time is uniform, whether the question arises upon the practice of the court or the construction of a statute. *Cornell v. Moulton*, 3 Denio, 12.

And in computing the time within which an act is required to be done, there is no distinction between the expression "from the date" and "from the day of the date." In the provision for the performance of such act. *Price v. Whitman*, 8 Cal. 412.

The method of computing time by Scotch law is that the terminus *a quo* the day or the date of the deed must be excluded, and the time reckoned independently of it. *Lawford v. Davies*, 47 L. J. Prob. N. S. 38, 39 L. T. N. S. 111, 26 Week. Rep. 424, L. R. 4 Prob. Div. 61.

But the rule that in computing time from a day or a date the day or date is to be excluded is not inflexible, and in the interpretation of a statute or contract it yields to a manifest purpose or intention in conflict with it. *Seward v. Hayden*, 150 Mass. 158, 5 L. R. A. 844, 22 N. E. 629; *Re Fortner*, 2 Harr. (Del.) 461; *Taylor v. Brown*, 147 U. S. 640, 37 L. ed. 313, 13 Sup. Ct. Rep. 549.

No absolute rule in computing time from an act or an event, that the day is to be inclusive or exclusive, exists; the question depends on the reason of the thing according to the circumstances. *Lester v. Garland*, 15 Ves. Jr. 248; *State v. Asbury*, 26 Tex. 83; *Taylor v. Brown*, 5 Dak. 335, 40 N. W. 525; *Price v. Whitman*, 8 Cal. 412.

And the days from and to which the time is to be computed should be included or excluded according to the context and subject-matter so as to effectuate the intent of the parties, and not to destroy it. *Williamson v. Farrow*, 1 Ball. L. 611, 21 Am. Dec. 492; *Manning v. Dove*, 10 Rich. L. 395; *Taylor v. Brown*, 147 U. S. 640, 37 L. ed. 313, 13 Sup. Ct. Rep. 549; *Texas*

of the corporation being specified as 'the raising, breeding, owning, buying, selling, and trading in live stock of all kinds, or in such as the corporation may see fit; and also the owning, buying, selling, and trading in real estate in the state of Texas, and in any other state or territory of the United States or the Republic of Mexico.' The charter was granted by virtue of subdivision 27, art. 566, Rev. Stat. Question. Was article 566, Rev. Stat., in force on June 29, 1885, or had the act of March 27, 1885, gone into effect, thereby repealing said article?"

The object of the constitutional convention in prescribing a period of time within which no law enacted by the legislature should be operative was to give notice to the people of its passage, that they might obey it when it should become effective, and also to enable them to adjust their affairs to the change

made, if any. *Price v. Hopkin*, 13 Mich. 325. The law which requires citation to be served five days before the return day thereof is analogous to the constitutional provision, in that each is intended to fix a time for giving notice of an event which is to occur, or a thing that is to be done, the first to an individual, the latter to all persons; and we might well apply the rule that the entire period of time mentioned is to expire between the two dates named, as, for instance, that the day of service and the day of return in service of citation must both be excluded in the computation of the time. Applying that rule in this case, the day of adjournment of the legislature and the day that the law shall take effect would be likewise excluded in the computation of time prescribed by the Constitution; that is, ninety full days must expire between the adjourn-

& P. R. Co. v. Goodson, 2 Tex. App. Civ. Cas. (Willson) § 27; *State v. Asbury*, 26 Tex. 83; *O'Connor v. Towns*, 1 Tex. 107; *Taylor v. Brown*, 5 Dak. 335, 40 S. W. 525.

And such a construction should be given as will operate most to the ease of the party entitled to favor. *State v. Asbury*, 26 Tex. 83; *Texas & P. R. Co. v. Goodson*, 2 Tex. App. Civ. Cas. (Willson) § 27; *O'Connor v. Towns*, 1 Tex. 107.

And it would tend to avoid forfeitures. *O'Connor v. Towns*, 1 Tex. 107; *Winston v. State*, 32 Tex. Crim. Rep. 59, 22 S. W. 138; *Texas & P. R. Co. v. Goodson*, 2 Tex. App. Civ. Cas. (Willson) § 27; *Blake v. Crowninshield*, 9 N. H. 304; *Dowling v. Foxall*, 1 Ball & B. 195.

And the day from which the reckoning commenced, and that on which it terminates, may both be included or excluded as will best preserve a right or prevent a forfeiture. *State ex rel. Stock v. Schnierle*, 5 Rich. L. 299.

A forfeiture will be avoided unless required by the positive words of the statute. *Dowling v. Foxall*, 1 Ball & B. 195.

So, no rule with reference to the inclusion or exclusion of the first or last day in computing time has been enforced so strictly as to defeat the intention of the parties, as that is always paramount to all other considerations. *Blackman v. Nearing*, 43 Conn. 56.

And, where a time is referred to as a terminus *a quo*, in computation, the first day is excluded, except in cases where it is necessary to include it in order to vest an interest or prevent a forfeiture or the divesting of a right, and in all cases where a point of time or the doing of an act is referred to merely as a terminus from which to measure time, the day of the date of the act should be excluded. *Millard v. Willard*, 3 R. I. 42.

But while, as a general rule, in computing time the first day is to be excluded, when the entire validity of an instrument or a title must fail, and the true intentions of the parties be defeated, unless the first day be included, it should be done. *Price v. Whitman*, 8 Cal. 412.

And a construction of a statute providing for a period of time which would exclude the day of the date will not be adopted where it is invoked, not to avoid a forfeiture or confirm a title, but to destroy one obtained by a purchaser in good faith under the sanction of a public judicial sale. *Griffith v. Bogert*, 18 How. 158, 15 L. ed. 307.

The general principle is that time will be so computed as to save the right intended to be favored by the law or to be secured by the 49 L. R. A.

parties to the contract. *Turner v. Odum*, 3 Coldw. 455; *Jones v. Planters' Bank*, 5 Humph. 619, 42 Am. Dec. 471.

And the day on which an act is done is included or excluded in the computation of a period of time running therefrom, as the case requires a rigorous or liberal construction. *Ege's Appeal*, 2 Watts, 283.

And where the construction of the language of a statute providing for the time of performance of an act is doubtful, courts will always prefer that which will confirm, rather than destroy, any bona fide transaction or title, and the intention and policy of the enactment should be sought for and carried out. *Griffiths v. Bogert*, 18 How. 158, 15 L. ed. 307.

The rule, however, that in computing time from or after the day of a given date the day is to be excluded, is never to be rejected unless it appears that a different computation was intended. *Bigelow v. Willson*, 1 Pick. 435.

So, in *Supreme Council A. L. of H. v. Gootee*, 61 U. S. App. 617, 89 Fed. Rep. 941, 32 C. C. A. 436, it was said that much of the confusion existing concerning the report of decisions of the cases involving the computation of time with reference to the inclusion or exclusion of the first and last days will be found, on a close examination of the opinions of the courts, to be owing to the desire to give due effect to the meaning of the parties as expressed in the language or phrases used in each case.

For application of these rules to particular subjects and cases, see *infra*, VII.

b. Application and reasons for.

The rule that, in construing instruments with reference to the time of performance of an act provided for therein, they should be so construed, if possible, as that rights depending upon them should be upheld and not destroyed, embraces every instrument or contract as well as wills, and applies as forcibly to the construction of statutes and all proceedings under them as to other papers. *Weeks v. Hull*, 19 Conn. 376, 50 Am. Dec. 249; *People v. New York C. R. Co.* 28 Barb. 284. And see *Cornell v. Moulton*, 3 Denio, 12, *supra*.

Not only mercantile contracts, such as bills of exchange, promissory notes, and policies of insurance, but also wills and all other instruments are to be understood and construed so that the day of the date or the day of the act from which a future time is to be ascertained is to be excluded from the calculation. *Weeks v. Hull*, 19 Conn. 376, 50 Am. Dec. 249.

But the rule of interpretation which excludes

ment of the legislature and the taking effect of the law. *O'Connor v. Towns*, 1 Tex. 107.

Article 3, § 39, of the Constitution of 1876, reads as follows: "No law passed by the legislature, except the general appropriation act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless in case of an emergency, which emergency must be expressed in a preamble or in the body of the act," etc. At the time this constitutional provision was adopted, the act of December 1, 1849 (Paschal's Anno. Dig. art. 457C), was in force, which is in this language: "Every law hereafter made, shall commence and be in force with the commencement of the sixtieth day after the day of the adjournment of the session of the legislature at which such law may be passed, unless in the law itself another time for the

commencement thereof is particularly mentioned." The construction of the Constitution urged by appellants' counsel would require that we change the language so as to read "until the ninetieth day," which would accord with the law as it then existed. But the convention did not use that language. From the change of the language, it must be presumed that there was an intention to change the rule fixed by the law upon the subject. *Oriental Hotel Co. v. Griffiths*, 88 Tex. 574, 30 L. R. A. 765, 33 S. W. 661. The changes plainly made are that the period of time is enlarged from sixty to ninety days; the legislature is prohibited from putting any law into effect in less time than that named, save in the excepted classes mentioned; and, instead of saying that the law shall take effect at the commencement of the ninetieth day, it is said "until ninety

the first, and includes the last, day, has no application to a provision which is clear and explicit, and can only be invoked where the act is to be done within a certain number of days or a specified period of time; whenever the statute says after the expiration of a day named, that day must fully expire. *Marvin v. Marvin*, 75 N. Y. 240.

And whenever the whole day and every moment of it can be counted then it should be, but whenever, if counted, the party would in fact have a fractional part of it only, then it should not be counted. *Phelan v. Douglass*, 11 How. Pr. 193.

The reason for the rule that in computation of time the first day will be excluded is, that the law takes no notice of fractions of a day, except in certain cases where the hour itself becomes material, and time is not, therefore, computed from the hour of the day on which the event happened to the corresponding hour of the day of performance, but the computation is from the day when the act was done, such day being regarded as a point of time, and the computation begins from the expiration of such day, as, if counted, it would fail to give the party to be affected the whole of that day, but only a fractional part of it. *Ibid*.

But such reason ceases whenever the party affected has a whole and entire day as one of those to be included in the computation. *Ibid*.

See also *infra*, VII., *Application of rules with reference to subject-matter and surrounding circumstances*.

IV. The statutory rule.

a. Statement and effect of.

In many jurisdictions there are statutes or rules of court providing, either explicitly or substantially, that the time within which an act is to be done shall be computed by excluding the first day and including the last, unless the last is Sunday or a holiday, in which case it also shall be excluded.

The rule thus laid down has been held to be merely declaratory of the law as it previously existed. *Womack v. McAhren*, 9 Ind. 6; *Batman v. Megowan*, 1 Met. (Ky.) 533; *Hahn v. Dierkes*, 37 Mo. 574; *People v. Burgess*, 153 N. Y. 561, 47 N. E. 889; *Carothers v. Wheeler*, 1 Or. 194; *Lutz's Appeal*, 124 Pa. 273, 16 Atl. 858.

And not to change the existing rule with reference to the first and last days, except, perhaps, to more definitely fix the event from which the count is to be made. *People v. Burgess*, 153 N. Y. 561, 47 N. E. 889. 49 L. R. A.

Thus, in computing the time under the New York statutory rule, the first day, or the day on which the time begins to run, is to be excluded. *Judd v. Fulton*, 4 How. Pr. 298; *Rae v. National L. Ins. Co.* 20 U. S. App. 410, 60 Fed. Rep. 690, 9 C. C. A. 215.

And in matters of practice the day on which any rule shall be entered, or order, notice, pleading, or paper served, is to be excluded in the computation of time for complying with the exigency of such rule, order, notice, pleading or paper; and the day on which a compliance therewith is required is included, except when it falls on Sunday, in which case the party has the next day to comply therewith. *Bissell v. Bissell*, 11 Barb. 96.

So, under the Missouri statutes the time within which an act may be done is to be computed by excluding the first day and including the last. *Hodgson v. Banking-House*, 9 Mo. App. 24.

And under N. H. Rev. Stat. chap. 1, § 25, one uniform rule for the computation of time is established, which excludes the day of the date of an act in all cases not specially provided for. *Lefavour v. Bartlett*, 42 N. H. 555.

And in Kentucky, where in the computation of a period of time the first day is excluded, the last day must be counted as one of the intermediate days. *Batman v. Megowan*, 1 Met. (Ky.) 533.

In the above case it was said that in *Smith v. Cassidy*, 9 B. Mon. 192, 48 Am. Dec. 420, *infra*, VII. f, 2, the rule that in the computation of time if the first day be excluded, the last day must be counted, was recognized as the correct one, but that it was inadvertently misapplied; and that no new rule was asserted in *Chiles v. Smith*, 13 B. Mon. 460, *infra*, VII. f, 2; but that the then existing rule was merely stated and exemplified, and the matter of ascertaining and determining when the day on which an act was done or an event occurred was to be computed as part of the time, was rendered definite and certain.

Where a state statute as to time for the performance of an act has been construed by courts of the state in a suit between the parties, their construction will prevail as to the parties under that statute in suits in the Federal court. *Griffith v. Bogert*, 18 How. 158, 15 L. ed. 307.

b. Application of.

The statutes and rules providing for the computation of time are very different in their range of application.

Thus, Mo. Rev. Stat. 1889, § 6570, providing that the time within which an act is to be done

days," etc. If the convention had intended that a law to be thereafter passed should take effect on the ninetieth day after adjournment of the legislature, it would have been easy and natural to have used the language of the law then in force. It cannot be claimed that it was intended that the law should go into effect at an earlier date than the ninetieth day, and the only change that could result from the language used is that it should take effect at a later date than that which would be expressed by language similar to that of the then-existing law.

The language "until ninety days" is incomplete and meaningless if we construe it alone by the words used, and therefore it becomes necessary, in order to arrive at the intention of the framers of the Constitution, to supply those words which have evidently been omitted. Mr. Sutherland says:

shall be computed by excluding the first day and including the last, and if the last be Sunday it shall be excluded, is intended to furnish a general rule for the computation of the time mentioned in all statutes, unless the terms used therein make such construction inadmissible. *St. Louis v. Bambrick*, 41 Mo. App. 648.

And the provision of Neb. Code, § 895, to that effect, was intended to establish a uniform rule applicable alike to the construction of statutes and to matters of practice. *McGinn v. State*, 46 Neb. 427, 30 L. R. A. 450, 65 N. W. 46.

And Hill's (Or.) Code, § 519, making the same provision, applies to all computations of time, and is not limited to cases in which the time is expressed in days. *Grant v. Paddock*, 30 Or. 312, 47 Pac. 715.

So, Ohio Rev. Stat. § 4951, providing that, unless otherwise specially provided, the time within which an act is required by law to be done shall be computed by excluding the first day and including the last, and if the last be Sunday it shall be excluded, applies to all computations of time under the provisions of the Code. *Chicago Label & Box Co. v. Washburn*, 15 Ohio C. C. 510.

And Minn. Gen. Stat. 1878, chap. 66, § 82, to that effect, is not confined to matters of practice in the courts, but is intended to establish a uniform rule for the computation of time, applicable, at least, to all cases arising under that chapter, whether the question arises in matters of practice or in the construction of statutes. *Spencer v. Haug*, 45 Minn. 231, 47 N. W. 794; *Johnson v. Merritt*, 50 Minn. 303, 52 N. W. 863.

But the statutory rule for computing time, excluding the first and including the last day, but excluding it when it is Sunday, applies only when it is necessary to have a rule for ascertaining the first or the last day on which a thing may be done, and when the first or last day is expressed it does not apply. *Northwestern Guaranty Loan Co. v. Channell*, 53 Minn. 269, 55 N. W. 121.

So Ind. Rev. Stat. 1881, § 1280, to that effect, prescribes the rule for the computation of time in all civil actions. *Wright v. Manns*, 111 Ind. 422, 12 N. E. 160.

But the Indiana statute has reference to matters properly falling within the Code of Civil Procedure, and not to matters in no way connected therewith. *Vogel v. State ex rel. Land*, 107 Ind. 374, 8 N. E. 164.

And it has no application to the office of justice of the peace, as neither the office nor any-
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"Where one word has been erroneously used for another, or a word omitted, and the context affords the means of correction, the proper word will be deemed substituted or supplied." Sutherland, *Stat. Constr.* § 260. Ninety days is the period of time intended to be prescribed by the Constitution which must elapse after the legislature adjourns before a law enacted by that body can become operative, but this is not expressed by the words used, neither can it be said that eighty-nine days or any less number must elapse if we regard only the words used. In fact, nothing definite and certain can be determined from these words; but, by supplying the words evidently omitted, we can read the provision as if it had been written thus, "until the expiration of ninety days after the adjournment of the legislature"; or, "until a period of ninety days shall have elapsed

thing relating to it is provided for by the Code. *Ibid.*

And Ky. Code Pr. § 681, providing that if a certain number of days be required to intervene between two acts the day of one only of the acts may be counted, does not apply where the computation is to be made from an act done as distinguished from the day of the act done. *Frankfort v. Farmers' Bank*, 20 Ky. L. Rep. 1635, 40 S. W. 811.

So, the Tennessee statute, which is the same as that of Minnesota and Indiana, applies when the computation begins from the beginning of some event or the performance of some act within a given length of time thereafter, and when it is indispensable in order that some right may be saved or that some liability may be avoided, but does not apply where the provision is that some act, like the service of a summons, shall be done a designated number of days before a specified day or event. *Dickinson v. Lee*, 2 Coldw. 615.

But the similar provision of the Dakota Code of Civil Procedure, § 6, applies only to matters of practice in the territory, and does not fix the rule concerning matters of a general nature to which it has no relation, such as a limitation in a patent granted to an Indian under the statutes of the United States. *Taylor v. Brown*, 5 Dak. 335, 40 N. W. 525.

Under the Florida common-law rule of court, 63, in all cases in which any particular number of days not expressed to be clear days is prescribed by the rules of practice of the courts, they are to be computed exclusively of the first day and inclusively of the last, unless the last shall happen to fall on Sunday or on certain other specified days, and then the time is to be reckoned exclusively of the last day also. *Crawford v. Feder*, 27 Fla. 323, 8 So. 642.

See also *infra*, VII., as to Application of rules with reference to subject-matter and surrounding circumstances.

And see *infra*, VI. b, as to application when last day falls on Sunday or a holiday.

V. Construction of particular provisions as to time.

a. Difference in language of provisions.

While the larger share of provisions, whether statutory or contractual, under which a computation of time is involved, requires a reckoning of a designated period from or after a particular time or event, provisions frequently occur when the reckoning is to be backwards from a designated time or event. Likewise, an act is often

after the adjournment of the legislature." The words supplied are consistent with the context and in harmony with the purposes of the convention in framing the section quoted. It is also in harmony with the previous decisions of this court in construing statutes upon the subject of notice, and we conclude that this provision of the Constitution should be construed as if the language had been used that is above supplied. Section 43 of article 12 of the Constitution of 1869 provided: "The statutes of limitation of civil suits were suspended by the so-called 'Act of Secession,' 28th of January, 1861, and shall be considered as suspended within this state until the acceptance of this Constitution by the United States Congress." The Constitution was accepted on the 30th day of March, 1870. In the case of *Dowell v. Vinton* this provision of the Constitution of 1869 was construed by the court of appeals,

the question being whether or not limitation commenced to run on the day the Constitution was accepted by Congress, or on the succeeding day. It was held by the court of appeals that the law of limitation was not revived until the 31st day of March, 1870, the day next succeeding the day on which the Constitution was accepted. We think that this case is in point, and correctly decided. It is in harmony with the decisions before cited herein, and with the general rules laid down for construction under like circumstances. See 1 Tex. App. Civ. Cas. (White & W.) § 327, p. 140. We therefore answer that article 566 of the Revised Statutes was in force on June 29, 1885, and that the act of March 27, 1885, did not go into effect until the 30th day of June of that year.

Rehearing denied.

required or permitted within a designated period of time, and time is often given until a designated day or event. So a designated period of time is sometimes required to intervene between two acts or events, and frequently a notice of a designated number of days or the like is required without reference to anything to mark either the beginning or ending of the period, and occasionally the period of time in the different provisions above mentioned is prefaced by the words "at least." The meaning of each of these provisions depends upon proper construction of the language used, and each has its own influence upon the question of the inclusion or exclusion of the first and last days of the prescribed period, and whether, if but one be included, it shall be the first or last.

In the subdivisions of this section, general rules only are given; for their application to particular facts and circumstances, see *infra*, VII., and its subdivisions.

b. "From" or "after" a day or event.

The general rule is that where a particular period sought, whether definite or indefinite, is to be begun or to be computed from or after some recognized division of time or its equivalent, as, for example, twenty days after date, the date so specified is to be excluded in computation of the time, unless the contrary appears. *Cummins v. Holmes*, 11 Ill. App. 158; *Bowman v. Wood*, 41 Ill. 203; *People ex rel. Harless v. Hatch*, 33 Ill. 9; *Vogel v. State ex rel. Land*, 107 Ind. 374, 8 N. E. 164; *Atkins v. Boylston F. & M. Ins. Co.* 5 Met. 439, 39 Am. Dec. 692; *Seaman v. Eager*, 16 Ohio St. 209; *Lutz's Appeal*, 124 Pa. 273, 16 Atl. 858; *Menges v. Frick*, 73 Pa. 137, 18 Am. Rep. 731; *Hill v. Kerr*, 78 Tex. 213, 14 S. W. 566; *Best v. Polk*, 18 Wall. 112, *sub nom.* *Best v. Doe ex dem. Polk*, 21 L. ed. 805; *Russell v. Ledsam*, 14 Mees. & W. 582, 14 L. J. Exch. N. S. 353, 9 Jur. 557.

And if a man is given a certain number of days after an event in which to perform an act or claim a right he is allowed so many full days, and a fragment of the day on which the event took place is not to be counted against him. *Griffin v. Forrest*, 49 Mich. 309, 13 N. W. 603.

And whenever the expression in the provision for time is, "from a day to a day," or, "from one day to another," the second day is to be included. *Conawingo Petroleum Refining Co. v. Cunningham*, 75 Pa. 138.

And one who is required to do an act within a designated time, as thirty days from the happening of an event which occurred on the 26th

of August, is entitled to the whole of the 25th of September for that purpose. *Judd v. Fulton*, 4 How. Pr. 298.

The words "from" or "after," however, used in a provision for a period of time to elapse between two acts or events, like the words "succeeding," "subsequent," and similar words, when not expressly declared to be inclusive or exclusive, are susceptible of different significations, and are used in different senses having an exclusive or inclusive meaning according to the subject to which they are applied, and their true meaning, therefore, must be collected from the context and subject-matter in the particular case. *Sands v. Lyon*, 18 Conn. 18; *Taylor v. Brown*, 5 Dak. 335, 40 N. W. 525; *Deyo v. Bleakley*, 24 Barb. 9; *Lysle v. Williams*, 15 Serg. & R. 135; *Pugh v. Leeds*, 2 Cowp. 714.

And the court will construe the language so as to effectuate the deeds of the parties, and not to destroy them. *Lysle v. Williams*, 15 Serg. & R. 135; *Deyo v. Bleakley*, 24 Barb. 9; *Pugh v. Leeds*, 2 Cowp. 714.

Especially where the words themselves abstractly may admit of either meaning. *Pugh v. Leeds*, 2 Cowp. 714.

Where a definite period is to be computed from or after an act or event, as where an appeal bond is required to be filed within twenty days after the rendition of judgment, and the like, the event, and not the time, is used to fix a point of time; and the rule as to whether or not the day of the event is to be included in making the computation is flexible, yielding to the intention of the parties as manifested by other parts of the instrument or by the whole taken together, by the concurrent acts and declarations of the parties, and by all circumstances tending to show it. *Cummins v. Holmes*, 11 Ill. App. 158.

And a provision for the performance of an act by a judgment debtor at the time of the rendition of the judgment or within four days thereafter shows an intention on the part of the legislature to exclude the first day in the computation of the four. *Ex parte Dean*, 2 Cow. 605, 14 Am. Dec. 521.

So, the words "from the date" and "from the day of the date," in a provision for time within which an act is to be done, mean the same thing, and may be either inclusive or exclusive of that day. *Houser v. Reynolds*, 2 N. C. (1 Hayw.) 114, 1 Am. Dec. 551.

And the words "from or after the date or the day of the date," in a provision for time within which an act is to be done, include the day

WYOMING SUPREME COURT.

George M. CONWAY *et al.*, *Pliffs. in Err.*,
v.
SMITH MERCANTILE COMPANY *et al.*

(6 Wyo. 327.)

1. Time "until" a certain day, within the meaning of an order of court, may be either inclusive or exclusive of the day mentioned, according to the intention of the court, and this intention may be inferred from the subject-matter and other considerations.
2. An order giving a party "until" a certain day within which to prepare and present a bill of exceptions includes the day named under a statutory rule that the last day mentioned shall be included in the time within which an act is to be done when required by law.

3. The successor of a trial judge who presided in a case, overruled a motion for a new trial, and granted time in which to present a bill of exceptions, may, on the latter's death before presenting the bill, make the order for its allowance in open court, where the statute provides that it shall be allowed by the court if presented in open court, but specifies that it shall be done by the judge of the court before whom the cause was tried if presented in vacation.

(Scott, J., dissents.)

(April 27, 1896.)

ON MOTION to strike from the record the bill of exceptions upon a writ of error to review a judgment of the District Court for Natrona County. *Overruled.*

when they are used in a conveyance to create an estate, but exclude it when they are used in an instrument to perpetuate the evidence of a debt. *Taylor v. Jacoby*, 2 Pa. St. 495, 45 Am. Dec. 615; *Houser v. Reynolds*, 2 N. C. (1 Hayw.) 114, 1 Am. Dec. 551.

And "from a time," and "from and after a time," used in provisions for time for the performance of an act, are expressions used indiscriminately and for the purpose of expressing the same idea. *French v. Wilkins*, 17 Vt. 341.

And when the words "from the date" are made use of to denote the terminus *a quo*, an immediate interest is to pass, and the day of the instrument is inclusive in the computation of time, for the reason that when words of an equivocal meaning are made use of, and there is no index from which the intention of the party who used them may be gathered, the construction should be most advantageous for him in whose favor the instrument is made. *Lysle v. Williams*, 15 Serg. & R. 135.

So, in *Seingorett v. Noguire*, 2 Ld. Raym. 1241, it was held that to aver that a contract was to commence with the day of the date was the same thing as to aver that it commenced from the day of the date.

See also *Hatter v. Ash*, 1 Ld. Raym. 85; *Avery v. Stewart*, 2 Conn. 69, 7 Am. Dec. 240; *Pearpoint v. Graham*, 4 Wash. C. C. 232, Fed. Cas. No. 10,877; *Taylor v. Jacoby*, 2 Pa. St. 405, 45 Am. Dec. 615; *Bemis v. Leonard*, 118 Mass. 502, 19 Am. Rep. 470, *supra*, II. And see *infra*, VII.

c. "Before" a day or event.

As a general rule, where notice is required to be posted or published a specified number of days before an event of which notice has to be given, the required number of days is to be computed by excluding the day of first posting or publishing and including the day on which the event is to occur. *Coe v. Caledonia & M. R. Co.* 27 Minn. 197, 6 N. W. 621; *Hall v. Cassidy*, 25 Miss. 48; *People use of Chaddock v. Barry*, 93 Mich. 542, 18 L. R. A. 337, 53 N. E. 785.

In the above Michigan case it was said that if *Isabelle v. Iron Cliffs Co.* 57 Mich. 120, 23 N. W. 618, *infra*, VII. d. 2, is at variance with the present case, it must be overruled; but the justice who wrote the opinion in that case was giving construction to a statute relative to the service and return of a writ of attachment where the officer making the service in that case was unable to find the defendant within his bailiwick, the question having been one of jurisdiction.

49 L. R. A.

In determining the time within which process or notice must be served the language of the statute must be observed, and when an act is to be done a certain number of days before a day stated, that day is excluded in the computation. *People use of Chaddock v. Barry*, 93 Mich. 542, 18 L. R. A. 337, 53 N. W. 785, *dictum*.

The specified day is the one to be excluded in the computation of time, but in counting back from that time the day on which the act is to be performed may be included. *People v. Burgess*, 153 N. Y. 561, 47 N. E. 889.

In the above case attention was called to the criticism of *Aultman & T. Co. v. Syme*, 91 Hun, 632, 26 N. Y. Supp. 528, *infra*, VII. g. 1, in *Connecticut Nat. Bank v. Bayles*, 17 App. Div. 596, 45 N. Y. Supp. 305, *infra*, VII. c. 1, and it was said that the appeal in the former case, recorded in 148 N. Y. 755, 43 N. E. 985, was dismissed for the reason that the court of appeals did not deem the order appealable or the question properly presented.

Where a statute requires a previous service of a given number of entire days, both the first and the last must be excluded in the computation. *Garner v. Johnson*, 22 Ala. 494.

And, in the absence of any statutory provision for governing computation of time where an act is required to be done a certain number of days or weeks before a certain other day upon which another act is to be done, the day upon which the first act is to be done must be excluded from the computation, and the whole number of days or weeks must intervene before the day fixed for doing the second act. *Ward v. Walters*, 63 Wis. 39.

And where an act is to be done by or before a given day it must be performed prior to that day. *Richardson v. Ford*, 14 Ill. 332.

But where a time is limited to do an act before a date named, and nothing in the reason of the thing requires the exclusion both of the day of the act and the day before which the act is to be done, the meaning of the legislature will not be taken to be that both days shall be excluded. *Hodgson v. Banking-House*, 9 Mo. App. 24.

New Hampshire Pub. Stat. chap. 2, § 34, providing that when time is to be reckoned from a day, date, act done, or the time of an act done, either by force of law or by virtue of a contract, such day, date, or the day when such act is done, shall not be included in the computation, is general, and applies equally whether the time is to be reckoned backward or forward from a specified day or act. *Bernard v. Martel*, 68 N. H. 466, 41 Atl. 183.

The facts are stated in the opinion.

Messrs. C. C. Wright and Clark & Breckons for defendants in error, in support of the motion.

Messrs. Burke & Fowler for plaintiffs in error, *contra*.

Groesbeck, Ch. J., delivered the opinion of the court:

John B. Okie, one of the defendants in error, files his motion to strike from the record the bill of exceptions.

1. One of the grounds of this motion is that the bill was not reduced to writing and presented for allowance to either the court, or the judge thereof in vacation, within the time allowed therefor. The order allowing time in which to prepare and present the bill of exceptions was made when the motion for a new trial was overruled,

and the parties making said motion duly excepted to the ruling of the court thereon, and, upon request, were given "until" the second Monday in May, 1895, within which to prepare and present for allowance their bill of exceptions. The second Monday in May, 1895, we judicially know, and it is conceded, under the statute then in force, was the first day of the term of the district court for Natrona county next succeeding the entry of the order allowing time for the preparation and presentation of the bill, and so the time allowed by such order was in effect "until" the first day of the next succeeding term of the court. This was within the time allowed by the statute, which provides that time may be given to reduce the exception to writing, but not beyond the first day of the next succeeding term. Rev. Stat. § 2646. The bill was not presented

d. "Within" a designated period.

The general current of the modern authorities on the interpretation of contracts, and also of statutes where an act is to be performed within a specified period from or after a day named, is to exclude the day thus designated and include the last day of the specified period. *Sheets v. Selden*, 2 Wall. 177, 17 L. ed. 822; *Atkins v. Boylston F. & M. Ins. Co.* 5 Met. 439, 39 Am. Dec. 692, *dictum*; *Roan v. Rohrer*, 72 Ill. 582; *Penn Placer Min. Co. v. Schreiner*, 14 Mont. 121, 35 Pac. 878; *Re Goswiler*, 3 Penn. & W. 200; *Harker v. Addis*, 4 Pa. 515; *Duffy v. Ogden*, 64 Pa. 240; *Edmundson v. Wragg*, 104 Pa. 500, 40 Am. Rep. 590; *Esler v. Peterson*, 8 Phila. 303; *Snyder v. Smith*, 1 Legal Gaz. 35; *Ex parte Paul*, 2 Legal & Ins. Rep. 77; *Gass v. Schuykill Iron Co.* 2 Legal Chron. 241; *Love v. North Branch Canal Co.* 2 Luzerne Legal Obs. 28; *Brenner v. Dombach*, 3 Lanc. Bar, 10th Feb. 1872; *Thorne v. Mosher*, 20 N. J. Eq. 257.

Unless it appears that a different computation was intended. *Atkins v. Boylston F. & M. Ins. Co.* 5 Met. 439, 39 Am. Dec. 692, *dictum*.

And where an act of assembly requires a thing to be done within a certain time from a prior date, and perhaps also from a prior act, and the party by not doing it loses his right, in relief of the party and to preserve him from losses, a most liberal construction ought to be chosen and the farthest time given from which the reckoning is to be made. *Green's Appeal*, 6 Watts & S. 327.

And where one is required to do an act within a designated time, as thirty days from the happening of an event, he will have the whole of the thirtieth day for that purpose. *Judd v. Fulton*, 10 Barb. 117.

e. "Between" designated dates or events.

Time between two days is that which is intermediate without computing any part of either of the two days to make it up. *Robinson v. Foster*, 12 Iowa, 186.

And the word "between," used in a provision with reference to a period of time between two days, excludes both. *Weir v. Thomas*, 44 Neb. 507, 62 N. W. 871; *Delaware, L. & W. R. Co. v. Mehrhof Bros. Brick Mfg. Co.* 53 N. J. L. 205, 23 Atl. 170.

And an act to be done between two certain days must be performed before the commencement of the latter day. *Richardson v. Ford*, 14 Ill. 332.

The term "to intervene," in a provision that a designated number of days shall intervene

between two acts, means "to come between," and when it is said that a day must intervene between two other days the meaning is that a day must fully elapse between the two days mentioned. *Coleman v. Keenan*, 76 Ill. App. 315.

Dut where a statute directs that a certain number of days are required to intervene between two acts, the date of one of the acts may be counted. *Jones v. State*, 42 Ark. 93; *Crawford v. Feder*, 27 Fla. 523, 8 So. 642.

Unless the statute calls for clear or entire days. *Crawford v. Feder*, 27 Fla. 523, 8 So. 642.

And where expressions used in the designation of a period of time to elapse between two events will admit of either exclusive or inclusive construction, and the effect of one would be to devert a right or work a forfeiture, if any doubt exists as to their meaning they should be so construed as to prevent a forfeiture. *Sands v. Lyon*, 18 Conn. 18.

f. "Until" a designated time or event,

The words "to," "till," and "until" are synonymous, and are sometimes ambiguous and equivocal in the particular connection in which they occur in provisions for a period of time for the performance of an act, and are therefore construed as exclusive or inclusive according as the subject-matter about which they are used may show the intention in using the words to have been the one or the other. *Gottlieb v. Fred W. Wolf Co.* 75 Md. 126, 23 Atl. 198; *Webster v. French*, 12 Ill. 302; *Kendall v. Kingsley*, 120 Mass. 94; *Ryan v. State Bank*, 10 Neb. 524, 7 N. W. 276; *King v. Stevens*, 5 East, 244, 1 Smith, 437; *CONWAY V. SMITH MERCANTILE CO.*

Whether such words will be held to be words of inclusion or exclusion is usually determined by the text of the statute or instrument in which they are used, and will be held to include or exclude the day named as the evident intention requires. *State ex rel. Bickford v. Benson*, 21 Wash. 365, 58 Pac. 217.

And this intention may be inferred from the subject-matter and other considerations. *CONWAY V. SMITH MERCANTILE CO.*

In *Ryan v. State Bank*, 10 Neb. 524, 7 N. W. 276, however, it was said that the word "until," used in defining a period of time in a statute, as well as in a contract, is usually taken as implying an intention to exclude the day to which it refers.

And in *People v. Walker*, 17 N. Y. 502, it was held that the word "until," used in a statute

for allowance until the first day of the next term, and counsel for the motion to strike the bill from the record contend that, by the terms of the order allowing time for such presentation of the bill, the first day of the next term must be excluded, as the time allowed therefor was up to, but not including, the first day of the term. It has always been the approved practice under this statute to have the order granting time for the presentation of the bill to read "up to and including the first day of the next succeeding term of the court;" but this custom was not followed, as the order gives time "until" the first day of the next term. The decision of this ground of the motion rests upon the construction to be given to the word "until," in the order allowing time for the preparation and presentation of the bill, and whether or not it includes or excludes the

first day of the next term succeeding the entry of the order. The word "until" may either, in a contract or a law, have an inclusive or exclusive meaning, according to the subject to which it is applied, the nature of the transaction which it specifies, and the connection in which it is used, and this rule extends to the correlatives of the word. Ordinarily, the word, like "from" and "between," excludes the day to which it relates. *Kendall v. Kingsley*, 120 Mass. 95. The authorities in parallel cases to the one at bar are conflicting. See *Webster v. French*, 12 Ill. 302; *Clark v. Ewing*, 87 Ill. 344. In a strong dissenting opinion in the last-cited case a number of cases are reviewed which are applicable to the question here presented: *Pepperell v. Burrell*, 2 Dowl. P. C. 674, where it was held that seven days' time for pleading gives the whole of the seventh

continuing the charter of a bank in force until the 1st day of January, 1850, excluded the day named, and the charter would end with the 31st day of December, 1849.

Bnt in *Kendall v. Kingsley*, 120 Mass. 94, it was said that the word "until," like the words "from" or "between," generally includes the day to which it relates.

When a thing is not authorized to be done until after a particular day, however, it cannot be done until after the whole of that day has elapsed. *Sapp v. Morrill*, 8 Kan. 677.

And where one is prohibited from doing an act until after the expiration of a designated time, as thirty days, he cannot do it until the next day after the whole thirty days have expired. *Judd v. Fulton*, 10 Barb. 117, 4 How. Pr. 298.

g. Notice without reference to terminal.

In computing the time for which a notice must be given of the performance of an act, either the day of the notice or the day of performance must be excluded, the other being included. *Mitchell v. Woodson*, 37 Miss. 587; *Small v. Edrick*, 5 Wend. 137; *Re Carhart*, 2 Dem. 627.

And it has been stated to be the general rule that where a statute requires service for a fixed number of days, the mode of computation is to include the day of service, and to exclude the day on which the period terminates. *Garner v. Johnson*, 22 Ala. 404.

But where ten days' notice is required by law the notice cannot require action on the tenth day. *Wing v. Cleveland* (Ohio) 14 Ohio L. J. 100.

And where a month's notice is required, and the months are broken, the day on which the notice is given is excluded; and the calendar month or other period of time required is complete when, starting from a given day in the first month, you arrive at the corresponding day in the succeeding month, whatever may be the length of either. *Freeman v. Read*, 4 Best & S. 174, 32 L. J. M. C. N. S. 226, 10 Jur. N. S. 149.

Upon the other hand, however, the general rule for computing time for the service of notice has been held to be that it is to be reckoned exclusive of the day of service and inclusive of the day on which the application is to be made. *Arnold v. Nye*, 23 Mich. 286.

In that case it was said that the exceptions to the general rule, that in computing time for notice it is to be reckoned exclusive of the day of service and inclusive of that on which the application was made, are of those cases in 49 L. R. A.

which, by the express terms of the statute or rule, the day on which an act is to be done is excluded.

h. "At least" prefacing period of time.

The rule has been laid down that where an act is required by statute to be done a designated number of days, at least, before a given event, the time must be reckoned exclusively both of the day of the act and that of the event. *Queen v. Shropshire Justices*, 8 Ad. & El. 173.

And that, when a statute requires notice of at least a certain number of days before a meeting or other act, that number of clear days is required, and the day of the notice and the day of the meeting are both to be excluded from the computation. *Jones v. State*, 42 Ark. 93.

The prevailing, and apparently the more modern, rule, however, is different. Thus, the words "at least," in a provision giving a number of days for the performance of an act prefixed to the number, do not necessarily mean full, clear days. *Stebbins v. Anthony*, 5 Colo. 348.

They do not change the requirement of the number of days, or affect the rule that either the first or last day shall be excluded and the other day included, or change the requirement into one of entire days. *State, Stroud, Prosecutor, v. Consumers' Water Co.* 56 N. J. L. 422, 28 Atl. 578; *Sappington v. Lenz*, 53 Mo. App. 44.

The words "at least" and "no less," in statutory provisions for a period of time, simply mean that so many days and no less are allowed. *Sappington v. Lenz*, 53 Mo. App. 44.

In the above case, *Taylor v. McKnight*, 1 Mo. 120, *infra*, VII. 1, 2, was distinguished upon the ground that it was decided previous to the enactment of the statutory rule for the computation of time.

While a requirement of not less than three days may well be held to demand three full days, a requirement of notice of at least ten days before the making of an application means only that notice shall be given as early as the tenth day before the application is made, and the computation is to be made by excluding the first day and including the last. *Arnold v. Nye*, 23 Mich. 286.

VI. The rule when Sunday or a holiday is the first or last day.

a. At common law.

For the common-law rule as to computing first and last day when the first or last day

day to plead in, after excluding the day on which the order was made. *Ozley v. Bridge*, 1 Dougl. 87, where a rule to plead "by" a particular day was entered, that day was construed to continue until the office opened the next morning. *Thomas v. Douglass*, 2 Johns. Cas. 226, where an order was made enlarging the time to plead "until the second day" of the term, and judgment for want of a plea was entered on the second day of the term; and this was held irregular by the appellate court (Kent being at the time one of the judges), the judgment was set aside, and it was held that the order must be so construed as to include the second day of the term, although it read "until" that day. In *Bunce v. Reed*, 16 Barb. 352, the court said: "It has been decided that 'till' includes the day to which it is prefixed;" citing *Dakins v. Wagner*, 3 Dowl. P. C. 535. To the same

effect are the following authorities: *Hahn v. Dierkes*, 37 Mo. 574; *Penn Placer Min. Co. v. Schreiner*, 14 Mont. 121, 35 Pac. 878; *Gottlieb v. Fred W. Wolf Co.* 75 Md. 126, 23 Atl. 198, and cases cited; *Houghwout v. Boisabuin*, 18 N. J. Eq. 315; *Glynn County Academy Comrs. v. Dart*, 67 Ga. 765; *Rogers v. Cherokee Iron & R. Co.* 70 Ga. 717. And it has been held that when time is given until a day certain to file a bill of exceptions, if it is filed on or before that day, it is filed in time. *Louisville & N. R. Co. v. Turner*, 81 Ky. 489; *Newport News & M. V. R. Co. v. Thomas*, 96 Ky. 613, 29 S. W. 437; *St. Louis & S. F. R. Co. v. Gracy*, 126 Mo. 472, 28 S. W. 736, 29 S. W. 579. The order of the court in the case at bar gave until a day certain "within which" to file the bill, and, under the positive provisions of the Code of Civil Procedure, the exceptions must be re-

falls on Sunday or a holiday, see note "Extension of time when last day falls on Sunday," *Brown v. Valles* (Colo.) 14 L. R. A. 120.

b. The statutory rule.

Many of the states have statutes providing that if the first or last day on which an act is to be done falls on Sunday or a holiday, that day is to be excluded in the computation of time. Under these statutes the general rule is that when an act is to be done on a day which happens to be Sunday or a holiday, it may be done on the Monday following; but the rule is not universal, and is not generally applicable to all questions of computation of time.

Under such provisions, the general rule is that, where an act is to be performed within a certain number of days, and the last day falls on Sunday, the person charged with the performance of the act has the following day to comply with his obligation. *Monroe Cattle Co. v. Becker*, 147 U. S. 47, 87 L. ed. 72, 13 Sup. Ct. Rep. 217; *Evans v. Chicago & A. R. Co.* 76 Mo. App. 468.

And the rule is the same when a given number of days are allowed to do an act. *West v. West*, 20 R. I. 464, 40 Atl. 6.

Sunday, however, cannot be excluded in computing the time within which an act is required to be done, unless there is some statute expressly providing for such exclusion. *Shefer v. Magone*, 47 Fed. Rep. 872; *Dorsey v. Pike*, 46 Hun, 112; *Cooley v. Cook*, 125 Mass. 406; *Broome v. Wellington*, 1 Sandf. 664.

Or unless Sundays and holidays are expressly excluded, or the intention of the legislature to exclude them appears manifest. *Cooley v. Cook*, 125 Mass. 406; *Edmundson v. Wragg*, 104 Pa. 500, 40 Am. Rep. 590; *West v. West*, 20 R. I. 464, 40 Atl. 6; *Stebbins v. Leowolf*, 3 Cush. 137.

Where the time limited for the performance of an act is such that one or more Sundays must fall within it, and there is no statute excluding any of them, it is not the province of the court to extend the time fixed by excluding the last, the first, or any intermediate Sunday or holiday. *Johnson v. Meyers*, 12 U. S. App. 220, 54 Fed. Rep. 417, 4 C. C. A. 399.

And the rule that when the last day of a period of time falls on Sunday the period will be extended to include the following Monday is not applicable to acts which by statute are required to be done within a certain time therein limited. *Haley v. Young*, 134 Mass. 364.

And *Sanb. & B. (Wis.) Anno. Stat. § 4971*, with 49 L. R. A.

relation to computing the last day of a period of time when it falls upon Sunday, applies only to cases when the time is expressed in days, and does not apply to the limitation of one year within which to bring an action to enforce a lien. *Williams v. Lane*, 87 Wis. 152, 58 N. W. 77. And see *Aultman & T. Co. v. Syme*, 91 Hun, 632, 36 N. Y. Supp. 528, *infra*, VII. g. 1. But see *Grant v. Paddock*, 30 Or. 312, 47 Pac. 712, *supra*, IV. b.

And where the time for doing an act is one or more years, and the last day falls on Sunday, it cannot be lawfully performed on the next day. *Williams v. Lane*, 87 Wis. 152, 58 N. W. 77.

So, it is only when an act is to be done on Sunday that the day is to be excluded under the statutory rule of computation. *Robinson v. Foster*, 12 Iowa, 186; *Conklin v. Marshalltown*, 66 Iowa, 122, 23 N. W. 294; *Merritt v. Gate City Nat. Bank*, 100 Ga. 147, 38 L. R. A. 749, 27 S. E. 979.

The statutory rule that when the last day of a period of time within which an act is to be done falls on Sunday, the Sunday is to be excluded and the act may be done on Monday, applies to courts not of record, including the municipal court of Rochester, so that a notice of appeal may be served on the following Monday, where the time to serve it expires on Sunday. *Dorsey v. Pike*, 46 Hun, 112, 11 N. Y. Supp. 227.

But it does not apply to the district courts of the city of New York. *Ready Roofing Co. v. Chamberlain* (N. Y.) 1 Rob. C. C. 222.

In *Dorsey v. Pike*, 46 Hun, 112, 11 N. Y. Supp. 227, *supra*, Marvin v. Marvin, 75 N. Y. 242, *supra*, III. b, was distinguished, the court saying that that case holds that the section of the Code with reference to computation of time does not apply to acts where the law specifically provides a different rule of computation; but that the provision relating to the mode of computation when the last day fell on Sunday was not brought before the court.

In Alabama the statutory provision that time within which an act is provided by law to be done must be computed by excluding the first day and including the last, and if the last is Sunday it must also be excluded, is construed to mean that if the last day happens to be Sunday, it is excluded, and the act must be performed on the day previous. *Allen v. Elliott*, 67 Ala. 432.

And in Missouri the construction seems to have been the same. See *Patrick v. Faulke*, 45 Mo. 312; *Miner v. Tilley*, 54 Mo. App. 627, *infra*, VII. I.

duced to writing, and presented to the court or judge thereof in vacation, "within the time given for allowance." It may be assumed that every order of court giving time beyond the trial term to present a bill of exceptions is made with reference to these statutory provisions. If the order gives time until the first day of the next term, it seems not to do violence to the language to construe the order as including that day, which is the first and only day after the trial term, when there is a court in session to which the bill may be presented. Such an order should not receive a strict construction, resulting in a denial of the right of the party to present his bill of exceptions to the court, but rather a liberal construction, preservative of that right. Time "until" a certain day may be either inclusive or exclusive of the day mentioned, according to the intention

of the court, and this intention may be inferred from the subject-matter and other considerations. If one has until the second Monday of May to perform an act or incur a forfeiture, it would be a harsh rule that would enforce the forfeiture after the performance of the act on that day. But the acts to be performed, the preparation and presentation of the bill, are, by the terms of the order and the language of the statute, to be done "within" a certain time; and in such case the statutory method of computation also found in the Code must apply: "Unless otherwise specially provided, the time within which an act is required by law to be done shall be computed by excluding the first day, and including the last, and, if the last be Sunday, it shall be excluded." Rev. Stat. § 2341. It is manifest from the order of the court that it was intended to

As to application of the statutory rule to particular subjects, see *infra*, VII.

VII. Application of rules with reference to subject-matter and surrounding circumstances.

a. General rule.

The common-law rules with reference to the computation of time apply generally to all matters, whether provided for by statute or not. And the statutory rule that the first day is to be excluded and the last day included in the computation of time, unless it falls on Sunday, in which case it is to be included, though in some states confined to matters provided for by the Codes of Civil Procedure, is generally applicable to provisions for time in contracts also, and to all cases in which a period of time is provided for, whether by contract or by statute or otherwise.

Both the statutory and the common-law rule, however, are often excluded either by the language of the provision for time, expressly designating the rule by which it is to be computed, or by the surrounding circumstances under which a departure from the usual rule would better accord with equity and right.

The following subdivisions, containing cases which are in the nature of illustrations of the general rule, should be considered in connection with the general rules given in the preceding portion of this note.

b. To contracts.

1. General and miscellaneous.

The general rule with reference to counting the first and last days in computing time, that one day is counted inclusive and the other exclusive, applies in the construction of contracts and statutes, as well as in matters of practice. *People v. New York C. R. Co.* 28 Barb. 284.

And see *Weeks v. Hull*, 19 Conn. 376, 50 Am. Dec. 249, *supra*, III. b.

In the absence of anything tending to show a contrary intention, the words "from date" in a contract exclude the day of date. *Walker v. John Hancock Mut. L. Ins. Co.* 107 Mass. 188, 45 N. E. 89.

2 Ind. Rev. Stat. § 205, however, providing that the time within which an act is to be done as therein provided shall be computed by excluding the first day and including the last, is held to relate exclusively to statutory time, and does not apply to ordinary contracts. *Cook v. Gray*, 6 Ind. 335.
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But the Missouri statute to that effect is held to apply to the interpretation of contracts when no different meaning is exhibited by the instrument to be construed. *Gray v. Worst*, 129 Mo. 122, 31 S. W. 585.

And it would appear from the cases below that the statutory rules and the rules of the courts are generally applicable to contracts as well as the rules of the common law; and that practically the same result is arrived at, whether the case be one for the application of the statutory or of the modern common-law rule.

Thus, under a contract conditioned for the payment of money one year from the date, dated November 25, 1848, on condition of the performance of a specified act within the time, performance of the act on the 26th of November, 1849, is seasonable, as the day on which the instrument is dated is to be excluded in the computation. *Oatman v. Walker*, 33 Me. 67.

And a tender under a contract by which money became due and payable within a year from the date, made on March 3, 1848, the date of the contract being March 3, 1847, is good. *Farwell v. Rogers*, 4 Cush. 460.

So, under a written contract dated April 19, 1844, to convey certain lands within twenty days from the date thereof, the day of the date is to be excluded in computing the twenty days, and the vendee would have been in time to offer performance of the stipulations on his part at any time on the 9th of May, and if during that day the vendor conveyed the land to another, thus disabling himself to perform the contract, it was a sufficient excuse. *Buttrick v. Holden*, 8 Cush. 233.

And where by the terms of a contract a deed was to be delivered and the purchase money for land paid on the 1st day of May, if the 1st day of May should fall on Sunday, compliance with the contract on Monday is a legal performance. *Stryker v. Vanderbilt*, 27 N. J. L. 68.

And a notice of election to take under a contract made July 14, to convey land at a stipulated price within sixty days, given on September 12, is sufficient and in season to warrant a decree for specific performance. *Serrill v. Burk*, 8 Phila. 515.

And under a contract dated December 24, 1883, by which a grantee of land promised to pay a designated sum to the grantor if he should dispose of the land at any time within five years, the date of the contract is to be excluded, and the date of the disposition included; and where he disposed of the land December 24, 1888, he is liable for the payment of the designated sum. *Shelton v. Gillett*, 79 Mich. 173, 44 N. W. 428.

give time within which to file the bill, and that the statutory rule of computation which includes the last day mentioned was contemplated. The matter has been indirectly passed upon in this jurisdiction in the cases of *Jubb v. Thorp*, 2 Wyo. 406, and *Woods v. Hilliard Flume & Lumber Co.* 2 Wyo. 457, decided by the territorial supreme court. In the former of these cases, the order of court allowed the exceptant "until" the first day of the next term to file the bill of exceptions, and in the latter case he was permitted to file the bill "by" the first day of the next term. It was considered in both of these cases that the bill must be presented in open court on the first day of the term mentioned, and not before a judge in vacation. These cases were, in effect, overruled by the case of *McBride v. Union P. R. Co.* 3 Wyo. 183, 18 Pac. 635, upon the point

that the bill could be presented to the judge in vacation, within the time allowed; but the other question, the one presented here, was not before the court in the last-mentioned case. The weight of authority is decidedly in favor of the position that the word "until," used in a connection similar to its use in the order of the court in the case at bar, giving time within which to present the bill of exceptions, includes the last day named; and we think our statutory rule for computing the time within which an act is to be done, when required by law, directing that the last day mentioned shall be included, is applicable, and settles the question. The bill was therefore presented in apt time.

2. Another ground for the motion to strike the bill from the record presents a more perplexing question. The bill was al-

So, the time provided for in an agreement for the purchase of bonds by which the purchaser was to hold them for one year, and the seller bound himself to repurchase the bonds at the option of the purchaser at the end of one year from the date of the contract, is to be computed by excluding the day of the date; and where the purchase was made April 21, 1890, the option ended April 21, 1891, including the whole of that day, and became exercisable April 22, 1891. *Weid v. Barker*, 153 Pa. 465, 26 Atl. 239.

But proceedings for the collection of a bond dated July 22, 1818, made payable in five years from the date, may properly be issued on the 22d of July, 1823, as in such case the computation of the period of time should be most advantageous to him in whose favor the instrument was made. *Lysle v. Williams*, 15 Serg. & R. 135.

So, a contract between merchants and owners of a vessel by which the merchants are given twenty days for loading, counting from the day of readiness until the day of dispatch, does not give them either the day of readiness or the day of dispatch, and the enumeration of the days must be made by excluding both. *Merritt v. Ona*, 44 Fed. Rep. 369, *sub nom.* *Merritt v. Mora*, 11 L. R. A. 724.

In the above case it was said that in *Pennsylvania, Re Goswiler*, 3 Penn. & W. 200, *supra*, III. a, was overthrown by *Thomas v. Afflick*, 16 Pa. 14, *supra*, II., which after being followed in *Barber v. Chandler*, 17 Pa. 48, 55 Am. Dec. 533, *infra*, VII. d, 2, was itself overthrown by *Cromellen v. Brink*, 29 Pa. 523, *supra*, III. and *Re Goswiler* again set on its feet.

But the word "from," in a contract for services to be rendered from a designated date, will be deemed to be intended to be inclusive of that date, where it appears that the person contracting to render services did actually enter into the services on that day, and that the employer discharged him on that day. *Wilkinson v. Gaston*, 9 Q. B. 137, 15 L. J. Q. B. N. S. 340, 10 Jur. 804.

So, in construing a contract providing for its performance in a designated number of days without more, the time is to be computed exclusive of the day of its date. *Blake v. Crowninshield*, 9 N. H. 304.

And where creditors give a debtor a letter of license to conduct his business "for and during the term of one year from the date hereof" the day of the date is to be excluded from the computation of the year. *Ammerman v. Digges*, 12 Ir. C. L. Rep. 1, Appx.

And where, under the terms of a contract, 49 L. R. A.

a party has until a designated day to accept, he may accept on that day if the offer is still open. *Houghwout v. Boisabuin*, 18 N. J. Eq. 315.

So, where a submission of an award is made on the agreement that it should be returned on or before a certain day, and the time is enlarged until another designated day, an award made on the last designated day is sufficient, as the word "until" is for such purpose inclusive. *Knox v. Simmonds*, 3 Bro. Ch. 358, 1 Ves. Jr. 309; *Kerr v. Jeston*, 1 Dowl. P. C. N. S. 538.

And a provision in articles to submit certain matters in controversy to arbitration, that the award should be made and published within ten days from the date of the article, is complied with where the articles were dated and entered into September 25, 1847, and the award was made, written out, signed, and witnessed on the 4th day of October following. *McClure v. Shroyer*, 13 Mo. 104.

But the release of all demands until a designated date does not release a bond dated that day. *Nichols v. Ramsel*, 2 Mod. 280.

Under a contract to deliver by the 1st day of November, however, a delivery on or before that day is sufficient. *Coonley v. Anderson*, 1 Hill, 519.

And under a contract for the sale of lumber, stipulating for the delivery thereof on or before August 1, and for payment on delivery, the seller has the whole of the 1st day of August to deliver the lumber, and unless the buyer is then ready to receive it and pay for it, he can have no right of action for breach of contract. *Adams v. Dale*, 29 Ind. 273.

So, where goods are sold October 5, to be paid for in two months, an action for the price cannot be maintained until the expiration of December 5. *Webb v. Fairmaner*, 3 Mees. & W. 473, 6 Dowl. P. C. 549.

And there is no variance between a contract to deliver goods by the 1st of November and a statement in the pleading, in an action thereon, that the goods were to be delivered on or before that time. *Coonley v. Anderson*, 1 Hill, 519.

And the intent of the parties to a sale on a credit of six months, with a provision for a resale if payment was not made at the end of that time, will be deemed to be that the day of the sale was to be excluded in the computation of the six months, as until the purchase was made no credit could be given. *Williamson v. Farrow*, 1 Ball. L. 611, 21 Am. Dec. 492.

A contract to complete work by a designated time, however, means that it shall be done be-

lowed, signed, and made a part of the record, on the first day of the term of the Natrona district court, following the entry of the order allowing time for the presentation of the bill for settlement, by Hon. J. H. Hayford, who was the successor of Judge Blake, the trial judge, and the one who overruled the motion for a new trial, and granted time within which to present the bill; the latter having died some time previous to the presentation of the bill. It is vigorously asserted that neither Judge Hayford, nor the court presided over by him, could have settled and allowed the bill narrating the occurrences at the trial, as the trial judge alone was the proper person to allow and sign the bill, and certify to the absolute truth of the matters detailed in the bill, and thus intelligently make it a part of the record, all of which must import absolute veri-

ty. It is contended that the successor to the trial judge, being a stranger to the record, cannot certify truthfully to the accuracy of the bill; and in a case like the one presented, owing to the impossibility of securing the action of the trial judge, on account of his death, that the only possible relief to be afforded to the losing party in such a case, who may wish to contest the judgment or decree unfavorable to him, is to secure a new trial, upon an application setting forth the death of the judge before the time for the settlement of the bill had expired, made within a reasonable time to the district court. Counsel for the respective parties have diligently arrayed the authorities substantiating and opposing this view, which, as will be apparent to one examining the question, will be found in irreconcilable conflict. Doubtless, the statute of West-

fore that time. *Rankin v. Woodworth*, 3 Penn. & W. 48; *Miller v. Phillips*, 31 Pa. 221.

But an averment of payment on the 1st day of May is not an averment of performance of a covenant to convey before the 1st of May. *Halloway v. Davis, Wright* (Ohio) 120.

So, where hogs are sold under an agreement to deliver between two days the word "between" excludes both days named. *Cook v. Drals*, 2 Cln. Sup. Ct. Rep. 340.

And under a stipulation to deliver designated property on demand at any time between two designated dates, a demand on the preceding day for delivery on the last day named is not sufficient. *Cook v. Gray*, 6 Ind. 335.

And under a contract for the delivery of property from the 15th to the 28th of a specified month, both the 15th and the 28th should be excluded in the computation of time, and evidence of an offer or tender on the 28th in a suit upon the contract is improper, and a pleading alleging a tender on the 28th is bad. *Newby v. Rogers*, 40 Ind. 9.

And under a contract for the sale of cattle, in which it was agreed as a part of the consideration that the purchaser should come and accept the cattle within eight days from the time of the contract, the eight days are to be computed by counting the first day, that is, the day upon which the contract was made. *Brown v. Buzan*, 24 Ind. 194.

So, under a contract for the sale of property to be delivered between September 15, and October 15, four days' notice of delivery to be given, the last day of delivery is October 14, and notice of intention to deliver on that day should be given on the 10th. *Fowler v. Rigney*, 5 Abb. Pr. N. S. 182.

But one who sells oil under a contract to deliver it, buyer's option, at any time from that date to December 31, has the whole of December 31 in which to perform. *Conawingo Petroleum Refining Co. v. Cunningham*, 75 Pa. 138.

So, under a contract for the transfer of slaves by which the transferee was bound to make his election within a year whether to hold the slaves as under a contract of hiring, or to be a purchaser, the day of the contract is to be excluded in the computation of the year, and where the transferee fails to elect upon the day on which the year ended as thus computed, his right to become a purchaser of the slaves is at an end. *Simpson v. Peck*, 2 Swan, 54.

And under a bond containing a provision that if the interest on the indebtedness secured thereby should remain unpaid for the space of thirty days after it became payable the principal should become due at the option of the

mortgagee, if an instalment of interest becomes due July 20, the limit is reached in case of non-payment on August 23, and a tender on August 29, is too late to prevent the exercise of the option. *Serrell v. Rothstein*, 49 N. J. Eq. 385, 24 Atl. 369.

In applying the rule in cases of forfeiture, however, that the day of the event after which, in a specified number of days, the forfeiture occurs, will be excluded, in case of failure of a mortgagor to pay interest within a specified number of days after it became due, a court of equity will lean against the construction which favors forfeiture. *Thorne v. Mosher*, 20 N. J. Eq. 257.

But under a contract by the terms of which a party is entitled to its benefit provided he comes to close the transaction within two weeks from the 24th of August on the terms therein mentioned, the computation of the time must commence on the 25th of August excluding the 24th, so that the two weeks would transpire with the 7th of September; and where the agent for the party called between the hours of 11 and 12 o'clock at night on that day at his residence half a mile from his own place of business, where he would have to go to transact the business properly, and after he had retired to rest and was asleep, and could not have gotten up and dressed himself and gone to his office and completed the business before 12 o'clock, the application will not be deemed to have been made within the time required by law, as he is deemed to be required to perform within a reasonable time, which is to be regulated by the circumstances of the case. *Curtis v. Blair*, 26 Miss. 309, 59 Am. Dec. 257.

2. Negotiable instruments.

The general rule under the statute, as well as at common law, is that in computing the time that a note payable at a future date has to run, the day of the date is excluded. *Beeman v. Cook*, 48 Vt. 201, 21 Am. Rep. 123; *Ammidown v. Woodman*, 31 Me. 580; *Leavitt v. Simes*, 3 N. H. 14; *Taylor v. Jacoby*, 2 Pa. St. 495, 45 Am. Dec. 615.

And this is the rule whether the time runs from the date or from the day of the date. *Henry v. Jones*, 8 Mass. 453.

A note payable without grace in a specified time is not due until that time has expired, excluding the day the note was dated from the computation. *Hill v. Norvell*, 3 McLean, 583, Fed. Cas. No. 6497.

And in computing the time when a note or bill payable at a certain number of months

minister (13 Edw. I. chap. 31), the parent of all statutes allowing bills of exception, required the signature and seal of one of the trial judges; but the reason for this rule was the necessity of presenting the bill immediately upon taking the exception to the judge for his signature, while his recollection was fresh. The practice afterwards was for the judge to note the exception, and to rely upon his notes in the determination of the question whether the bill tendered was true or not, and the bill could be tendered during the term. This rule has still further been relaxed by statute in many jurisdictions in this country, by permitting the bill to be presented within a limited time after the term. Our statute goes still further and allows the court to grant time for the tendering of the bill for allowance and settlement, not beyond the first day of

the next succeeding term; and it also confers the power to allow the bill upon a court as well as a judge,—an innovation upon the usual statutory rule, and enlargement of the usual grant of time beyond the term within which to tender it for allowance. The time may be extended to and including the first day of the next succeeding term of the court, and, when the exception is reduced to writing, it must be presented to the court, or to the judge thereof in vacation, within the time given for allowance. If true, it shall be the duty of the court if presented in open court, or the judge of the court before whom the cause was tried if presented in vacation, to allow and sign it; whereupon it shall be filed with the pleadings as a part of the record, but not spread at large upon the journal. If the writing is not true, the court or the judge in vacation shall correct

after date will become due, the rule is to exclude the day of the date from the computation, and include the day of payment when no days of grace are allowed, and the note will become payable on the same day of the stipulated month as that of its date. *Roehner v. Knickerbocker*, L. Ins. Co. 63 N. Y. 160; *Campbell v. Lane*, 25 Tex. Supp. 93.

Thus, where a note is dated November 11, 1858, and made payable in twelve months after date, the payee has no legal right to demand payment until November 11, 1859, and the debtor has until the last minute of that day to pay the note. *Young v. Van Benthuyssen*, 30 Tex. 762.

So, the maker of a note payable one day after date is entitled to the whole of the following day after the one on which the note is dated for payment, and cannot be sued thereon before that day has expired. *Taylor v. Jacoby*, 2 Pa. St. 495, 45 Am. Dec. 615; *Sanders v. Ochiltree*, 5 Port. (Ala.) 73, 30 Am. Dec. 550; *Moore v. Hollaman*, 25 Tex. Supp. 81; *Raeffe v. Moore*, 58 Ga. 94.

And a usage of banks to include the day of the date of a promissory note in their computation of the time when it becomes due will be recognized only as evidence of the assent of the parties to such usage and of their waiving their legal claims, and not as forming rules for the decision of the court. *Blanchard v. Hilliard*, 11 Mass. 85.

So, where days of grace are allowed on a negotiable note the day on which the note became due is excluded from the computation of the time at which suit may be maintained, or the statute of limitations will begin to run against the note. *Bell v. Sackett*, 38 Cal. 407; *Fisher v. State Bank*, 7 Blackf. 610; *Watkins v. Willis*, 58 Tex. 521.

And the rule is the same under the usual statutory provision as to the computation of time. *Benson v. Adams*, 69 Ind. 353, 35 Am. Rep. 220.

A note dated August 25, and payable in four years from date, falls due August 28, four years afterwards. *Ripley v. Greenleaf*, 2 Vt. 129.

And a promissory note dated October 17, 1849, payable twelve months after date, falls due, counting the three days of grace, on the 20th of October, 1850. *Sheppard v. Spates*, 4 Md. 400.

And a note dated November 1, 1857, payable eleven months after date, is not due, including the three days of grace, until October 4, 1858. *Campbell v. Lane*, 25 Tex. Supp. 93.

And one payable on the 1st of March is not 49 L. R. A.

due until the expiration of the 4th of that month, and an action commenced thereon on that day is premature. *Wiggle v. Thomason*, 11 Smedes & M. 452.

So, a bill drawn payable at five days after sight and accepted the first day of a month is payable on the 9th of the same month, the day of the acceptance being excluded and the three days of grace allowed, and a demand and protest for nonpayment on the 8th is premature and of no effect. *Mitchell v. DeGrand*, 1 Mason, 176, Fed. Cas. No. 9,661.

In *Bellasis v. Heister*, 1 Ld. Raym. 280, however, probably decided under the old common-law rule, it was held that in computing the time at which a bill of exchange payable a certain number of days after sight becomes due the day of sight is to be included.

Under Tenn. act Feb. 21, 1860, permitting a greater rate of interest than 6 per cent, but not to exceed 10 per cent for money loaned, which was to take effect from and after the 1st day of September, 1860, a note executed on that day at 10 per cent is usurious, as in such case the words "from and after" include that date. *Turner v. Odum*, 8 Coldw. 455.

The Missouri statute in relation to bills of exchange and negotiable promissory notes, § 737, providing that paper falling due on Sunday or a holiday shall be considered as falling due on the day previous, grants an exception to the general rule provided by Mo. Rev. Stat. § 6570, that when the last day for doing an act is Sunday, it shall be excluded in the computation of time. *Miner v. Tilley*, 54 Mo. App. 627.

So, in *Wentworth v. Clap*, 11 Mass. 87, note, which was an action on a note dated June 26, 1810, payable in fifty-seven days and grace, in which the usual demand on the maker was made August 21, and the usual notice upon the indorser August 24, the court refused to permit the note to go to the jury; but it does not appear whether the question depended upon the inclusion or exclusion of the first or last day of the period.

3. Insurance policies.

Insurance policies are contracts, and provisions for a period of time contained in them are subject to the common-law and statutory rules of computation to the same extent as contracts generally.

Thus, the rule is that the words "from the day of the date," in a provision for a period of time in an insurance policy, excludes the day, but "from the date" includes it. *Howard's Case*, 2 Saik. 625.

it, or suggest the correction to be made, and it shall then be signed as aforesaid. Rev. Stat. §§ 2040, 2049, as amended by Session Laws 1890, chap. 38, § 1. The exceptant may be allowed under the statute, not only time beyond the term, but until and including the first day of the next term, to tender the bill for allowance, and this full time was given in this cause. When this time is granted, pursuant to the statute, the exceptant ought not to be deprived of the right to present his bill on the first day of the next term, by a change in the personnel of the court, either by resignation, death or other casualty not occurring through his own laches.

The rule given in the earlier text-books was very liberal, and, where an appellate court had exhausted its endeavors to have the bill correctly returned it would still do

what is in its power to obtain the ends of justice. In one instance, where a judge refused to sign a bill after having been so ordered by the appellate tribunal, and resigned in order to escape this duty, the supreme court, being satisfied that the bill was true as presented, ordered it entered as part of the record, as though it had been duly signed. *People v. Pearson*, 4 Ill. 270, 285, cited with approval in *Powell*, App. Proc. p. 253. In this work it is said in treating of this matter that "such, it is apprehended, would be the course of proceedings where the judge died before signing the bill which was presented to him in due time, or any other accident prevented its execution, where the appellate court were satisfied of the truth of its contents." In support of this position may be cited the case of *Burk v. McMullen*, 4 Pa. 317. The later text-books seem to lean

And the effect of the word "from" in an insurance policy insuring against claims for personal injury, in respect to accidents caused by vehicles for twelve calendar months from November 24, 1887, is to exclude November 24, 1887, and include November 24, 1888, in the computation of the period of insurance, so that the insurance company would be liable in case of the accidents happening November 24, 1888. *South Staffordshire Tramways Co. v. Sickness & Acci. Assur. Asso.* [1891] 1 Q. B. 402.

So, under the by-laws of a mutual benefit association, making an assessment payable on or before August 31, and providing that in case of nonpayment the member should be suspended, but giving sixty days from the date of suspension within which the member could secure reinstatement by paying all dues, assessments, and fines, an assessment made by the executive committee on the 1st day of August gives the member until the 31st, and all of that day in which to make payment, and in case of a nonpayment he would be suspended by operation of the by-law upon September 1, and reckoning the sixty days within which he could be reinstated by excluding the first and including the last day, payment on October 31 would be within the sixty days from September 1, and sufficient to reinstate the member. *Supreme Council A. L. of H. v. Gootte*, 61 U. S. App. 617, 89 Fed. Rep. 941, 32 C. C. A. 436.

And in *Howard's Case*, 1 Ld. Raym. 480, which was an action upon a life-insurance policy, dated September 8, 1897, for one year from the day of the date of the policy, the insured having died on the 3d of September, 1898, at one o'clock in the morning, it was held that the words "from the day of the date" were exclusive but that the insurer was liable because, as no fractions of a day will be considered, the policy remained in force until twelve o'clock of that night.

So, in computing the one year mentioned in an insurance policy providing that after one year from date the policy will be enforceable for the full amount, the day of the date is to be excluded in the absence of anything tending to show a contrary intention, and that the policy took effect at noon on the day of its date makes no difference. *Walker v. John Hancock Mut. L. Ins. Co.* 167 Mass. 188, 45 N. E. 89.

And under a stipulation that the policy is to be deemed forfeited unless the insured makes payment of an assessment within thirty days from the date of notice thereof, the day on which notice comes to him will be excluded in 49 L. R. A.

the computation of the thirty days. *Protection L. Ins. Co. v. Palmer*, 81 Ill. 88.

And under the rules of a mutual benefit association giving a member one month from date of notice of assessment within which to pay, a notice to a member that the time for payment expires May 10, and that he will stand suspended if not paid on or before that day, mailed to the member April 20, is insufficient and invalid, and will not warrant a forfeiture of the member's rights under his certificate. *Bridges v. National Union*, 73 Minn. 486, 76 N. W. 270, 409, 77 N. W. 411.

In computing the period of ninety days specified in an accident insurance policy insuring against accident which shall occasion death within ninety days from the happening thereof, the day on which the accident occurred is to be excluded; and where the death of the insured occurred at about the same hour of the accident on the ninety-first day thereafter, no recovery can be had. *Perry v. Provident L. Ins. & Invest. Co.* 99 Mass. 162.

And under 36 Vict. chap. 44, § 37, providing, in effect, that if a person takes additional insurance without the previous sanction of the original insurer his policy becomes void, but if he gives notice in writing, and the company does not within two weeks after the receipt of that notice express its dissent, the additional insurance shall be deemed to be assented to, the two weeks is to be reckoned exclusive of the day on which the notice was received; and where such a notice was given on the 5th of July, and a fire occurred on the 19th, the company is still in a position to repudiate the policy. *McCrea v. Waterloo County Mut. F. Ins. Co.* 26 U. C. C. P. 431.

So, the day upon which a notice was mailed should be excluded in the computation of the thirty days for which notice must be given, under the New York statute, prior to the maturity of a premium of a life insurance policy, in order to forfeit the policy for nonpayment. *Rosenplanter v. Provident Sav. L. Assur. Soc.* 96 Fed. Rep. 721, 46 L. R. A. 473, 37 C. C. A. 566; *Rae v. National L. Ins. Co.* 20 U. S. App. 410, 60 Fed. Rep. 690, 9 C. C. A. 215.

And where a life-insurance policy provides that it is to terminate in case the premium charged shall not be paid in advance on or before the day at noon on which the same shall become due and payable, if the payment falls due on Sunday that day is to be excluded, and the payment may properly be postponed till Monday without a forfeiture of the policy. *Hammond v. American Mut. L. Ins. Co.* 10 Gray, 306.

And the rule is the same under the Iowa stat

to the position that the trial judge alone can settle and allow the bill of exceptions. 3 Enc. Pl. & Pr. 446, 452, 455, 456, and cases cited; 2 Thomp. Trials, § 2807, citing only *Law v. Jackson*, 8 Cow. 746; Elliott, App. Proc. § 799. Some of the courts hold to the rule that the trial judge alone is competent to sign the bill because he alone is personally cognizant of the proceedings, and can testify to the accuracy of the bill, and that the exceptant should not lose his exception because of an event he could in no wise prevent, and is entitled to a new trial where there is no trial judge to act; while other tribunals, of equal respectability and dignity, hold that the court continues although its personnel changes, and that the successor of the trial judge has authority to settle and allow the bill. Perhaps the differences in practice may be illustrated by contrast-

ute where the articles of incorporation of the insurance company required the payment of an assessment to be made within thirty days from the time the notice of assessment was mailed, if the last of the thirty days is Sunday. *Holbrook Bros. v. Mill Owners' Mut. Ins. Co.* 86 Iowa, 255, 53 N. W. 229.

So, property insured against fire by a policy, purporting by its terms to run from the 14th of February until the 14th of August, and until so long after as the insured shall pay a designated sum and the insurer shall accept the same, is protected during the whole of the 14th of August, and the insurer is liable for loss caused by a fire on that day where the insured intended to keep up the policy, and the insurer knew of such intention, but the renewal premium was not demanded or paid until afterwards. *Isaacs v. Royal Ins. Co. L. R. 5 Exch. 290*, 18 Week. Rep. 982, 39 L. J. Exch. N. S. 189, 22 L. T. N. S. 681.

And a policy of insurance running to January 24, 1895, containing provisions for continuance, will be held to include the whole of that day, so that in case of the death of the insured at 8 o'clock in the evening of that day the company would be held liable on the policy, where by the provisions of the policy the premium was payable on or before January 24 in every year, so that the insured had all of the 24th in which to pay the premium and keep up an unbroken insurance. *Thomson v. Connecticut Mut. L. Ins. Co.* 4 Pa. Dist. R. 382.

And while a stipulation in an insurance policy, that it shall begin at noon and expire at noon on days named becomes a special rule for the fixing of the dates referred to, it does not apply as a rule for all computations of time under the policy. And another clause therein providing that the policy shall be canceled at any time at the request of the insured or by the company, by giving five days' notice of such cancellation, is governed by the general rule excluding the first day and counting days as legal days beginning and ending at midnight. *Penn Plate Glass Co. v. Spring Garden Ins. Co.* 189 Pa. 255, 42 Atl. 138.

An insurance policy on goods to be shipped between two designated days, however, does not cover goods shipped on either of such days, as both days are to be excluded in the computation. *Atkins v. Boylston F. & M. Ins. Co.* 5 Met. 439, 39 Am. Dec. 692.

And where a loss occurs on September 13, 1889, under a policy of fire insurance containing a clause limiting the time within which an action may be commenced to six months after loss, and action is commenced March 15, 1890, 49 L. R. A.

ing the rulings in the states of Illinois and North Carolina upon the matter of settlement of the bill where the trial judge has forgotten the occurrences of the trial, and cannot remember whether the matters detailed in the bill are true or not. In the former state, it was held that where the testimony was not preserved by the stenographer's notes, and the judge had forgotten the evidence, he should examine the witnesses who testified at the trial, to ascertain what they testified to. *People v. Gary*, 105 Ill. 264. In the latter state, in a case where the trial judge certified that his memory of the case was too indistinct to remember what had occurred at the trial, owing to the lapse of time since the trial and before the bill was presented to him, the court said: "There are numerous precedents that if the case cannot be settled by the judge by reason

It may be maintained, as the six months will not be deemed to include the day upon which the loss of damage occurred, as to include it would effect a forfeiture of the policy. *Dwelling-House Ins. Co. v. Osborn*, 1 Kan. App. 197, 40 Pac. 1099.

And where a policy of fire insurance provides that no action shall be maintained thereon unless brought within twelve months after the loss, and the insured property is burned on March 16, 1884, suit instituted on the policy March 16, 1885, is in time where March 15 is Sunday. *Owen v. Howard Ins. Co.* 87 Ky. 571, 10 S. W. 119.

But in *Allemania Ins. Co. v. Little*, 20 Ill. App. 431, which was an action upon an insurance policy containing a provision that in case of loss suit must be brought thereon within six months from the happening of the fire, it was held that if the fire occurred on the 23d day of August, 1884, and suit was not brought until the 24th day of February, 1885, it was too late; but the case was one in which the fire commenced upon one day and lasted until the next, and the question was whether the limitation ran from the day the fire commenced or from the day of the destruction of the building.

4. Leases and rental contracts.

Under the old common-law rule a lease to commence at date included the day of the date. *Haths v. Ash*, 2 Saik. 413.

And a lease *habendum* from henceforth included the day of the making. *Cornish v. Cawsey*, Aleyn, 77.

And under a lease made *habendum* from the date of the indenture, ejectment might be maintained on the same day with the demise. *Osborn v. Rider*, Cro. Jac. 135.

But a lease *habendum* from the day of the date excluded the day of the date. *Cornish v. Cawsey*, Aleyn, 77.

And in ejectment on a lease *habendum* from the day of the date, the ejectment could not be laid on the same day, but on a demise *habendum* from henceforth it might. *Lewlyn v. Williams*, Cro. Jac. 258.

And a lease from the 1st day of May to the 1st day of May next was exclusive of those days, so that ejectment would lie on the second day. *Doe ex dem. Bailey v. Smyth*, Anthon, N. P. 243.

Under a lease made to run from the 1st day of April for a year, however, the 1st day of April is not to be excluded in computing the year, but the term commences on that day. *Fox v. Nathans*, 32 Conn. 348; *Marys v. Anderson*, 24 Pa. 272.

of loss of papers, or (prior to the amendatory act) by reason of his having gone out of office, or otherwise, a new trial will be granted; and, by analogy, the same rule will be adopted where, by the great lapse of time, the judge is unable to settle the case." But it was held that the appellant must show that he was not guilty of laches. *Simmons v. Andrews*, 106 N. C. 201, 10 S. E. 1052, and cases cited; *Owens v. Paston*, 106 N. C. 480, 11 S. E. 375. In the case of *Newton v. Boodie*, 3 C. B. 795, it was held that where a party has lost the benefit of a bill of exceptions tendered to the ruling of a judge at nisi prius or at the assizes, by the death of the judge, and without any default on his own part, it is not competent to another judge of the court out of which the record issues to seal the bill of exceptions; and in such a case, where the circumstances war-

rant it, the court will allow the party to move for a new trial, notwithstanding the proper time for doing so has elapsed. But the rule was granted in order to see if there was evidence to fix one of the defendants on plea of not guilty, as borne out by the notes of the chief justice of the court, who died before the bill was perfected; and it was decided that there was no evidence to connect such defendant with any of the proceedings in trespass, and this was decided upon the notes of the evidence, and the rule was discharged. This ruling and examination into the notes of the judge was tantamount to reviewing the cause on its merits, warranted, perhaps, under the circumstances, and is apparently a better practice than to leave the party to obtain his new trial in the court below, as a matter of right and of course, owing to the death of the trial judge without

And expires on the last day of March of the next year. *Ibid.*

And a lease dated September 10 ends on September 10 of the following year, and a notice to surrender possession by that time is good. *Higgins v. Halligan*, 46 Ill. 173.

And where a house is leased on the 10th of January from year to year the rental payable quarterly, the fourth quarter becomes in arrear on the 10th of the succeeding January, and the landlord may on that day resort to legal proceedings to obtain payment thereof. *Donaldson v. Smith*, 1 Ashm. (Pa.) 197.

So, in *Hatter v. Ashe*, 3 Lev. 438, 1 Ld. Raym. 84, it was held that the words "from the date," in the lease, should be construed to include in the term the day upon which the lease was dated.

In *Barwick's Case*, 5 Coke, 93b, however, it was held that the day of the date of a freehold lease by letters patent running from the day of the date was to be excluded, and that therefore the letters patent were void, as creating a future estate.

And in *Bacon v. Wallee*, 3 Bulst. 204, it was held that a lease running "from date," and one running "from the day of the date," is the same thing, the expressions meaning the same. But see, *infra*, *Wilcox v. Wood*, 9 Wend. 346; *Mack v. Burt*, 5 Hun, 28.

And in *Ackland v. Lutley*, 9 Ad. & El. 879, 1 Perry & D. 636, it was said that the general understanding is that terms for years last during the whole anniversary from the date on which they are granted.

So, the more modern cases hold that the words "from the date" and "from the day of the date," when used in a lease to designate the commencement of a term, have precisely the same meaning. *Bigelow v. Willson*, 1 Pick. 485.

And that the words "from the day of the date" or "from the date," contained in written leases, may be exclusive or inclusive of that day according to the context and subject-matter. *Donaldson v. Smith*, 1 Ashm. (Pa.) 197.

And a lease of premises includes the day of the date of the lease, unless the instrument shows a contrary intention, or unless a different custom or usage appears. *Buchanan v. Whitman*, 78 Hun, 67, 27 N. Y. Supp. 604.

In the above case *Mack v. Burt*, 5 Hun, 28, *infra*, was distinguished upon the ground that in that case the lessee was to have possession "from and after May 1," this expression unquestionably excluding the 1st day of May.

So, a lease for twenty-one years in possession but not in reversion, made by a person under a power reserved in his marriage settlement, 49 L. R. A.

to his only daughter to commence from the day of the date, is a lease in possession and not *in futuro*, and is good, as it will be construed inclusive of the day of the date. *Pugh v. Leeds*, 2 Cowp. 714.

And under a lease of certain premises from December 25, 1849, for a term of fourteen years, with a proviso that it shall be lawful for either of the parties to determine the demise at the expiration of the first seven years by six months' notice, the seven years are to be reckoned from December 25, 1849, and the lease may be determined on December 25, 1856. *Bird v. Baker*, 1 El. & El. 12, 28 L. J. Q. B. N. S. 7, 4 Jur. N. S. 1148.

And the term of a lease made January 25, to run from the first day of April next for and during and until the full end and term of five years, rent to be payable in equal quarterly payments on the first day of April, July, October, and January, and containing a provision that the lessees would at all times leave upon the land leased property enough to secure one quarter's rent, commences on the 1st day of April that year, and includes that day, and the first quarter's rent is payable on that day in advance. *Deyo v. Bleakley*, 24 Barb. 9.

So, the tenancy under a one-year lease will be deemed to commence on the day of the date of the lease, and to terminate at midnight of the day preceding that day in the following year, where the lessee took possession of the premises on the day of the date of the lease. *Buchanan v. Whitman*, 151 N. Y. 253, 45 N. E. 556.

And under a lease executed and delivered June 12, 1890, to continue during the full term of twenty-one years next ensuing, giving the lessees power to terminate it whenever they found it would not pay them to continue, a notice of election to terminate the lease, given June 12, 1891, was too late, as the lessee had then entered upon the second year and was liable for the rent for that year. *Nesbit v. Godfrey*, 155 Pa. 251, 25 Atl. 621.

And a lease to hold from the 1st day of April for one year expires on the 31st day of March of the following year, and, though the lessee is entitled to remain in possession the whole of the 31st of March, he has no right to remain a moment longer, and it would be proper to give him notice to quit on that day. *Fox v. Nathans*, 32 Conn. 348.

Upon the other hand, however, the general rule in the computation of time of the duration of a lease has been held to be to count the day of the execution of the lease out, and count

certifying to the bill; for it is manifest that such a course would be a hardship to the prevailing party in the court below, to force him to retry the cause, if there were no reasons for doing so. By granting a new trial the defendant in error would be put to the time and expense of a retrial of the cause; and this should not be done, unless it appears by an inspection of the record and a re-examination of the issues and the evidence, that prejudicial error was committed by the trial court. But it is intimated that in the case of *Stirling v. Wagner*, 4 Wyo. 5, 31 Pac. 1032, 32 Pac. 1128, this court through the opinion of the writer hereof, intimated that the court allowing the bill must have some knowledge of the matters detailed in it, otherwise it could not suggest the corrections to be made, and that the statute using such language indicates an ac-

curate knowledge of the events at the trial. We do not think that the case decided that question, as the matter in dispute therein was as to the power of an ex-judge to sign the bill in vacation; and we held that a liberal construction of the statute, under the weight of authority, permitted him to sign and allow the bill. There were some expressions in that case which might lead counsel to infer that the bill must be allowed and signed by the trial judge, and not by a stranger to the proceedings of the trial court; but, taken as a whole, the opinion does not speak, nor attempt to speak, conclusively on the point in dispute in this case. It was insisted that a liberal construction of the statute should prevail in that case, and this is the rule that we shall follow in the case before us, as the statutes relating to the practice in securing bills of exception

the day of its termination in. *Higgins v. Haligan*, 46 Ill. 173.

And under a lease providing that the lessee is to hold from and after the 1st day of May for one year to the 1st day of May in the succeeding year, the 1st day of May at the commencement of the term is to be excluded in the computation of the time it is to run. *Wilcox v. Wood*, 9 Wend. 346; *Mack v. Burt*, 5 Hun. 28.

And a written lease specifying that it is for the term of one year from the 1st day of November, 1872, to the 1st day of November, 1873, commences on the 2d day of November, 1872, and terminates on the 1st day of November, 1873, where there is no evidence of a different intent. *Goode v. Webb*, 52 Ala. 452.

And a lease for a term of years running from the 1st day of July in a designated year begins, so far as the computation of the duration of the term is concerned, on the 2d of July of that year. *Atkins v. Sleeper*, 7 Allen. 487.

So, an assignment executed on the 31st of August of all rents due and coming due to the assignor until October 1, of a designated year, from the tenants of a certain estate who pay their rents on the first day of each month, will not be deemed to have been intended to be limited to the rents falling due on the 1st of September, but will also be deemed to include those which fall due on the 1st of October. *Kendall v. Kingsley*, 120 Mass. 94.

And where rent becomes due on the 1st day of May, a period of one month from that time within which payment is required to be made to prevent a forfeiture expires on the 1st day of June following, as in the computation of the time the day upon which the rent becomes due is to be excluded. *Sheets v. Selden*, 2 Wall. 177, 17 L. ed. 822.

And where a lease provides that in case of default in payment of rent within five days after it becomes due judgment in ejectment may be entered, and the fifth day falls on Sunday, the tenant has the whole of Monday within which to pay rent. *Gregg v. Krebs*, 5 Pa. Dist. R. 779.

Occupation for the full time under a lease of real estate from the forenoon of April 2, 1890, until the forenoon of April 1, 1891, constitutes living upon demised premises for one entire year within the provisions of a law giving a pauper a settlement who has thus dwelt in a township for one whole year, as in such case the statutory rule for the computation of time does not apply, and the computation is to be made most favorable to the parties whose rights are affected thereby. *Cascade Overseers v. Lewis Overseers*, 148 Pa. 834, 23 Atl. 1003, 49 L. R. A.

And a lessee under a lease, stating that he has taken it from the 30th day of September at a designated price per annum, and who enters at noon on that day and quits at 4 o'clock in the afternoon of September 29 of the following year, is a tenant for a year, and gains a settlement by reason thereof within the terms of 1 Wm. IV. chap. 18, § 1. *Queen v. St. Mary*, 1 Bl. & Bl. 816.

c. To statutes of Limitations.

1. In civil actions.

In ordinary cases the rule that in reckoning time from a day or a date the day or date is to be excluded is applicable to the statute of limitations, as well as to other statutes. *Seward v. Hayden*, 150 Mass. 158, 5 L. R. A. 844, 22 N. E. 629.

In the above case, it was said that the authorities on which Presbrey v. Williams, 15 Mass. 193, *infra*, rested have since been overruled, and that case was said to have been overruled by *Bemis v. Leonard*, 118 Mass. 502, 19 Am. Rep. 470, *supra*, III.

And the rule of the modern decisions is nearly, if not quite, universal, that in computing the time in which an action may be brought the first day upon which it might have been brought is excluded. *Davison v. Budlong*, 40 Hun. 245; *Harris v. Harris*, 13 Ohio C. C. 170.

And that the day when money became due should be excluded from the count in reckoning the duration of the period prescribed by the statute of limitations. *Geistweidt v. Mann* (Tex. Civ. App.) 37 S. W. 372.

And if a statute of limitations were deemed to apply to a demand existing at the time of its enactment, the day on which the statute took effect would be excluded in the calculation of the six years within which an action might be brought. *Fairbanks v. Wood*, 17 Wend. 329.

Thus, a statute of limitations passed on the 7th day of February, 1843, providing a ten years' limit, does not bar a bill filed on the 7th of February, 1853, under the rule of the Alabama courts to include one day and exclude the other, except where the statute requires so many clear days. *Owen v. Slatte*, 26 Ala. 547, 62 Am. Dec. 745.

So, in computing the time within which a limitation will run against an account, the day on which the cause of action accrued should not be counted. *Smith v. Dickey*, 74 Tex. 61, 11 S. W. 1049.

In the above case, *State v. Asbury*, 26 Tex. 82, *infra*, VII. c. 2, was distinguished upon the

are a part of the Code of Civil Procedure, and that and "all proceedings under it shall be liberally construed, in order to promote its object, and assist the parties in obtaining justice." The court should save the rights of the parties, if possible, by saving the bill. *Edwards v. Kearney*, 13 Neb. 502, 14 N. W. 536, and other cases from that state cited in *Stirling v. Wagner*, 4 Wyo. 5, 31 Pac. 1032, 32 Pac. 1128. It is true that the last clause of the section of the Code relating to the allowance of bills of exception does provide that, if the bill is not true, the court or judge shall correct it, or suggest the corrections to be made; and this, standing alone, might imply that the court or judge must have personal knowledge of the events of the trial, in order to intelligently sign the bill; but the exceptant has filed his bill within the time allowed by the court, in open court,

and this is under the express provision of the statute. The court continues although its personnel changes, and where, as in this case, a duty is imposed upon the court to sign and allow the bill of exceptions, as well as upon the trial judge, it seems that the power to perform these duties must carry with it the power of determining the truth of the bill, even where the presiding judge is the successor to the trial judge, who has died, resigned, or gone out of office. The court, at the term when the bill was presented, was the successor of his predecessor, could exercise the same powers, and had the right to act on every case that remained undecided upon the docket, as fully as his predecessor could have done. The court remains the same, and the change of the incumbents cannot and ought not, in any respect, to injure the rights of the litigant

ground that that was a criminal case, and in criminal cases the statute and proceedings are to be construed strictly against the prosecutor and in favor of the accused.

And in computing the six years within which an action for money had and received must be brought under the New Jersey statute of limitations, the day on which the money came to the defendant's hands should not be counted. *McCulloch v. Hopper*, 47 N. J. L. 189, 54 Am. Rep. 146.

So, a cause of action on an account for goods sold accrues on the day that the last of the goods was delivered, and that day is to be excluded in computing the time within which action may be brought under the statute. *Menges v. Frick*, 73 Pa. 137, 13 Am. Rep. 731.

And where goods are sold on the 19th day of February, 1870, and the debt thereby created becomes due on that day, the creditor may bring his action therefor on the 19th day of February, 1873, as in such case the three years' limitation providing that action may be begun within three years is computed by excluding the first day and including the last. *Hook v. Bixby*, 13 Kan. 164.

And in computing the time within which a suit against a boat for stores should be commenced, the day on which the delivery was completed should be excluded. *The Mary Blane v. Beehler*, 12 Mo. 477.

In *Shaline v. Goodman*, 2 Tex. App. Civ. Cas. (Willson) § 267, however, it was held that under Tex. Rev. Stat. art. 3203, providing that actions to recover debts not evidenced by a contract in writing must be brought within two years, an action on a claim for goods sold which fell due February 28, 1881, brought on February 28, 1883, is barred.

So, in computing the time within which an action should be commenced upon a note, the day on which the right of action accrued should be excluded. *McGraw v. Walker*, 2 Hilt. 404; *Blackman v. Nearing*, 43 Conn. 56, 21 Am. Rep. 634; *Beeman v. Cook*, 48 Vt. 201, 21 Am. Rep. 123; *Baker v. Ramsburg*, 4 Mackey, 1; *Bilitch v. Brewer*, 83 Ga. 333, 9 S. E. 837.

And the practice of commencing suits on notes payable at bank on the 3d day of grace after their dishonor, though well established, does not affect the rule. *Blackman v. Nearing*, 43 Conn. 56, 21 Am. Rep. 634.

The day of payment is included as the last of the currency of a note or bill, so that a suit on that day is premature, and for that reason the statute of limitations does not begin 49 L. R. A.

to run until the day after the day of payment. *Bilitch v. Brewer*, 83 Ga. 333, 9 S. E. 837.

In the above case, *English v. Ozburn*, 59 Ga. 392, *infra*, VII. h, was distinguished on the ground that the object of service of notice of trial is to enable the party to make preparations for trial, and there is no obstacle to beginning such preparation on the day of service; and *Barrett v. Devine*, 60 Ga. 632, and *Western & A. R. Co. v. Carson*, 70 Ga. 388, *infra*, VII. f, 2, were distinguished upon the ground that certiorari can be brought upon a judgment or verdict upon the same day of its rendition, whereas, in the absence of an express demand and refusal, no action can be brought upon an ordinary promissory note until the day after its maturity; and it was said that it is doubtful whether the rule for computing time for the bringing of certiorari, indicated though not distinctly expressed, in *Jones v. Smith*, 28 Ga. 41, *infra*, VII. f, 2, would not, if correctly understood and applied in computing months, be consonant to the one laid down in Ga. Code, § 4, ¶ 8, for computing days, which is that only the first or the last day shall be counted.

Thus, a right of action on a note which became due October 4, 1852, accrues thereon October 5, 1852, and an action commenced October 5, 1858, is within the six years limited by statute. *McGraw v. Walker*, 2 Hilt. 404.

And a promissory note made payable generally on or before the 15th day of October, 1880, is not barred on the 15th day of October, 1888, so as to prevent suit on that day. *Bilitch v. Brewer*, 83 Ga. 333, 9 S. E. 837.

And the day of the date of a promissory note payable on demand is to be excluded in reckoning the six years named in the statute of limitations after which an action thereon is barred. *Seward v. Hayden*, 150 Mass. 158, 5 L. R. A. 844, 22 N. E. 629.

So, an action on an order or warrant for the payment of money dated December 23, 1885, commenced December 23, 1895, is in time under the ten years' statute of limitations, within the statutory rule of Missouri that the time within which an act is to be done shall be computed by excluding the first day and including the last. *Parsons v. Egyptian Levee Co.* 73 Mo. App. 458.

And under Pennsylvania act of May 28, 1858, providing that no action to recover back interest in excess of 6 per cent voluntarily paid shall be sustained unless commenced within six months from and after the time of payment, suit brought on November 14, 1881, to recover such an excess included in a payment made on the preceding 13th of May in season, the 13th

parties. *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 9 L. ed. 234; *McCandless v. McWha*, 20 Pa. 183; *Bahnsen v. Gilbert*, 55 Minn. 334, 56 N. W. 1117; *Hays v. McNealy*, 16 Fla. 406.

In this connection it is well to keep in view the discrimination made in the statute. If the bill is presented in vacation, it is to be presented to the judge of the court "before whom the cause was tried;" but there is no such statutory provision expressly providing that the "court" settling and allowing the bill should be presided over by the trial judge.

In this case the parties opposing the bill stated in writing that the bill was true, and the order of the court allowing the bill recites such admission. The evidence and the details of the trial appear to be preserved by the notes of the official stenographer, and,

although these are made prima facie correct by statute, they are not sufficient without the authentication of the court or judge allowing the bill. *Johns v. Adams*, 2 Wyo. 194, 197. We think that as the evidence and exceptions were thus preserved by the stenographer, and as the opposing parties admitted the correctness of the bill, the court to whom the bill was presented, within the time given by the order allowing time for its preparation and presentation, was warranted in authenticating the bill. In these busy days, it would be impossible for a trial judge to remember accurately the events of the trial, without having recourse to the laborious and tedious method of taking copious notes of the evidence and matters of exception; and his memory would have to be marvelous without such aids to carry in his mind the minutiae of the trial, where, as in

of November being Sunday. *Edmundson v. Wrang*, 104 Pa. 500, 49 Am. Rep. 590.

And under the Oregon statute declaring that no action shall be maintained for the recovery of real property or the possession thereof unless the plaintiff or his ancestor, predecessor, or grantor was seised or possessed of the premises within ten years before the commencement of such action, the day on which the grantors of the person in possession became entitled to possession by the death of their ancestor should be excluded in making the computation. *Grant v. Paddock*, 30 Or. 312, 47 Pac. 715.

So, in computing time under the statute of limitations against actions for a personal injury, the day on which the injury occurred should be excluded. *Texas & P. R. Co. v. Moore* (Tex. Civ. App.) 43 S. W. 67; *Texas & P. R. Co. v. Goodson*, 2 Tex. App. Civ. Cas. (Willson) § 27.

And an action brought October 30, 1896, is in season under a one-year limitation, when the injuries were sustained October 30, 1895. *Texas & P. R. Co. v. Moore* (Tex. Civ. App.) 43 S. W. 67.

And so is an action for a personal injury received on April 13, 1888, commenced on April 13, 1889. *Louisville & N. R. Co. v. Watson*, 90 Ala. 68, 8 So. 249.

In *Peterson v. Georgia R. & Bkg. Co.* 97 Ga. 708, 25 S. E. 370, however, it was held that the plaintiff in an action for a personal injury has a right to sue on the day he is injured, and in computing the period of limitation of the time within which he must sue, which in Georgia is within two years after the right of action accrues, the computation should begin on that day.

So, an action brought by a person discharged from imprisonment December 14, against a magistrate for false imprisonment, by writ sued out on the following 14th of June, is commenced within the six calendar months after the act committed, as required by 24 Geo. II. chap. 44, § 8, as the 14th day of December ought not to be included in the computation. *Hardy v. Byle*, 9 Barn. & C. 603, 4 Mann. & R. 295.

Likewise the five years from the date of entry of a judgment within which it may be revived under Pa. act March 26, 1827, are to be computed exclusive of the day on which the judgment was rendered. *Green's Appeal*, 6 Watts & S. 327.

And in computing the ten years within which an action upon a judgment is required by law to be brought, the day on which the judgment was entered is to be excluded. *Warren v. Slade*, 23 Mich. 1, 9 Am. Rep. 70. 49 L. R. A.

And where judgment was rendered March 15, 1859, an action commenced by summons March 15, 1869, is in season. *Ibid.*

And where a decree was rendered November 20, 1883, a suit upon it is in time under the ten years' statute of limitations, within Tenn. Code, § 46, providing that the time within which any act is to be done shall be computed by excluding the first and including the last day, if brought November 20, 1893. *Cowan v. Donaldson*, 95 Tenn. 322, 32 S. W. 457.

However, in *Cook v. Moore*, 95 N. C. 1, it was held that a judgment rendered October 20, 1873, is barred by the ten years' statute of limitations, so that no recovery could be had thereon in an action brought October 20, 1883.

So, where the last day of the five years during which a judgment is a lien falls on Sunday, a scire facias to revive the judgment may, under the Pennsylvania statutory rule for the computation of time, be issued on the Monday following. *Lutz's Appeal*, 124 Pa. 273, 16 Atl. 858.

And the statute of limitations of New York providing that a final judgment or decree for a sum of money is presumed to be paid and satisfied after the expiration of twenty years from the time the party recovering it was first entitled to a mandate to enforce it, runs against a judgment recovered January 27, 1876, and expires on January 27, 1896, under the statutory construction act of 1892, 1894, § 27, providing that in computing any specified number of days, weeks, or months from a specified event, the day upon which the event happens is deemed the day from which the reckoning is made, and the day from which the time is reckoned shall be excluded, as the statute being silent as to the day from which the computation of a year is to be made, it will be deemed to have been the intention of the legislature to adopt the same computation as that adopted with reference to months, the statute providing that a year is twelve months; and where a summons is placed in the hands of the sheriff for service on that day, and thereafter duly served, it is in season. *Connecticut Nat. Bank v. Bayles*, 17 App. Div. 596, 45 N. Y. Supp. 305.

In the above case, *Presbrey v. Williams*, 15 Mass. 193, *infra*, was said to have been overruled by *Bigelow v. Willson*, 1 Pick. 485, *infra*, VII. g. 3, and it was said that it was not in accordance with the decisions of the state of New York; and *Aultman & T. Co. v. Syme*, 87 Hun. 295, 34 N. Y. Supp. 379, 91 Hun. 632, 36 N. Y. Supp. 528, *infra*, VII. g. 1, was disapproved, the court saying that it was difficult to under-

this case, time was allowed and taken to and including the first day of the next term of court. As a matter of practice, sanctioned by long usage and recognized by statute, both bench and bar rely upon the official notes of the stenographer; and this practice is one that should be upheld, as it expedites the business of the courts.

Repeating the quotation from *People v. Williams*, 91 Ill. 91, used in the case of *Stirling v. Wagner*, 4 Wyo. 5, 31 Pac. 1032, 32 Pac. 1128: "It is, however, contended that so long a time has elapsed since the trial of the cause that it is impossible for the judge to determine what the evidence was on the trial. We do not apprehend there can be much trouble on this score. It is set up in the petition, and not denied in the answer, that a full phonographic report of all the evidence offered on the trial was

made at the time by skilled reporters. If this be true, we cannot see how there can be much room for controversy in regard to the evidence." These expressions relate to the preservation of evidence taken in a chancery case in open court, instead of by the master; but the principle is the same as in other Illinois cases, particularly that of *People v. Gary*, 105 Ill. 264, holding that the trial judge may resort to such means when his memory cannot be relied upon, in determining the truth of the bill of exceptions; that is, either by taking as true the notes of the stenographer, or by rehearing the witnesses where the testimony has not been preserved. We do not decide whether this latter method can be resorted to, as the court below re-examined no witnesses, but evidently relied upon the notes of the stenographer, and the written admission of the adverse parties, to

stand how the learned general term arrived at its conclusion.

So, the day upon which an administrator or executor qualifies is to be excluded in computing the limitation of two or three years, as the case may be, which will bar a creditor's demand against him as such. *Elder v. Bradley*, 2 Sneed, 247; *Paul v. Stone*, 112 Mass. 27.

And a demand made upon an administrator on the 12th of January, 1853, is within the year prescribed by law after the granting of letters of administration, where the letters were granted on the 12th of January, 1852. *Kimm v. Osgood*, 19 Mo. 60.

And a writ dated January 19, 1871, is in season within the two years' limitation in Massachusetts, where the bond was filed and approved January 19, 1869. *Paul v. Stone*, 112 Mass. 27.

So, under the Texas statute providing that the owner of a claim against an estate rejected by an administrator may, within ninety days after such rejection, bring a suit against the administrator for its establishment, the ninety days is to be computed exclusive of the day of the rejection of the claim. *Hunter v. Lanus*, 82 Tex. 680, 18 S. W. 201.

And under an order of the probate court made on the 14th of December, limiting to six months from date the time for the exhibition of claims against the estate of the deceased person, a claim exhibited on the 14th of the following June is in season. *Weeks v. Hull*, 19 Conn. 376, 50 Am. Rep. 249.

So, where a cause of action accrues to a woman during coverture, and her right depends upon her having brought her suit within one year after her discovery, a bill filed November 9, 1870, is in time, where her husband died November 9, 1869. *Rogers v. Etter*, 8 Baxt. 13.

A person becomes of age, however, on the day before his 21st birthday, and the period of limitation of an action which accrues at a person's majority begins to run on that day, and that day is to be included in the computation of the time, and therefore a period limited by years will expire on the second day before his birthday anniversary. *Ross v. Morrow*, 85 Tex. 172, 16 L. R. A. 542, 19 S. W. 1090.

In computing the time excepted from the statute of limitations by Ala. Code, § 3244, providing that the time between the death of a person and the grant of letters testamentary or of administration, not exceeding six months is not to be counted in the estimate, the day of the death of a person must be included, and the 49 L. R. A.

day on which the letters are granted must be excluded. *Allen v. Elliott*, 67 Ala. 432.

And under Tex. Const. 1869, art. 12, § 43, providing that statutes of limitations in civil actions were suspended by the acts of session, and shall be considered as suspended within the state until the acceptance of the Constitution by the United States Congress, the day upon which Congress accepted the Constitution of Texas is to be excluded in the computation of the four years' limitation, and where the Constitution was approved by act of Congress dated March 30, 1870, a suit brought March 30, 1874, is in season. *Dowell v. Vinton*, 1 Tex. App. Civ. Cas. (White & W.) § 327.

The contrary rule, however, has been laid down and acted upon in a few of the cases. But it is to be observed that, with the exception of the Georgia case, they are all early cases, and were probably decided under the early rule including the first day when the computation was from an act done.

Thus, where a definite period is fixed by law within which a given right or privilege is to be taken advantage of, the first day upon which that right or privilege could lawfully have been asserted is to be considered the date upon which the period of limitations commenced to run, and that day is to be included in the computation where any question arises as to whether such right or privilege was exercised in time. *Jones v. Kern*, 101 Ga. 309, 28 S. E. 850.

And in determining whether an action on a written instrument was brought within the period allowed by the statute of limitations, the day of the date of the instrument is to be included, and the day on which the summons was issued is to be excluded. *Shinn v. Tucker*, 33 Ark. 421.

So, a promise made on the 1st day of November, 1811, and which might be sued on that day, is barred by the six years' statute of limitations, so that a suit thereon cannot be maintained on the 1st of November, 1817. *Presbrey v. Williams*, 15 Mass. 193, said in *Seward v. Hayden*, 150 Mass. 158, 5 L. R. A. 844, 22 N. E. 629, *supra*, to have been overruled in *Bemis v. Leonard*, 118 Mass. 502, 19 Am. Rep. 470, *supra*, III.

And an action on a note commenced December 16, 1854, is barred by the four years' statute of limitations where the note was dated December 14, 1850, and was made payable one day after date. *Smith v. Wilson*, 15 Tex. 132.

So, where a judgment was rendered in the circuit court on the 3d day of October, 1820, the filing of a transcript of the record in the supreme court on the 3d of October, 1825, is

establish the truth of the bill; and we think his action was warranted under the circumstances of the case, as there was no dispute as to what the bill should contain. *Elliott*, App. Proc. § 799; *Wood v. People*, 59 N. Y. 119. Under the case as presented, it would be manifestly unjust to both of the parties to reject the bill for lack of sufficient authentication, as such a course might result in a new trial, when the record, if examined, might not disclose reversible error. If such would not be the result, the plaintiffs in error would be deprived of the right of re-

view secured under constitutional and statutory provisions, without any fault on their part, and when they have proceeded under the order of the court, and are not guilty of laches. We feel that we must liberally construe the statute, and save the bill in order to prevent a miscarriage of justice.

3. The remaining ground of the motion is that the bill of exceptions does not purport to show all the evidence admitted at the trial of the cause. It is but fair to say that counsel inserted this ground owing to the action of the court in requesting an argument

too late, and is barred by the statute of limitations. *Jacobs v. Graham*, 1 Blackf. 392.

2. In criminal prosecutions.

The rule has been laid down by a majority of the cases that in computing time under an act requiring an indictment to be found within a designated period after the commission of the crime the day upon which the criminal act is done is excluded. *Com. v. Wood*, 5 Pa. Dist. R. 179.

Thus, the two years' statute of limitations against prosecutions for murder in Florida does not bar a prosecution by indictment on the 13th of December, 1880, where the offense was alleged to have been committed on the 13th of December, 1878. *Savage v. State*, 18 Fla. 970.

And an action under a statute declaring that certain penalties incurred by railroad companies shall be sued for within ten days after the same are incurred is properly brought on the 30th of December, where the penalties were incurred on the preceding 20th of that month. *People v. New York C. R. Co.* 28 Barb. 284.

So, under the act for the prevention of cruelty to animals, 12 & 13 Vict. chap. 92, § 4, requiring that every complaint thereunder shall be made within one calendar month after the cause of such complaint shall arise, the day of the alleged offense is to be excluded from the computation of the calendar month, and an information laid on June 30 is in time to confer jurisdiction upon the justice where the act of alleged cruelty was committed May 30. *Radcliffe v. Bartholomew* [1892] 1 Q. B. 161.

So, *W. Va. Code*, chap. 13, § 12, providing that the time within which an act is to be done shall be computed by excluding the first day and including the last, or if the last be Sunday it shall also be excluded, applies to the construction of statutes in criminal as well as civil cases, and applies to a statute of limitations with reference to the violation of the exercise law. *State v. Beasley*, 21 W. Va. 777.

In *State v. Asbury*, 26 Tex. 83, however, it was held that the application of the doctrine that in computing time such a construction should be given as will operate most to the ease of the party entitled to favor, to the question whether or not the statute of limitations has run against a misdemeanor, requires the inclusion of the day on which the offense was committed.

And in *People v. Wood*, 10 N. Y. Legal Obs. 61, it was held that in computing the time limited within which to prosecute for a criminal offense the day on which the offense was committed is to be included.

And under 27 Eliz. chap. 13, providing that no person shall take any benefit from a robbery except he or they so robbed shall commence his or their suit or action within one year after such robbery, the day on which the robbery was committed is included in the year; and where a robbery took place on the 9th of Octo-

ber, a writ on the 9th of the following October is too late. *Norris v. Hundred de G.* 1 Brownlow & G. 156, *Hobart*, 139.

d. To provisions for time in civil actions.

1. General statement as to.

Common-law rules as to computation of time are applicable to provisions for time in civil actions as well as in the construction of statutes and contracts, and the rules of court, and statutory rules for the computation of time are particularly applicable to civil actions, having been adopted and enacted in some instances with special reference to civil actions, and having been held in some instances to be applicable to them only.

2. Service and return of process.

The general rule is that, in determining the question whether or not a summons was served in time, either the day of service or the day of return or appearance will be excluded, and the other of those days will be included. *Day v. Hall*, 12 N. J. L. 203; *Bowman v. Wood*, 41 Ill. 203.

And usually the day of service of a summons is included, and the return day is excluded. *Reigelsberger v. Stapp*, 91 Ind. 311; *Stebbins v. Anthony*, 5 Colo. 348; *Neitzel v. Hunter*, 19 Kan. 221; *Pollard v. Yoder*, 2 A. K. Marsh. 264; *Ferris v. Zeldler*, 5 Phila. 529; *Montgomery v. Souder*, 8 Lanc. L. Rev. 185.

In *Ferris v. Zeldler*, 5 Phila. 529, *supra*, it was said that the contrary rule suggested in *Barber v. Chandler*, 17 Pa. 43, 55 Am. Dec. 533, *infra*, was but a *dictum* and not important to the decision of the case, and that a later opinion of one of the judges plainly shows its incorrectness.

Thus, a summons served on the 11th of the month, returnable on the 17th, is served six days before the return day within a provision requiring such service, under the rule for the computation of time, that the day of the service should be excluded and the day of the return included. *Young v. Krueger*, 92 Wis. 361, 66 N. W. 355.

And so is service of a summons on the 11th returnable on the 17th. *Smith v. Force*, 31 Minn. 119, 16 N. W. 704.

And a writ issued and served on Wednesday, which is returnable at a term to commence on the following Monday, is served at least five days before the return thereof, within the meaning of the Alabama statute. *Garner v. Johnson*, 22 Ala. 494.

And a requirement of five days' service of a summons is satisfied by service on the 26th of April of a summons returnable on the following 1st day of May. *Day v. Hall*, 12 N. J. L. 203.

And a writ served on the 5th of January, to be returned on the 15th is in time. *Reigelsberger v. Stapp*, 91 Ind. 311.

upon that point. We cannot say that it is necessary to have all the evidence before us at this stage of the proceedings. That matter may only be determined by an inspection of the bill and an examination of the assignment of errors. So far as we can ascertain from the certificate to the bill, we think it may be gathered therefrom that all of the evidence is in the bill. However, if it should hereafter appear that the bill has vices which will invalidate it, we can dispose of that matter upon the hearing upon the merits.

The motion to strike the bill of exceptions from the record is overruled.

Conway, J., concurs.

Scott, J. (who sat in lieu of Mr. Justice Potter, who was of counsel below), dissenting:

I dissent from so much of the foregoing opinion as appears in paragraph 2 thereof, and think that the motion to strike should be granted.

And a summons returnable March 23d, making the answer day the 12th of April following, allows twenty days for answering after the day on which the summons was returnable, as required by law. *Neitzel v. Hunter*, 19 Kan. 221.

So, a service of a summons on the 21st of September, the term of court to which it is returnable commencing on the 1st of October following, is a sufficient ten-day service, excluding the day of service and including the day on which the term commences. *Martin v. Reed*, 9 Ind. 180.

And so is a service on the 22d of June, when the court commences on the following 2d day of July. *Womack v. McAhren*, 9 Ind. 6.

And so is a service on the 21st of September when the first day of the term of the court following is the 1st day of October. *Martin v. Howell*, 8 Ind. 501.

Likewise of a service on the 28th of December, when the term of court to which it is returnable commences on the 7th of January following. *Dugdale v. Ryan*, 8 Ind. 529.

And service on the 31st of August, the term of court commencing on the 10th of September following. *Blair v. Davis*, 9 Ind. 236; *Blair v. Manson*, 9 Ind. 357.

And a summons issued on the 15th of June, returnable on the 25th of that month, is proper. *Krohn v. Templin*, 2 Ind. 146.

And so is the service of a summons on the 27th of December, returnable on the 7th of the January following, the term of court commencing on the 6th of January; and it makes no difference that it was made returnable on the 2d day of the term, and that default was taken on that day. *Baltimore & O. & C. R. Co. v. Fihn*, 2 Ind. App. 55, 28 N. E. 201.

And where six days' service of a summons is required, and it is returnable on the 8th of the month, a service on the 2d is good under the rule for computation of time, reckoning one day inclusive and the other exclusive. *Columbia Turp. Road v. Haywood*, 10 Wend. 422.

In the above case, *Small v. Edrick*, 5 Wend. 137, *infra*, VII. d. 4, was distinguished upon the ground that the phraseology of the statute under which that case arose was different, the statute there requiring notice to be served at least fourteen days before the first day of the court, while in the present case the statute required the summons to be served at least six days before the time of appearance.

So, under Ind. act March 6, 1877, chap. 105, § 315, providing that if the summons be personally served ten days before the return day the action shall stand for issue and trial at the term during which it was made returnable, the time is computed by excluding the day of service and including the return day, and service on the 9th for the 19th is a good ten days' service. *Monroe v. Paddock*, 75 Ind. 422.

And a judgment by default may be rendered on the 10th day after the day on which the summons was served under the Indiana statute 49 L. R. A.

with relation to the service of a summons, computing the time by excluding the day of service and including the return day of the writ. *Kerr v. Haverstick*, 94 Ind. 178.

And in determining whether service of a summons had been perfected twenty days previous to the return term, as required in Alabama, the first day of the term is the last day of the period limited, and if by including this day twenty days have elapsed after the day of service, the case properly stands for trial at that term. *Thrower v. Brandon*, 89 Ala. 406, 7 So. 442.

By the early rules of the common law, however, if a process was served on Wednesday, that day was included in the computation, and where it was returnable on the following Monday, it would be deemed to have been served five days before the term of court beginning that day. *Dickinson v. Lee*, 2 Coldw. 615.

And in computing the time of serving process before the return day the day of service was included and the return day excluded. *Dilts v. Zeigler*, 1 G. Greene, 164, 48 Am. Dec. 370; *Temple v. Carstens*, 1 G. Greene, 492.

And in counting the three days in which a summons in forcible entry and detainer might be made returnable, the day of service was one day, and a service of a summons on the 6th returnable on the 9th was good. *Barto v. Abbe*, 16 Ohio, 408.

So, a service of a summons on the 27th of October the return day of which was the 7th of November is a service of ten days before the return day, the return day being left out of the count. *Black v. Johns*, 68 Pa. 83.

And in computing time with a view to the service of process the day on which the process is served is one of the fourteen at the expiration of which, in Massachusetts, a writ is returnable, and a writ served October 20, returnable November 3d, is in season. *Butler v. Fessenden*, 12 Cush. 78.

In New Hampshire under the statute providing that writs of mesne process shall be served fifteen days before the sitting of the court at which the process is returnable, the day upon which the service is made is included as one of the fifteen days. *Bell v. Adams*, 10 N. H. 181, *dictum*.

And in the computation of time under the Pennsylvania act of assembly authorizing the institution of suits before a justice, all summons to be returnable in not less than five days from the date, the day of issuing the summons as well as of the return is to be counted. *Barber v. Chandler*, 17 Pa. 48, 55 Am. Dec. 533.

In the service of writs in Connecticut the statute declares that the day of service shall be computed. *Spencer v. Champion*, 13 Conn. 11. *dictum*.

When it is provided, however, that a designated period of time shall intervene between the service and return of process, many of the cases have held that both the first and last day

LOUISIANA SUPREME COURT.

STATE of Louisiana *ex rel.* STATE PHARMACEUTICAL ASSOCIATION *et al.*
App'rs.

v.

John T. MICHEL.

(52 La. Ann. 936.)

*1. A bill which has passed both houses of the general assembly, and been signed by the presiding officers thereof, is presented to the governor, within the meaning of the Constitution, when the clerk of the house of representatives or secretary of the senate carries the same to the executive office, and offers or tenders it to the governor or his secretary.

*Headnotes by Blanchard, J.

of the period must be excluded, though the contrary rule has also been asserted.

Thus, under the Texas statute requiring that process shall be executed at least five days before the return day thereof, five full days must intervene between the service and the return of a citation, and both the day of service and the day of return must be excluded from the computation. *O'Connor v. Towns*, 1 Tex. 107.

And Mich. Comp. Laws, § 4987, providing that a summons in a proceeding before a circuit-court commissioner to obtain possession of lands must command the defendant to appear at a time and place therein to be specified, not less than three nor more than six days from the issuing thereof, shows an intention to require three entire days after the day of service and before the return. *Sallee v. Ireland*, 9 Mich. 154.

And where a summons in a justice's court is tested on the 27th of February and returnable on the 8th day of March, and the law requires such summons to be served at least six days before the return day, the last day for the service thereof is March 1. *Isabelle v. Iron Cliffs Co.* 57 Mich. 120, 23 N. W. 613.

And Mich. Comp. Laws, § 4987, requiring the summons in certain cases to be served at least two days before the return day thereof, necessarily excludes the day of the return from the computation of the two days. *Sallee v. Ireland*, 9 Mich. 154.

So, in computing the five days allowed to sheriffs and their deputies for serving writs under Ga. act 1856, pamphlet 136, the return day or latest day fixed for filing petitions at law or bills in equity must be excluded. *Baxley v. Bennett*, 33 Ga. 146.

And a justice's summons required to be made returnable not less than two nor more than four days from the date thereof is erroneous and defective if made returnable on the 2d day after it was issued. *Everts v. Flak*, 44 Mich. 516, 7 N. W. 81.

But in the computation of time under the Missouri statute providing that in proceedings to revive justices' judgments the citation shall be served upon the defendant commanding him to appear at a time not less than ten nor more than thirty days from the issuing thereof, and that the same shall be served at least ten days before the day of appearance, the statutory rule that time shall be computed by excluding the first day and including the last applies, the words "not less" and "at least" not being equivalent in meaning to the word "more." *Sappington v. Lenz*, 53 Mo. App. 44.
49 L. R. A.

2. The mandate of the Constitution is not that the governor must act, in the way of a veto, within five days of his reception of a bill, but within five days of its presentation to him.

3. The day on which the bill is presented is not to be included in the computation of the five days, but the last day of the specified period is to be computed.

4. A "day," in this sense, begins at 12 o'clock midnight, and extends through twenty-four hours to the next 12 o'clock midnight.

5. There is a general rule that, where a limitation of time is fixed within which a particular act or thing is required to be done, if done at all, after which performance or the doing of the thing would be without effect, if the time limited exceed a week, an intervening Sunday is included in

So, in the computation of time under Iowa Rev. 1860, § 2815, providing that a defendant, if served otherwise than by publication, shall be held to answer at the next term provided he be served so as to leave at least ten days between the day of service and the first day of the term, both the day upon which the service was made and the first day of the term of the court are to be excluded. *Robinson v. Foster*, 12 Iowa, 186.

And Iowa Rev. § 4121, providing that unless the term "clear days" is used the mode of computing time is by excluding the first day and including the last, does not apply to prevent the exclusion of both the first and last days in the computation of time under that act. *Ibid.*

So, under *Oldham & W.'s Digest*, art. 415, providing that citations shall be returnable on the first day of the term of court after they are issued, and that the defendant is not compelled to plead at the return term unless the citation shall be served at least five days before the first day of the return term, exclusive of the days of service and return, the five days are clear days, and where a citation issues October 3, and is made returnable October 17, and service is made October 12, judgment cannot be rendered by default against the defendant for failure to answer. *Dickson v. Burke*, 28 Tex. 117.

Under the Nebraska statutory rule provided, by § 895 of the Code, that time within which an act is to be done shall be computed by excluding the first day and including the last, the invariable practice has been to make a summons, required by Neb. Code, § 811, to be served, unless accompanied by an order of arrest, at least three days before the time of appearance, returnable on the 4th day from the date of service. *White v. German Ins. Co.* 15 Neb. 660, 20 N. W. 30.

But a summons in an action of forcible detainer issued and served three days prior to the day appointed for trial, including the day of service, is sufficient under that act to confer jurisdiction over the person of the defendant. *Messick v. Wigent*, 37 Neb. 692, 56 N. W. 493.

And the time of service of a summons issued by a justice of the peace under Kan. Civil Code, § 536, containing a similar provision, is governed by the statutory rule, and the day of service must be excluded but the day of appearance included. *Schultz v. Hine*, 39 Kan. 334, 18 Pac. 221.

In the above case, *Garvin v. Jennerson*, 20 Kan. 371, *infra*, VII. d, 5, was distinguished

the computation; if less than a week, Sunday is excluded.

6. When the time stipulated is such that it does not necessarily include Sunday, Sunday is excluded from the computation without express mention of the fact. When the time stipulated must necessarily include Sunday, to exclude that day from the computation there must be an express declaration to that effect.

7. It follows that, if one of the five days accorded the chief executive in which to return a bill with his objections happens to be Sunday, the same is not to be computed as one of the constitutional "five days."

8. This view is strengthened by the general policy of the law in regard to the first day of the week, which, by statute, in Louisiana, is made a day of "public rest," and by the sentiment prevailing in Christian countries.

9. Whatever doubt may exist in the judicial mind as to the proper meaning to be given to the words used, it is safely resolved in favor of that construction, sanctioned alike by the policy of the law and the moral sentiment of the people.

(February 19, 1900.)

A PPEAL by relators from a judgment of the Judicial District Court for the Parish of East Baton Rouge refusing a writ of mandamus to compel defendant to promulgate a legislative bill as a law. *Affirmed.*

The facts are stated in the opinion.

Mr. Albert Voorhies, for appellant:

Sundays are counted as the general rule. *Pierce v. Cushing*, 33 La. Ann. 404.

Mr. Charles M. Cunningham, with Mr. Milton J. Cunningham, Attorney General, for respondent.

upon the ground that in that case the provision required depositions to be filed at least one day before the day of trial, while in the case at bar the requirement was that the summons must be served at least three days before the time of appearance, and not on the day of appearance.

Under How. (Mich.) Stat. § 6827, providing that a summons shall in all cases except as therein before provided, be served at least six days before the time of appearance mentioned therein, the day of service is excluded in the computation, and the appearance day is included. *People use of Chaddock v. Barry*, 93 Mich. 542, 18 L. R. A. 337, 53 N. W. 785.

And a summons served on the 14th, returnable on the 16th of the same month, is sufficient under a statute requiring summons in actions in which the plaintiff is a nonresident to be served not less than two days before the time for appearance mentioned in it. *Ball v. Mander*, 19 How. Pr. 468.

But in estimating the five days for the return of a summons under the Pennsylvania act, providing for the return of a summons not more than eight nor less than five days after the date of the summons, the day of the date of the summons is to be excluded, and a summons issued by a justice April 12, requiring the defendant to appear April 16, gives only four days, and is therefore void. *Montgomery v. Souder*, 8 Lanc. L. Rev. 185.

So, the statutory rule for computation of time applies to the time for publication of notice to nonresident defendants, under Kansas Code providing therefor; and the answer day must be not less than forty-one days from the date of the first publication, and the day of the first publication is to be excluded and the answer day included. *Beckwith v. Douglas*, 25 Kan. 229.

But a service of a summons under a statute requiring publication for four successive weeks, the first of which shall be at least thirty days before the return day, by publishing it for four successive weeks, the first publication being on May 2 and the last on May 3, the return day being June 1, is sufficient where either the first day of publication or the return day is excluded from the publication. *Stebbins v. Anthony*, 5 Colo. 348.

So, Hutch. (Miss.) Digest 823, art. 17, requiring the publication of notice to nonresident defendants in chancery to be made once a week, for one month, requires that publication shall be made for a calendar month, which period must intervene between the date of the first publication and the date of the last, except 49 L. R. A.

cluding one day and including the other. *Mitchell v. Woodson*, 37 Miss. 587.

And a publication in three successive issues of a weekly newspaper, of a summons against an absent or transient defendant, does not comply with Oldham & W.'s Dig. (Tex.) art. 1103, requiring a publication for three successive weeks of a citation issuing from a justice's court, unless the full term of three weeks or twenty-one days elapse between the day of the first publication and the day on which the judgment is rendered exclusive both of the first day of the publication and the return day of the writ. *Hill v. Faison*, 27 Tex. 428.

The California statutory rule for the computation of time, requiring that when an act is to be done within a designated time it shall be computed by excluding the first and including the last day, does not apply to the computation of the time for the publication of a summons required to be once a week for not less than three months, as there is no time within which an act is to be done within the meaning of the statutory rule for the computation of time. *Savings & Loan Soc. v. Thompson*, 32 Cal. 347.

But the general rule applies to service of citation in surrogate's court required to be eight days before return day, so that the service of a citation on the 12th returnable on the 20th of the same month is sufficient to confer jurisdiction. *Re Carhart*, 67 How. Pr. 216, 2 Dem. 627.

And under N. Y. Code Civ. Proc. § 2520, requiring citations in surrogate's court to be served "at least" eight days before the return day, the statutory rule applies to the computation of the six days. *Re Carhart*, 2 Dem. 627.

But under Mich. act March 16, 1840, requiring that a citation shall be served three days at least before the return day thereof, both the day of service and the day of return must be excluded in the computation of the three days, the latter being excluded by the terms of the statute and the former by the rule of construction excluding the day of service, that being a fraction of a day. *Dousman v. O'Malley*, 1 Dougl. (Mich.) 450.

And a default cannot be entered in Louisiana until after the full expiration of the tenth day after the citation, and a default cannot be confirmed until the full expiration of two days after the default was entered. *Hart v. Nixon*, 25 La. Ann. 136.

So, when the last day for the service of a summons in the New York marine court was Sunday, service on the next day is in time, under § 788 of the Code, providing that if the last day occurs on Sunday it must be excluded

Blanchard, J., delivered the opinion of the court:

This is a proceeding by mandamus to compel the secretary of state to promulgate as a law duly enacted an act of the general assembly of the state of Louisiana known as "House Bill No. 46," entitled "An Act to Amend and Re-enact Act No. 66 of the Acts of 1888, Entitled 'An Act to Regulate the Practice of Pharmacy; to Regulate the Sale of Compounded Medicines and Drugs, Preparations and Prescriptions; to Regulate the Sale of Poisons; to Create a State Board of Pharmacy, and to Regulate the Emoluments Thereof; to Prevent the Practice of Pharmacy by Unauthorized Persons, and to Provide for the Trial and Punishment of Violators of This Act by Penalties and through Civil Process, and to Repeal all Laws Contrary to, or in Conflict with, Any of the Pro-

visions of This Act.'" The contention of the relators is that at a late session of the general assembly the aforesaid bill duly passed both houses, and was on the 8th of July, 1898, signed by the speaker of the house of representatives and by the lieutenant governor and president of the senate; that the enrolled copy of the bill so signed was presented to the governor of the state on the same day, July 8, 1898, for executive approval; and that, the act not having been returned by the governor within five days thereafter, the general assembly continuing in session, it had become a law as though the executive signature in approval thereof had been attached. The further contention is that application was made to the secretary of state to promulgate the act in accordance with law, and that he refused to do so. To the preliminary writ, requiring him

from the count, though the day of service was the 31st day after the granting of the attachment. *Gibbon v. Freel*, 65 How. Pr. 273.

3. Pleading.

In computing the time to plead with reference to including the first and last day, the general rule is that one day is to be inclusive and the other exclusive, so as to give the party the full number of days. *Hoffman v. Duel*, 5 Johns. 232; *Phelan v. Douglass*, 11 How. Pr. 193.

And where a party has a certain number of days in which to plead or answer, judgment cannot be taken against him until after the last of those days has expired. *Brackett v. Brackett*, 61 Mo. 223; *Lohman v. Cox*, 9 N. M. 503, 56 Pac. 286.

Thus, in computing the time to plead on ten days' notice under a rule of court, the day on which the notice was given is excluded. *Marks v. Russell*, 40 Pa. 372.

And where a rule to plead is served on the 1st day of September, a default entered on the 21st of that month is premature. *Hoffman v. Duel*, 5 Johns. 232.

But where ten days' time to reply is given, either the first or the last of the ten days must be excluded from the calculation, and where the extension is made March 24, and the following five days are holidays, excluding the one day of the ten, a judgment for want of a replication on the 8th of April following is not too soon. *Liffin v. Pitcher*, 1 Dowl. N. S. 767, 6 Jur. 537.

And the defendant in an action in which a judge's order had been made, that three days after the service thereof at the defendant's residence the plaintiff should be at liberty to proceed as if personal service of the writ of summons had been effected, and service is made on the 21st of the month, has all of the 24th thereof, and a judgment obtained upon the 24th is irregular. *Weeks v. Wray*, L. R. 3 Q. B. 212, 37 L. J. Q. B. N. S. 84, 17 L. T. N. S. 498, 16 Week. Rep. 399, 9 Best & S. 62.

So, under a declaration entered on the 6th of June, indorsed, "Plea in four days for judgment," the defendant has the whole of the 10th of January to plead, and judgment signed on that day for want of a plea is irregular. *Dunn v. Hodson*, 1 Dowl. & L. 204, 7 Jur. 971.

And a summons requiring the defendant to answer plaintiff's plea on or before August 2, gives him all of the 2d day of August in which to plead, and no action on the merits of the case can be taken until August 3d, and a judgment rendered previous to that time is invalid. *Lohman v. Cox*, 9 N. M. 503, 56 Pac. 286.

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And where an order is obtained giving a defendant seven days' time to plead on May 15, and defective pleas are delivered on May 22, a judgment signed by the plaintiff as for want of a plea upon that day is too early, and will be set aside. *Pepperell v. Burrell*, 2 Dowl. P. C. 674, 1 Crompt. M. & R. 372, 4 Tyrw. 811.

Under the Pennsylvania court rule providing that unless a declaration be filed within twelve months from the first day of the term to which an action is brought a judgment of *non pros* shall be entered, as of course, calendar months are referred to, and the return day of the summons must not be counted, so that, where the summons was returnable November 6, 1876, judgment of *non pros* cannot be regularly entered until November 8, 1877. *Gustine v. Elliott*, 11 W. N. C. 433.

And under the Wyoming statute, by which the first day of a period of time is excluded and the last day included, a month from August 30 would begin at the last moment of that day, and six months would end with February 28, following, so that a petition filed on February 28 is filed within six months from August 30, notwithstanding the fact that the other six months of the year is one day short. *Daly v. Anderson* (Wyo.) 48 Pac. 839.

Under the early common-law rule, however, the time to plead under a judge's order extending the time was reckoned inclusive of the day of the date of the order, but exclusive of the day on which it expired. *Kay v. Whitehead*, 2 H. Bl. 35.

So, the general rule is that the word "till," in an order giving a defendant till a designated day to plead, is inclusive of the day to which it is prefixed, and permits a plea on that day. *Dakins v. Wagner*, 3 Dowl. P. C. 535; *Thomas v. Douglass*, 2 Johns. Cas. 226.

And see *supra*, IV. f.

And where a rule is entered requiring a party to plead before the end of the next term he has the whole of the last day of the term in which to plead, and his default cannot be entered until the next day thereafter. *Sharp v. Door*, 15 Johns. 531.

And under the Texas statute of May 15, 1846, p. 370, § 24, providing that, if the defendant does not file his answer before the fifth day after the meeting of the court, the plaintiff may have judgment by default made final on such day, judgment cannot be made final on the fifth day of the meeting of the court, but must be delayed until the sixth, as the day of the meeting of the court must be excluded in the computation. *Hollis v. Francois*, 1 Tex. 118.

to show cause why the act should not be promulgated, the secretary of state, through the attorney general, answers, in effect, that he should not be required to promulgate the act as a law of the state for the reason that the same was vetoed by the governor within five days after he received the same at the hands of the messenger of the house, and was not subsequently passed by the action of the two houses of the general assembly, the governor's veto to the contrary notwithstanding. The case was tried below on the following admission of facts: "It is admitted that house bill No. 46, after being signed by the speaker of the house and lieutenant governor on the 8th of July, 1898, was carried to the governor's office about 10 or 11 o'clock on the night of July 8; that the governor's private secretary had gone home, and that the governor declined to re-

ceive the bill at that hour; that this bill was in a batch containing a large number, as shown by the receipts; that on the next day—July 9—the bills were delivered to the governor, and he signed a receipt, which had been prepared on July 8, without noticing the date; that the engrossed copy of the bill, along with the copies of the other bills included in the same receipt, was delivered to the secretary of state at 4 P. M. on July 9, as shown by memorandum made by the secretary of state at that time; that the secretary of state also signed a receipt for this bill, together with the other bills, dated July 8, without noticing the date. It is further admitted that the governor's veto reached the house of representatives at 11:20 P. M. on July 14, just before adjournment, and that the house did finally adjourn that night at 12 o'clock without

So, in *Oxley v. Bridge*, 1 Dougl. 67, it was held that on a rule to plead by a particular day, that day is construed to continue until the office opens on the next morning.

In *Clark v. Ewing*, 87 Ill. 344, however, it was held that where time to plead is extended by rule to a specified date, it does not include that day, and a default for want of a plea may be taken on that day, the words "to that day" meaning until the meeting of the court on that day.

And in *Freeman v. Jackson*, 1 Bos. & P. 479, it was held that the first and last days of the period designated in an order to enlarge time for pleading are both reckoned inclusively.

So, in computing the number of days intervening between the filing of a petition and the commencement of a term of court, where a designated number of days is required to intervene, the Sundays intervening are counted, and the rule is not affected by the fact that the term commenced upon Monday, and the last day of the period was Sunday. *Heard v. Phillips*, 101 Ga. 691, 44 L. R. A. 369, 31 S. E. 216; *Conklin v. Marshalltown*, 66 Iowa, 122, 23 N. W. 294.

As no act was required to be performed on that day. *Conklin v. Marshalltown*, 66 Iowa, 122, 23 N. W. 294.

So, in *Seed v. Ketchum*, 15 W. N. C. 366, upon a rule to strike off judgment taken for want of a defense on the third Saturday after the return day, which was October 6, the defense having been filed on the following Monday, it was said that the established practice has been to consider the Monday following the return day as within the first week in which a plaintiff may file his copy without notice.

New York Code Civ. Proc. § 788, providing that if the last day to perform an act falls on a public holiday it must be excluded in computing time, does not include the Saturday half holiday provided for by N. Y. Laws 1887, chap. 289, and where the time to plead expires on Saturday the pleading should be served on that day, and an order extending the time to plead, granted on Monday, is unauthorized, as the time has already expired. *Fries v. Coar*, 19 Abb. N. C. 267, 13 N. Y. Civ. Proc. Rep. 152.

4. Notices of trial.

The day on which a notice of hearing or trial is served is to be excluded, as a general rule, in the computation of the time when such notice is to be given, and the first day of the term included. *Anderson v. Baughman*, 6 Mich. 298; *Dayton v. McIntyre*, 5 How. Pr. 117, 3 Code Rep. 164.
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And in the case of the publication of a notice the rule is to exclude the day of publication and include the first day of the court. *Stebbins v. Anthony*, 5 Colo. 348.

And statutes providing that the time within which an act is to be done shall be computed by excluding the first day and including the last establishes a general rule for the computation of time applicable to service of notices of trial, as well as to any other acts in civil actions. *State ex rel. Currie v. Weld*, 39 Minn. 426, 40 N. W. 561; *Easton v. Chamberlin*, 3 How. Pr. 412.

And this is the rule notwithstanding another statute providing that notice of trial may be served at any time after the issue joined, but must be ten days before the court. *Easton v. Chamberlin*, 3 How. Pr. 412.

In *State ex rel. Currie v. Weld*, 39 Minn. 426, 40 N. W. 561, *supra*, it was said that the court is not disposed to extend the rule of computation adopted in *Greve v. St. Paul*, S. & T. F. R. Co. 25 Minn. 327, *infra*, beyond the language of the rule then construed.

Thus, a notice of trial served on the 11th for the 21st is a good ten days' notice. *Dayton v. McIntyre*, 5 How. Pr. 117, 3 Code Rep. 164.

And so is a notice on the 9th for the 19th. *Legge v. Williams*, cited in 2 Tidd, Pr. 9th ed. 755.

And notice under Cal. Code Civ. Proc. § 1373, posted on the 12th day of July of a hearing on the 22d day of the same month, is sufficient as a ten days' notice under the statutory rule. *Bates v. Howard*, 105 Cal. 173, 38 Pac. 715.

And a notice of trial served October 10, for a term of court beginning October 18, is a sufficient eight-day notice. *State ex rel. Currie v. Weld*, 39 Minn. 426, 40 N. W. 561.

2 N. Y. Rev. Stat. 410, § 7, however, providing that notice of trial shall be served at least fourteen days before the first day of the court at which the trial shall be intended to be had, excludes the first day of the court from the count; and where the rule of court excludes the day of service, the computation must be had by excluding both the first and last day, and a notice served on the 9th for the 23d is insufficient. *Small v. Edrick*, 5 Wend. 137.

And in computing the ten days under the Kansas statute providing for the trial of issues at a term of court which are made up ten days before the term, the first day of the term should be excluded and the day on which the issues were made up by the filing of the last pleading included. *Dougherty v. Porter*, 18 Kan. 206.

And in giving the ten days' notice of agree-

acting on the veto; that the governor takes no note of the hour that a bill is received or the hour when a veto is sent in. But the secretary of state noted the hour that he received the engrossed copy of house bill No. 46, and the clerk of the house noted the hour at which the veto came in." There was judgment refusing to make the writ peremptory, and dismissing the action at relators' cost. This appeal followed.

The question first arising for determination is, What constitutes a presentation of an act of the general assembly to the chief executive for his action, under the Constitution? If the act known as "House Bill No. 46" were, in the constitutional sense, presented to him on July 8, and he did not return the same, with his veto, to the house in which it originated until more than five days after such presentation, then the act

must (unless an intervening Sunday—one of the five days—is excepted from the computation) be considered as having become a law, and the veto without effect to prevent that consummation. Article 41 of the Constitution is imperative that, "as soon as bills are signed by the speaker of the house and president of the senate they shall be taken at once, and on the same day, to the governor by the clerk of the house of representatives, or secretary of the senate." The bill in question was signed by the speaker of the house and president of the senate on July 8, 1898. It therefore became the duty of the clerk of the house to take it at once, on the same day, to the governor, and he did so. It was between 10 and 11 o'clock at night, it is true, but the governor was in his office at the capitol building, and it was "the same day" on which the presiding offi-

ment required by rule 8 of the Minnesota supreme court the day of service and the first day of the term must both be excluded. *Greve v. St. Paul, S. & T. Falls R. Co.* 25 Minn. 327.

5. Notices, motions, and proceedings in general.

As to all proceedings in actions with reference to which an act is required or permitted to be done in a designated period of time, the general rule is that the first day of the period is to be excluded in the computation of such time. *Phelan v. Douglass*, 11 How. Pr. 193.

Thus, service of notice of motion on Thursday is a sufficient four days' notice, where the motion was to be made on the Monday following, being the first day of the term of court, though the last day of the four was Sunday. *Charles v. Stansbury*, 3 Johns. 261.

And under a rule of court requiring applications for a change of venue to be made by the second Wednesday of the term of court, the second Wednesday is included and an application on that day is a sufficient compliance with the rule. *Walters v. Stockberger*, 20 Ind. App. 277, 50 N. E. 763.

So, the statutory rule for the computation of time excluding the first day and including the last applies to a continuance for service by publication under Kan. Comp. Laws 1879, § 35, p. 708, providing that in such case the justice of the peace shall continue the cause for a period not less than thirty nor more than fifty days, and it is not necessary that there should be thirty clear days excluding both the day of adjournment and the day of trial. *Warner v. Bucher*, 24 Kan. 478.

And in computing the time of a notice to take depositions, either the day on which the notice is given or the day on which the depositions are to be taken is to be included. *Littleton v. Christy*, 11 Mo. 390.

And under the provisions of the Ohio statute notice of the taking of depositions must be one day previous to the taking, and the day of giving notice, and also the day of taking the depositions, must be excluded from the computation. *Devlin v. Jelly, Tappan* (Ohio) 127.

So, the time limited by Mich. Comp. Laws, § 4245, requiring notice of application for an order that a commission issue to take a deposition at least ten days before the making of such application, is to be reckoned exclusive of the day of service and inclusive of that on which the application is to be made. *Arnold v. Nye*, 23 Mich. 286.

And notice of such an application to take the deposition of a witness out of the state, served 40 L. R. A.

July 29 which application was to be made on August 8, is sufficient under a statute requiring such notice to be served at least ten days before the making of the application. *Eaton v. Peck*, 26 Mich. 57.

And in *Walsh v. Boyle*, 30 Md. 262, it was held that a notice in a proceeding in equity in which each party was allowed by order to take testimony upon giving one day's notice, given on the 28th of December that evidence would be taken on the following day, is sufficient.

But, under Kan. Civ. Code, § 361, providing that every deposition intended to be read in evidence on a trial must be filed at least one day before the trial, one clear day must intervene between the filing of the deposition and the commencement of the trial at which it is to be read, and both the day on which the deposition is filed and the day of the trial are to be excluded in making the computation. *Garvin v. Jennerson*, 20 Kan. 371.

And, under the statutory rule for the computation of time excluding the first day and including the last, a notice of the taking of a deposition, required to be for at least six days under the circumstances of the case, given on the 21st of the month, stating that the deposition would be taken on the 26th, gives insufficient time and the deposition will be quashed. *Richardson v. Burlington & M. River R. Co.* 8 Iowa, 260.

And a notice under a writ of inquiry, given on the 9th of the month for the 23d thereof, is not a sufficient notice required by law to be given fourteen days before the day on which the writ is to be executed. *Nichols v. Nichols*, 10 Wend. 560.

It has been held, however, probably under the old common-law rule of computation, that where a previous notice of a motion or other proceeding in a statute is required to be given, the whole of the day on which the notice is served is included in the computation of time, and the day upon which the motion is to be made or other proceeding had is excluded. *Vandenburgh v. Van Rensselaer*, 6 Paige, 147.

And under that rule, where the law requires that a month's notice of an action shall be given, the month begins with the day on which the notice is served. *Castle v. Burditt*, 3 T. R. 623.

But the two days' notice allowed by 9 Geo. I. chap. 22, providing for actions to recover damages for injury done to premises maliciously set on fire, for giving notice of the offense, are reckoned exclusively of the day the fire occurs. *Pellew v. Hundred of Wotton*, 9 Barn. & C. 134, 4 Mann. & R. 130.

cers of the two houses had attached their signatures to the bill. If the clerk of the house had not taken the bill that day, at once after its signature by the presiding officers of the two houses,—certainly before 12 o'clock midnight,—to the governor, he would have failed in the duty prescribed for him by the organic law. Article 76 of the Constitution declares that "every bill which shall have passed both houses shall be presented to the governor. If he approve it, he shall sign it; if not, he shall return it, with his objections in writing to the house in which it originated," etc. The language is: "Every bill . . . shall be presented to the governor." Here the bill was carried to the governor's office. It was at night. The governor's private secretary had gone to his home, but the governor himself was there. The clerk of the house made

known the object of his visit. The governor declined to receive the bill. The clerk withdrew, and returned with the bill the next day, July 9, 1898, when it was received by the governor, and a receipt signed dated July 8, 1898. It seems this receipt had been prepared by the clerk the evening previous, expecting the bill to be then received by the governor; and the next day, when it was signed, the date was not noticed. Undoubtedly, the object of the clerk of the house in going to the executive office on the night of July 8 was to fulfil his constitutional duty of presenting the bill to the governor on the same day on which the presiding officers of the two houses had signed it. When he made known the purpose of his visit to the governor, and tendered the bill, it was a presentation of it, in the constitutional sense, and the fact that the governor de-

And notice of one calendar month, required to be given of the commencement of an action, given April 28, is in time where the action was commenced on the following May 29. *Freeman v. Read*, 4 Best & S. 174, 32 L. J. M. C. N. S. 226, 10 Jur. N. S. 149.

And a notice given to the justice of the peace, of an intended suit, pursuant to Pa. act March 21, 1772, served on the 19th of May, when suit was brought on the 18th of June, is a sufficient thirty days' notice. *Thomas v. Adick* 16 Pa. 14.

But in the computation of the calendar month's notice to a justice of the peace of an action against him for wrongfully breaking and entering the plaintiff's dwelling house, required by 24 Geo. II. chap. 24, § 1, the day of giving the notice and the day of suing out the writ are both to be excluded. *Young v. Higgon*, 6 Mees. & W. 53, 8 Dowl. P. C. 212.

In the above case *Castle v. Burditt*, 3 T. R. 623, *supra*, II., was said to be overruled.

So, in computing the thirty days prior to the next term of court that a subpoena in a divorce action must issue, the day of its issue must be excluded, but the day previous to the return day, though Sunday, is to be counted. *Fordham v. Fordham*, 2 Del. Co. Rep. 78.

And under Neb. Gen. Stat. 265, § 7, providing that the terms of probate court shall commence on the first Monday, and that such terms shall be deemed open until the third Monday of the same month, such third Monday is included in the term, where the act also provides that on that day all causes not then finally determined shall be continued by the court until the next regular term. *Ryan v. State Bank*, 10 Neb. 524, 7 N. W. 276.

6. Attachment, replevin, and arrest.

The rules above given for the computation of a period of time appear to apply, with very little exception, to periods of time prescribed for the performance of acts in connection with attachment, replevin, and arrest.

Thus, under Mass. Gen. Stat. chap. 123, § 57, providing that the copy of the writ and of the return of an attachment of personal property of a designated class shall be deposited in the town clerk's office within three days thereafter, the day on which the attachment is made is to be excluded. *Bemis v. Leonard*, 118 Mass. 502, 19 Am. Rep. 470.

And the proper rule for the computation of time, under Ill. Rev. Laws 1833, 87, § 11, providing that the defendant in foreign attachment shall be notified of the pendency of the attachment by publication, and in case sixty 49 L. R. A.

days shall not intervene between the first insertion of the notice and the first term of the court the cause shall be continued, is to exclude the day on which the notice was first inserted in the newspaper, and include the day on which the term commenced. *Valrin v. Edmonson*, 10 Ill. 270; *Forsyth v. Warren*, 62 Ill. 68.

So, where the statute permits the intervention of one day between the date of the jurat to an affidavit for attachment and the act or date of issuing the writ, the day does not begin to run until the expiration of the day upon which the affidavit is executed, and the writ may issue after the expiration of the intervening day. *Horton v. Monroe*, 98 Mich. 195, 57 N. W. 109.

And the four days from the time of the return of a writ after which a bail bond can be assigned under the English practice should be computed one of the first and last days inclusive and the other exclusive, and where the return is made on Wednesday, the bail bond cannot be assigned until Monday, the fourth day being Sunday. *Bullock v. Lincoln*, 2 Strange, 914.

And where the bond was excepted to on Wednesday an attachment could not regularly issue against the sheriff until the Tuesday following, Sunday being omitted. *North v. Evans*, 2 H. Bl. 35.

So, under N. Y. Code Civ. Proc. § 638, requiring service of the summons in an action in which an attachment has been granted within thirty days after the granting thereof, if the thirtieth day is Sunday, a service on the thirty-first day is sufficient under N. Y. Code Civ. Proc. § 788, providing that in the computation of time if the last day occurs on Sunday it must be excluded from the count. *Gibbon v. Freel*, 93 N. Y. 93.

Under the old common-law rule, however, the last day of a term of court was considered as the day on which all judgments were rendered unless it appeared otherwise from the record, and in computing the thirty days from a judgment during which property attached on mesne process was holden, the day after the last day of the term was the first of the thirty. *Portland Bank v. Maine Bank*, 11 Mass. 204.

And in *Spencer v. Champion*, 13 Conn. 11, the court intimated its opinion that in computing the time limited for the continuing after final judgment of a lien on real estate created by attachment the day on which the judgment was rendered was to be included, but refused to decide the point, the case turning upon other ground.

Pennsylvania act June 20, 1883, however, providing for the exclusion of the first and the

clined to then receive it did not render nugatory and ineffective this presentation. To hold otherwise would put it in the power of a chief executive to delay at will the presentation of a bill to him,—something the Constitution is careful to guard against. "If any bill," says the last clause of article 76 of the Constitution, "shall not be returned by the governor within five days after it shall have been presented to him, it shall be a law in like manner as if he had signed it, unless the general assembly, by adjournment, shall prevent its return, in which case it shall not be law." The mandate of the organic law is not that the governor must act, in the way of a veto, within five days of his reception of a bill, but within five days of its presentation to him. If it were the first, he might, by not receiving a measure, hold it up until within five days

of the end of a session of the general assembly, then receive it, and the adjournment taking place would prevent its return, thus defeating its becoming a law; or, in case it was returned with a veto message just prior to adjournment, action on the veto by the two houses would be prevented. But the presentation of the measure being made to him,—an offer of it to him; a tender of it to him,—it can make no difference that he does not receive it. The constitutional requirement is fulfilled, and from that moment the delay begins to run and he must act, if his purpose be to veto, within five days. See *Opinion of the Justices*, 45 N. H. 611. The bill in question having been presented on July 8, the governor was entitled to "five days" for its consideration. Within that period he must return it, with his objections, or else it becomes a law the same

inclusion of the last day in computing time, applies to cases where the performing or doing of some act, duty, matter, payment, or thing is directed by law or by special order of the court, and does not apply to the computation of time under the act allowing attachments against non-resident debtors, providing that the attachment shall be made returnable not less than two, nor more than four, days from the date thereof; and an attachment returnable in five days is without jurisdiction, though the fourth day is Sunday. *Protzman v. Wolff*, 4 Pa. Dist. R. 473.

So, a replevin bond executed on the 28th of February, conditioned that three months after the date thereof the defendant will pay, etc., expires the 28th of May following, and execution will be due thereon May 29. *Moor v. Covington City Nat. Bank*, 80 Ky. 305.

And under Wis. Rev. Stat. chap. 120, § 84, providing that the warrant in an action of replevin shall be made returnable on the third day after it shall issue, Sundays excepted, a Sunday included within the three days must be excepted whether it is the last day for the return of the warrant or an intervening day. *Lowe v. Stringham*, 14 Wis. 322.

Sunday will not be counted in computing the twenty-four hours within which a replevin bond is required by law to be executed after a replevy, in a case in which the goods were replevied on Saturday. *Link v. Clemmens*, 7 Blackf. 479.

And a notice to appear for examination issued by a magistrate to whom application has been made for authority to arrest a debtor, required by Mass. Stat. 1877, chap. 250, § 1, to be served not less than three days before the time fixed for the examination, served on January 4, a little before 7 P. M., notifying the defendant to appear on January 8 at 9 A. M., satisfies the statute. *Stewart v. Griswold*, 134 Mass. 391.

7. *Condition and docketing of judgments.*

Judgments are sometimes required to be rendered within a designated time after the submission of the cause or some other act, and sometimes a specified period is required to elapse between the two acts. In all such cases the rules, both statutory and at common law, for the computation of time apply to the computation of such period.

Thus, the Missouri statutory rule that the time within which an act is to be done shall be computed by excluding the first day and including the last, and if the last be Sunday it shall be excluded, applies to the computation of the 49 L. R. A.

three days after a cause has been submitted within which a justice is required to render and enter judgment by Wagner's (Mo.) Stat. 838, § 9. *Hodgson v. Banking-House*, 9 Mo. App. 24.

And a five days' notice, served on Wednesday, of an application for a judgment to be made on the following Monday, is sufficient under N. Y. Code, § 407, providing that in the computation of time the first day is excluded, and the last day included. *Taylor v. Corbiere*, 8 How. Pr. 385.

But under the New York act providing for courts held by justices of the peace, § 124, providing that in certain cases the justice shall render judgment and enter the same in his docket within four days after the cause shall have been submitted to him for his final decision, where a cause was submitted on the 28th of June, judgment rendered on Monday the 3d day of July following is too late, and therefore void, as, the fourth day being Sunday, judgment should have been rendered on the preceding day. *Bissell v. Bissell*, 11 Barb. 96.

And the statutory rule has no application in the computation of time under N. Y. Rev. Code, § 1228, declaring that judgment upon the decision of the court cannot be entered by the clerk until after the expiration of four days from the filing of the decision and the service upon the attorney for the adverse party of a copy thereof and notice of filing, and four days must fully expire after the decision is filed and notice served before judgment can be lawfully docketed. *Marvin v. Marvin*, 75 N. Y. 240.

The English practice is that a rule for judgment must have four clear days exclusive of the first and last and of Sunday, before judgment can be entered. *Roberts v. Stacey*, 13 East, 21.

e. *To provisions for time in criminal cases and penal actions.*

Though some of the statutory rules with reference to computation of time are made specially applicable to civil actions, the general rule which seems to be practically the same under the modern common-law doctrine and under the statutes seems to be applicable to criminal cases.

Thus, the general rule for the computation of time, to count the day on which the act is done when the limitation runs from the act and not from the day, is applicable to the computation of the two days mentioned in Ky. Crim. Code, § 283, providing that sentence in a felony case shall not be pronounced until two days after the verdict is rendered, unless the court is about

as if he had signed it, unless the general assembly, by adjournment, shall prevent its return, etc. "Adjournment," as here used, means final adjournment at the close of the session; not adjournment for the day, or for several days during the session. *Id.* 45 N. H. 610. If the house in which the bill, proposed to be vetoed, originated should happen not to be in session when the governor's message arrived, delivery of the bill, with the governor's objection, to the presiding officer of the body, or to its clerk, would seem, according to the adjudicated cases, to suffice; and, in case neither the presiding officer nor the clerk can be found, its deposit on the presiding officer's table or desk or in the office of the clerk would, doubtless, likewise suffice. See *Id.* 45 N. H. 609, 610. The day on which the bill is presented to the governor is not to be included in the computation

of the five days, but the last day of the specified period is to be computed. *Sheets v. Selden*, 2 Wall. 190, 17 L. ed. 826; *Corwin v. Comptroller General*, 6 S. C. N. S. 394; *People ex rel. Harless v. Hatch*, 33 Ill. 14, 138; *Price v. Whitman*, 8 Call. 412, 417; *Iron Mountain Co. v. Haight*, 39 Cal. 541; *Dwarr. Stat.* 768, 769; *Re Senate Resolution*, 9 Colo. 632, 21 Pac. 475. A "day," in this sense, begins at 12 o'clock midnight, and extends through twenty-four hours to the next 12 o'clock midnight. 2 Bl. Com. 141; *Black, Law Dict., verbo, Day*; *Opinion of the Justices*, 45 N. H. 610. The governor has the whole of the twenty-four hours constituting a day. He has what is called a "natural" or "astronomical" day, not an artificial day. *Bouvier*, referring to "a day" as a division of time, says in its natural sense it consists of twenty-four hours, or

to adjourn for the term. *Bush v. Com.* 80 Ky. 244.

So, a sentence of one calendar month's imprisonment for an offense expires on the day preceding that day which corresponds numerically in the next succeeding month with the day on which the sentence was passed, and if there is no such corresponding day in the next month, then the sentence expires on the last day of that month. *Migotti v. Colvill*, L. R. 4 C. P. Div. 233, 40 L. T. N. S. 747, 27 Week. Rep. 744, 14 Cox. C. C. 305.

And where a person is sentenced to imprisonment on the 31st of October for one calendar month and for a second offense for fourteen days, commencing after the calendar month, the first sentence must be computed from midnight of the 30th of October, and expires at midnight on the 30th of November, notwithstanding the fact that he remains in prison during the whole month of November and one day besides, and his second sentence would expire on the 14th day of December, and his detention until that time is lawful. *Ibid.*

The day of commitment of a prisoner, however, when he was removed to prison on that day is to be reckoned as part of the term, for as the liberty of the subject is concerned the statute ought to receive a construction favorable to the prisoner. *Com. v. Keniston*, 5 Pick. 420.

So, where the drawing of a jury is required by law to take place not less than fourteen days before the day appointed for the holding of a term of court, it is from that day that the fourteen days are to be counted, and that day must, under the statutory construction act, be excluded; and in making the count back from that time, the day on which the drawing was to be had may properly be included. *People v. Burgess*, 153 N. Y. 561, 47 N. E. 889.

And where, in an indictment under 33 Geo. III. chap. 52, § 62, prohibiting officers of the East India company residing in India from receiving presents, information charges that the defendants were British subjects holding office and residing in the East Indies on the first of January, 1794, and until the 20th of November, 1795, and that while they held such office and resided in the East Indies on the 20th day of November, 1795, they received certain presents, the word "until" will be taken inclusive of the 29th of November, 1795. *Rex v. Stevens*, 5 East, 244, 1 Smith, 437.

But the word "until," in a charge of the illegal sale of liquor until a designated day, is exclusive, and implies a negative of that day. *Wicker v. Norris*, Cas. t. Hardw. 110. 49 L. R. A.

So, under the Alabama statute requiring that any person indicted for any capital crime shall have a copy of the indictment and a list of the jury delivered to him at least two entire days before he shall be tried, the two days must be exclusive of the delivery and also of the day of trial. *State v. M'Lendon*, 1 Stew. (Ala.) 195.

And in computing time under Texas Code Crim. Proc. art. 554, providing that no defendant in a capital case shall be brought to trial until he has had a one day's service of a copy of the names of persons summoned under a special venire facias, unless he waives the right, the day of the service and the day of trial must be excluded, and a service at half past one is not sufficient to hold the defendant to trial at three o'clock P. M. on the following day. *Spear v. State*, 2 Tex. App. 246.

So, where penalties are to be recovered by information before justices of the peace under a statute directing that the justices shall summon the persons informed against to appear and plead and attend the hearing of the information at a time and place named in the summons, which is to be served ten days at the least before the time appointed, there must be ten clear days between the service and the day of hearing inclusive of those days. *Mitchell v. Foster*, 12 Ad. & El. 472, 4 Perry & D. 150, 9 Dowl. P. C. 527.

And under the English excise act, 4 & 5 Wm. IV. chap. 51, § 19, requiring that ten days' notice at least to appear shall be given to a party accused of offenses against the excise laws, ten clear days must be given; and where the accused is summoned September 20, and September 30 the justice hears evidence and convicts the accused and imposes a penalty upon him, the conviction is void, and the justice is liable in trespass for issuing a distress warrant for the penalty. *Ibid.*

But the seven days which a party convicted for keeping open a beerhouse at prohibited times under 11 Geo. IV. and 1 Wm. IV. chap. 85, has for paying a penalty imposed upon him before a distress warrant can issue, are to be reckoned one of the first and last days exclusive and the other inclusive. *Newman v. Hardwicke*, 3 Nev. & P. 368, 8 Ad. & El. 124, 1 W. W. & H. 284, 2 Jur. 493.

See also *supra*, *To statutes of limitations—In criminal prosecutions*, VII., c. 2.

1. To provisions for time in proceedings for review.

1. Motions for new trial.

Motions for a new trial, as well as other pro-

the space of time which elapses while the earth makes a complete revolution upon its axis. Law Dict. See also Abbott, Law Dict. *verbo*, Day, and 33 Ill. 137. In this case the bill is held to have been "presented" to the governor on July 8. Excluding that day from computation, the five days given him by the Constitution for its consideration began at 12 o'clock midnight, just as the twenty-four hours constituting the 8th of July ended and the twenty-four hours constituting the 9th of July began. Ordinarily, then, he was entitled to the twenty-four hours, respectively, of the 9th, 10th, 11th, 12th, and 13th of July in which to consider it, and return it with his objections. But the 10th of July, 1898, was Sunday, and of this the court takes judicial cognizance.

As a consequence, the question next arising for determination is, Does Sunday count

in the computation of the five days? Is it to be included or excluded? If the first, then the governor's veto of the measure on July 14 came too late. The bill had meanwhile become a law, and thereafter its efficacy as such could not be destroyed by the veto message. If the second, the veto message, reaching the house of representatives, where the bill originated, at any time during the hours constituting July 14, was timely. There is a rule of general, though perhaps not of universal, acceptance, that, where a limitation of time is fixed within which a particular act or thing is required to be done, if done at all, after which performance or the doing of the thing would be without effect if the time exceed a week, an intervening Sunday is to be included in the computation; if less than a week, Sunday is to be excluded. 26 Am. & Eng. Enc. Law, p. 10; *Halcy v.*

ceedings for review, are proceedings in the trial of a civil action, and therefore fall within the express provisions of the statutory rules for the computation of time, and are, of course, governed by the common-law rule in the absence of statutory provision.

Under the old common-law rule the day on which a verdict was rendered was to be computed as one of the four days which were allowed by law, in Pennsylvania, to move for a new trial. *Lane v. Shreiner*, 1 Blinn. 292; *Burrall v. DuBois*, 2 Dall. (Pa.) 229; *White v. Crutcher*, 1 Bush, 472.

And the day on which a verdict was given was to be reckoned inclusively in computing the three days allowed for motion in arrest of judgment, and a motion on the 15th was too late where the verdict was given on the 11th. *Burrall v. DuBois*, 2 Dall. (Pa.) 229.

And a motion for a new trial, made on the 4th day of June, was not within the three days allowed by Ky. Civil Code, § 371, where the verdict and judgment were rendered in the case May 31st of that year. *White v. Crutcher*, 1 Bush, 472.

So, under Ky. Civil Code, § 371, requiring an application for a new trial to be made within three days after the verdict or decision was rendered, the three days are juridical days, and Sunday was excluded, the intention of the legislature being to give three days, on any one of which the party could move for a new trial, and the day of the decision and the day of the motion were both computed as part of the three days given. *Long v. Hughes*, 1 Duv. 387.

Under the more modern rule, however, the day of the verdict or judgment is excluded, and the day of the motion is included.

Thus, in computing the four days within which a new trial may be ordered the day upon which judgment was rendered will not be included as one of the four. *Hathaway v. Hathaway*, 2 Ind. 513.

And the ten days within which one is required to move to set aside a default by Wagner's (Mo.) Stat. 847, § 2, is to be computed under the Missouri statutory rule by excluding the first day and including the last; and where judgment was rendered October 28, a motion to set aside a default, made on November 6, is in time. *Reynolds v. Missouri*, K. & T. R. Co. 64 Mo. 70.

So, the first day of the twenty days within which, after the commencement of the succeeding term, petitions to rehear are required to be filed in North Carolina, is to be excluded from the count, and the last also when it falls on Sunday. *Barcroft v. Roberts*, 92 N. C. 249. 49 L. R. A.

And a motion for a new trial, required by Ohio Code, § 5307, to be filed within three days after the verdict is rendered, is too late, under the Ohio statutory rule for the computation of time, where the verdict was rendered on Friday and the motion for a new trial was filed on the following Tuesday. *Chicago Label & Box Co. v. Washburn*, 15 Ohio C. C. 510.

And where, in a motion for a new trial, the movant is allowed until a certain day, time, or term to prepare and file the motion and approved brief of evidence, the word "until" includes such day, term, or time, and, if proper action be taken at that time, it is in season. *Rogers v. Cherokee Iron & R. Co.* 70 Ga. 717.

So, the proper mode of computing time, under the Illinois statute providing that at any time within one year after a judgment in an action of ejectment, the party against whom it is rendered, his heirs or assigns, upon payment of costs, shall be entitled to have the judgment vacated and a new trial granted, is to exclude the day named and include the day on which the act is to be done; and where a judgment was rendered April 12, 1882, the one year after the judgment commenced to run on April 13, 1882, and was completed April 12, 1883. *Pugh v. Reat*, 107 Ill. 440.

And where the court determines the issues in a case on the 9th day of April, and ninety days are given the losing party within which to file his bill of exceptions, and he files it July 8, of that year, it is filed on the ninetieth day within the meaning of the statutory rule, and within the time fixed by the order. *Sheldon Bank v. Royce*, 84 Iowa, 288, 50 N. W. 986.

But the Missouri statutory rule of law concerning the computation of time, that when the last day for doing an act falls on Sunday the act may be done on the following Monday, does not apply to a motion to set aside a judgment of a justice of the peace required to be made within ten days after the rendition of the judgment, by Mo. Rev. Stat. 1889, § 6237, so that where the tenth day is Sunday the motion must be made previously, and cannot be made on Monday. *State ex rel. Kerr v. Sheehan*, 55 Mo. App. 66.

Nor does it apply to the computation of the four days after trial within which motions for new trials and in arrest of judgment are required to be made by law in Missouri, where Sunday is one of the intermediate days, and not the last day. *National Bank of the Metropolis v. Williams*, 46 Mo. 17.

2. Appeal, error, review.

Under the old common-law rule the day on

Young, 134 Mass. 366; *Anonymous*, 2 Hill, 375; *Thayer v. Felt*, 4 Pick. 354; *Hannum v. Tourtellott*, 10 Allen, 494; *Cunningham v. Mahan*, 112 Mass. 59. Consideration of this rule commends its wisdom.

The Federal Constitution allows the President of the United States ten days, Sundays excepted, to return a bill, with his objections, after its presentation to him. Many of the states of the Union allow ten days, Sundays excepted. Some allow a less number of days, Sundays excepted, and others a less number of days without mentioning Sunday. Where there has been an omission to except Sunday in the constitutional provision, and cases have gotten into the courts, no authoritative announcement of the rule to be followed has been laid down, so far as our research has extended. Indeed, no decision covering the exact case has been

found anywhere. There appear to be no adjudications on the point by this court in the past, though for more than thirty years the constitutional provision has been as it is now, *viz.*, that, if any bill shall not be returned by the governor within five days after its presentation, it shall be a law, etc., Sunday not mentioned. The Constitutions of 1868, 1879 and 1898, all so declare, while the four earlier Constitutions—those of 1812, 1845, 1852, and 1864—gave the governor ten days in which to return a bill with his objections, Sundays excepted. It would seem that, since the earlier Constitutions expressly excepted Sunday, and the later Constitutions did not, the intention of the framers of the later Constitutions was that Sunday should be counted in the five days allowed the governor. But this first impression is obliterated

which a judgment was rendered was to be included in the computation of the time within which to take an appeal. *Greer v. Spencer*, 3 Ky. L. Rep. 409; *Agnew v. Philadelphia*, 2 Phila. 370; *Chiles v. Smith*, 13 B. Mon. 460.

And the same rule applied to an appeal from an award of arbitrators. *Hampton v. Erenzeller*, 2 Browne (Pa.) 18.

And where judgment was entered June 13 an appeal taken July 3 was not within twenty days, and is too late. *Agnew v. Philadelphia*, 2 Phila. 370.

In *Smith v. Cassity*, 9 B. Mon. 192, 48 Am. Dec. 420, however, it was held that in computing the time within which a writ of error might be taken the rule was to exclude the day on which the judgment or decree was rendered and include the day of suing out the writ of error.

But in *Chiles v. Smith*, 13 B. Mon. 460, *supra*, *Smith v. Cassity*, 9 B. Mon. 192, 48 Am. Dec. 420, *supra*, was overruled.

And in *Frankfort v. Farmers' Bank*, 20 Ky. L. Rep. 163, 49 S. W. 811, it was held that an appeal granted January 21, 1898, from a judgment rendered January 21, 1898, is too late, under Ky. Civ. Code Pr. § 745, providing that an appeal shall not be granted except within two years next after the right of appeal first accrued, as the time is to be computed from the entry of the judgment, and not from the day of the entry.

In the above case, *Batman v. Megowan*, 1 Met. (Ky.) 533, *infra*, VII. r. was distinguished upon the ground that that case was based upon the peculiar phraseology of the statute, the court holding that the two days next after the election meant the two next or following days.

So, in *Wheeler v. Bent*, 4 Pick. 187, an appeal was permitted to be entered under Mass. Stat. 1817, chap. 190, § 7, requiring such an appeal to be proceeded upon at the next term of the supreme judicial court which should be holden next after the expiration of thirty-four days after such appeal should be made, reckoning the day on which the appeal was made as one of the thirty-four.

Both under the more modern common-law rule, and under the statutory method, however, the general rule is that in computing the time within which a writ of error must be brought or an appeal taken, the day of the entry of the judgment, decree, or order appealed from should be excluded. *Brainard v. Norton*, 14 Ill. App. 643; *Swift v. Tousey*, 5 Ind. 196; *Noble v. Murphy*, 27 Ind. 502; *Faure v. United States Exp. Co.* 23 Ind. 48; *Wright v. Manns*, 111 Ind. 422, 12 N. E. 180; *Carleton v. Byington*, 10 Iowa, 588. *Smith County Comrs. v. Labore*, 37 49 L. R. A.

Kau, 480, 15 Pac. 577; *Calvert v. Williams*, 34 Md. 672; *Chapman v. Allen*, 33 Neb. 129, 49 N. W. 926; *Young v. Whitcomb*, 46 Barb. 615; *John v. Hock*, 6 Lanc. L. Rev. 353; *Carson v. Love*, 8 Yerg. 215; *Bach v. Ginacchio*, 1 Tex. App. Civ. Cas. (White & W.) § 1315; *Bennett v. Keehn*, 67 Wis. 155, 30 N. W. 112; *Smith v. Gale*, 137 U. S. 577, 34 Led. 792, 11 Sup. Ct. Rep. 185; *York's Case*, 1 Abb. (U. S.) 503, Fed. Cas. No. 18,139.

And the last day of the period is to be included. *Chapman v. Allen*, 33 Neb. 129, 49 N. W. 926; *Smith County Comrs. v. Labore*, 37 Kan. 480, 15 Pac. 577; *Carleton v. Byington*, 10 Iowa, 588; *Wright v. Manns*, 111 Ind. 422, 12 N. E. 180; *Faure v. United States Exp. Co.* 23 Ind. 48.

In *Wright v. Manns*, *supra*, as reported in 9 West. Rep. 298, the ruling in *Lange v. Dammler* (Ind.) 9 West. Rep. 52, 11 N. E. 33, was said to have been inadvertent and of no authority.

And in computing a period of one year within which proceedings in error might be commenced, it would commence to run on the day following the day of the final rendition of judgment, and terminate on the day and month numerically corresponding with the date of the entry of judgment in the following year. *Chapman v. Allen*, 33 Neb. 129, 49 N. W. 926; *Smith County Comrs. v. Labore*, 37 Kan. 480, 15 Pac. 577.

And the rule applies to the computation of time on appeal from a decision of the alderman and justice of the peace, and the judgment day is to be excluded. *Thomas v. Premium Loan Assn.* 3 Phila. 425, *Overruling Agnew v. Philadelphia*, 2 Phila. 370, *supra*; *Noble v. Murphy* 27 Ind. 502.

And to judgments of mayors of cities. *Noble v. Murphy*, 27 Ind. 502.

And an appeal from a judgment of a justice of the peace, taken May 4, is in season under the Missouri statute requiring an appeal to be taken in ten days, where the judgment appealed from was rendered April 24, excluding an intermediate Sunday. *Semple & B. Mfg. Co. v. Thomas*, 10 Mo. App. 457.

And so is an appeal from a justice's judgment rendered March 15, taken on the 14th day of April next following. *Faure v. United States Exp. Co.* 23 Ind. 48.

And in *Glascock v. Boyer*, 50 Ind. 391, in which judgment was rendered by a justice of the peace on the 16th of December, and an appeal bond was filed and approved on the 15th of the following January, and the transcript from the justice and the appeal bond were filed

ated when we consider and apply the general rule above referred to. Under the operation of that rule, had not the framers of the earlier Constitutions expressly excluded Sundays from computation in the ten days given the governor, then Sunday would have been counted; whereas since, in the later Constitutions, five days only are allowed,—a time which does not necessarily include a Sunday,—that day (Sunday) happening to be one of the five days is excluded from the count. Where the time stipulated was such that it did not necessarily include Sunday, Sunday is excluded from the computation, without express mention of the fact. Where the time stipulated must necessarily include Sunday, to exclude that day from the computation there must be an express declaration to that effect. Such is the effect of the general rule laid down, and the framers of the several Constitutions under which the state has been governed are presumed to have intended the language and phrases used in consonance therewith. It follows

on the 29th of that month. It was held that the appeal was within the thirty days required.

So, in computing the twenty days allowed by the Pennsylvania arbitration law of March 20, 1810, for an appeal, the day on which an award is entered is to be excluded. *Sims v. Hampton*, 1 Serg. & R. 411; *Frantz v. Kaser*, 3 Serg. & R. 395.

And, an appeal from a decree of the orphans' court, made the 8th of October, 1829, taken the 8th of October, 1830, is within the one year after the confirmation of the account required by Pa. act February 8, 1810. *Ege's Appeal*, 2 Watts, 283.

And under the Texas probate act of 1870, providing that a petition for a review of acts done on the probate side of the district court could be brought within two years from the date of the order, a petition for a review, filed October 14, 1875, is in time, where the order granting letters of administration was made October 13, 1873. *Ramirez v. McClane*, 50 Tex. 598.

So, where a judgment was rendered by the mayor of a city on the 3d of March, and an appeal was taken on the 2d of April following, the appeal required to be taken in thirty days is in time, as the third day of March would be excluded. *Noble v. Murphy*, 27 Ind. 502.

And so is an appeal from a judgment rendered by a mayor on the 24th of February, taken on the 25th of March following. *Swift v. Tousey*, 5 Ind. 196.

And an appeal taken on the 21st of March, from a judgment rendered before an alderman on the 1st of March, is within the twenty days allowed by law for entering an appeal. *Browne v. Browne*, 3 Serg. & R. 496.

And under Ind. Rev. Stat. 1881, § 1231, providing that a party aggrieved may appeal from an order appointing or refusing to appoint a receiver within ten days thereafter without awaiting the final determination of the case, the filing of the record in the appellate court on the 25th day of July is in time, where such an order was made on the 16th day of that month. *Hursh v. Hursh*, 99 Ind. 500.

But where a decision is signed on the 27th of April, under the United States bankruptcy act, the ten days after the entry of the decree or decision within which an appeal may be taken expires on the 7th of May, the 27th of April being excluded in the computation, and an appeal not taken until the 9th of May is: 49 L. R. A.

that, if one of the five days accorded the chief executive in which to return a bill with his objections happens to be Sunday, the same is not to be computed as one of the constitutional "five days." This view is strengthened by the general policy of the law in regard to the first day of the week, and by the sentiment prevailing in Christian countries. In law, Sundays are generally excluded as days upon which the performance of any act demanded by the law is not required. They are held to be *dies non juridici*. And in the Christian world Sunday is regarded as the "Lord's Day," and a holiday, a day of cessation from labor. By statute, enacted as far back as 1838, this day is made in Louisiana one of "public rest." Rev. Stat. § 522; Code Prac. arts. 207, 763. This is the policy of the state of long standing, and the framers of the Constitution are to be considered as intending to conform to the same. They had the power to have written in the provisions of the organic law stipulating the time in which the

too late. *York's Case*, 1 Abb. (U. S.) 503, Fed. Cas. No. 18,139.

So, an appeal perfected June 15, 1885, from a judgment entered June 15, 1883, is in time under a statute prescribing that appeals are to be taken within two years. *Milwaukee County Supers. v. Pabst*, 64 Wis. 244, 25 N. W. 11.

And an appeal taken February 20, 1867, is taken within three months from the enrolment of the decree, as required by Ala. Const. art. 4, § 30, when the decree was taken, entered, and enrolled November 30, 1866. *Walker v. Walker*, 42 Ala. 489.

And under § 407 of the New York Code, requiring in the computation of time that the first day shall be excluded, a notice of appeal served on June 27 is within the one month within which an appeal is authorized, where the order appealed from was entered May 27. *Gallt v. Finch*, 24 How. Pr. 193.

So, under the Iowa statutory rule the six months from the rendition of a judgment or order appealed from within which appeals may be taken expires, where the order appealed from was made on the 3d day of June, 1890, on the 3d day of December, 1890. *Ritchey v. Fisher*, 85 Iowa, 560, 52 N. W. 505.

And where judgment was rendered on the 30th day of March, and an appeal was taken on the 30th day of September following, more than the six months for taking an appeal has not elapsed within the statutory rule for the computation of time so as to invalidate the appeal, because March has thirty-one days, and the time included one day of March and the full six calendar months following it. *Parkhill v. Brighton*, 61 Iowa, 103, 15 N. W. 853.

And where final judgment was rendered on the 25th day of May, 1867, and the transcript was filed on the 24th of May, 1870, on which day process was issued and delivered to the sheriff and by him mailed to the sheriff of the proper county for service, the appeal was taken within the three years provided for by the Indiana statute. *Crawford v. Prairie Creek Ditching Assn.* 44 Ind. 361.

So, under the Ohio statutory rule, an undertaking required by Ohio Rev. Stat. § 5227, providing that a party desiring to appeal shall give an undertaking with sufficient surety to be approved by the clerk of the court within thirty days after the rising of the court, given and approved October 31, 1888, is in time where the

governor should return a bill with his objections words which would have signified an intention to depart in such instance from the policy of the law, but it was not done. When they ordered merely that he must return the bill within five days after its presentation to him, they must be held to have meant days other than those of "public rest." Whatever doubt may exist in the judicial mind as to the proper meaning to be given to the words used, it is, we think, safely resolved in favor of that construction sanctioned alike by the policy of the law and by the moral sentiment of the people. The governor of the state has five days in which to consider a bill presented to him before he is compelled to return it with his objections, and in this computation of days he may exclude an intervening Sunday or other legal holiday. He vetoed the bill involved in this controversy on the 14th of July, which was timely, considering that the 10th of July was Sunday. As it was not thereafter

passed by the two houses of the general assembly by the requisite constitutional vote, his veto to the contrary notwithstanding, the measure did not become a law, and the case of the relators falls.

In reaching the conclusions announced above, the fact that there is no constitutional prohibition against the general assembly sitting on Sundays has not been lost sight of. The general assembly has not heretofore generally held sessions on Sunday, and consideration of what would be the effect of a session on that day, in so far as making the same count, notwithstanding it was Sunday, in the computation of the five days allowed the governor in which to return a bill with his objections, does not properly arise herein. It is therefore unnecessary to determine the same now, and opinion is reserved.

Judgment affirmed.

Rehearing denied March 19, 1900.

court adjourned October 1, 1888. *Bushong v. Graham*, 4 Ohio C. C. 138.

But, under the rule of computation excluding the first day, an appeal taken on the 22d of August from a judgment rendered February 21 is not within the six months prescribed by statute therefor. *Glore v. Hare*, 4 Neb. 131.

And under N. Y. Code, § 253, requiring notice of appeal to be served within twenty days after judgment, where judgment is entered November 14, the time expires with the 4th of the following December, and service on the 5th is too late and worthless. *Young v. Whitcomb*, 46 Barb. 615.

And an appeal bond filed on the 18th day of January is too late, under the Colorado rule for the computation of time that one day shall be included and one day excluded, where the order appealed from was made on the 18th of December of the previous year, as the thirty days expired on the 17th day of January. *Hax v. Leis*, 1 Colo. 171.

And, under the Texas statute, requiring that an appeal bond be given within twenty days after the term of the court at which the judgment was rendered, where the term of court closes on the 16th day of July the twenty days allowed after giving the bond expires on the 5th day of August, and a bond filed on the 6th of August is too late. *Burr v. Lewis*, 6 Tex. 76.

So, a notice of appeal and an undertaking on appeal, filed on August 30, is not filed within sixty days of the determination and entry thereof in the record as required by law, under the statutory method of computing time in Wyoming, excluding the first day and including the last, where the judgment was entered not later than June 30. *Daley v. Anderson* (Wyo.) 48 Pac. 839.

Under these rules, however, an appeal the return day of which falls on a legal holiday is filed in time if filed on the following day. *First Nat. Bank v. Mead*, 29 Pittsb. L. J. N. S. 120; *Snyder v. Kemper*, 15 Lanc. L. Rev. 116.

And the day a justice's judgment is rendered must be excluded in estimating the twenty days for an appeal therefrom, and Monday must be added if the twentieth day falls on Sunday. *John v. Hock*, 6 Lanc. L. Rev. 353, 4 Del. Co. Rep. 109.

Such an appeal is governed by the statutory rule, so that if the last day to taken such an appeal is Sunday it may be taken on the following L. R. A.

ing Monday. *Buckstaff v. Hanville*, 14 Wis. 78; *Monell v. Terwilliger*, 8 Neb. 360.

And where the four days provided for in R. I. Gen. Laws, chap. 248, § 1, providing that an appeal may be taken from a decree of a court of probate by filing bond within forty days next after the decree shall have been made, ends on Sunday, the bond may be filed on the following day. *West v. West*, 20 R. I. 464, 40 Atl. 6.

And the six months' limitation of time to appeal from the date of the judgment, provided for in Washington, if the last day limited falls on Sunday, will run over until Monday under the method of computation of time prescribed by Wash. Code, § 743, so that a notice served on the following Monday is in time. *Spokane Falls v. Browne*, 3 Wash. 84, 27 Pac. 1077.

So, where an award was filed on the 26th of February, an appeal taken on the 18th of March was taken on the twentieth day within the meaning of a provision allowing twenty days to appeal where it was leap year and the 17th of March was Sunday. *Harker v. Addis*, 4 Pa. 515.

And so is an appeal from a decree under Pa. act April 16, 1827, relative to the distribution of money arising from sheriffs' and coroners' sales, made on the 12th of April which was entered on the 3d of May, where the 2d of May was Sunday. *Re Goswiler*, 3 Penn. & W. 200.

But in computing the six months within which after the entry of an order, judgment, or decree an appeal may be taken to the circuit court of appeals by the act of Congress of March 3, 1891, the last day of the six months, though falling on Sunday, is not to be excluded in the computation; and an appeal taken on the following day is too late, as the provisions of the Federal statute extending the time when the last day falls on Sunday in the bankruptcy and other acts, clearly indicate that it was the intention of Congress that all Sundays should be counted as part of the time limited within which an act is to be done under their legislation, unless they are excluded by express provision. *Johnson v. Meyers*, 12 U. S. App. 220, 54 Fed. Rep. 417, 4 C. C. A. 399.

And an appeal is triable under Ga. act November 30, 1892, providing that all cases on appeal shall be returnable to and triable at the next ensuing term after twenty days have elapsed from the filing of the appeal at a term beginning on Monday, though the twenty days from the filing elapsed upon the previous Sunday, as the provision of the Code for comput-

ing time does not apply, there being nothing in this case to be done on the last day. *Merritt v. Gate City Nat. Bank*, 100 Ga. 147, 38 L. R. A. 749, 27 S. E. 979.

It has been held, however, that the common-law rule, including the first day and excluding the last in the computation of a period of time where an act is to be done within a certain number of days, does not apply to computations under Pa. act June 16, 1836, requiring that an appeal from the award of arbitrators shall be entered within twenty days after the day of the entry of the award on the docket, as by the terms of the statute itself the day of filing the award cannot be counted. *Smalts v. Lake*, 2 Phila. 245.

And under Vt. Rev. Stat. chap. 26, § 28, providing that a writ of review may be brought within three years next after the rendition of the judgment to be affected by it, the words "next after the rendition" mean next after the day of rendering, and the day of the rendering of the judgment is excluded from the computation of the three years. *French v. Wilkins*, 17 Vt. 341.

So, under 49 Geo. III. chap. 68, § 5, requiring ten clear days' notice of intention to appeal, the ten days are to be taken exclusively both of the day of the serving of the notice and the day of holding the session. *King v. Herefordshire Justices*, 3 Barn. & Ald. 581.

And the words "ten days at least," in a provision for notice of intention to prosecute an appeal, mean clear days, exclusive both of the day of giving notice and of the day upon which the act is to be done, contemplated by the notice; and such a notice, given November 2, appointing November 12 as a day for hearing, is too late. *Norton v. Salisbury Town Clerk*, 16 L. J. C. P. N. S. 9, 10 Jur. 970, 4 C. B. 32, 1 Lurw. Reg. Cas. 335.

And a notice under a local act requiring seven days' notice at least to be given by an appellant of his intention to bring an appeal, served December 31, January 7 being the day on which appeals were entered, is insufficient, as both the day of giving the notice and the day of holding the sessions must be excluded, the day of bringing an appeal being the day on which it is entered, and not that on which it is held. *Reg. v. Middlesex Justices*, 3 Dowl. & L. 109, 9 Jur. 758, 14 L. J. M. C. N. S. 139.

But the rule of the West Riding Sessions, that, in case of appeal not otherwise directed by law, ten days' notice is to be given exclusive of the day of notice and first day of the sessions, does not apply to a notice of appeal against an order for the stopping up a footway; the statute in such case requiring ten days' notice means ten days' notice, one day inclusive and the other exclusive. *King v. West Riding of Yorkshire Justices*, 4 Barn. & Ad. 685.

And under Michigan supreme court rule 10, providing that a writ of error may be made returnable in not less than twenty days, the time runs from and excludes the date of issue, and includes the return day; and a writ issued August 30 is properly made returnable September 19. *Doyle v. Minzer*, 41 Mich. 549, 50 N. W. 392.

So, in *Traders' Safe & Trust Co. v. Calow*, 77 Ill. App. 146, it was said that there is no rule that the first day on which an appeal was granted does not count in estimating the time within which a bond must be filed, and that counsel have until ten o'clock in the morning following the last day of the time allowed in which to file the bond.

The same rules apply in reckoning backwards from the time of commencement of the time of the appellate court.

Thus, a requirement that citation on appeal shall be served at least twenty-five days before the first day of the term of the supreme court is satisfied by service on the 19th of December, when the first day of the term falls on the 13th day of the succeeding January. *Crawford v. Feder*, 27 Fla. 523, 8 So. 642.

And under the Missouri statute, providing that all appeals taken thirty days before the first day of the next term of the supreme court shall be returnable at such term, the day upon which the appeal was taken is to be excluded and the first day of the next succeeding term of court is to be included, and the appeal is returnable at the next succeeding term of court, if, by such a computation, it was taken exactly thirty days before the first day of that term. *St. Louis v. Hambrick*, 41 Mo. App. 648.

And under the statutory rule for the computation of time, an appeal taken on the 4th day of February is returnable at the term of the supreme court beginning March 5, this being leap year. *Deere v. Hucht*, 32 Mo. App. 153.

And under Wagner's Stat. 850, § 20, providing that all appeals allowed ten days before the first day of the term of the appellate court next after the appeal is allowed, shall be determined at such term unless continued for cause, the ten days is to be computed under the statutory rule for computing time by including the day on which the appeal was taken and excluding the first day of the term. *Hodgson v. Banking-House*, 9 Mo. App. 24.

In the above case, *Taylor v. McKnight*, 1 Mo. 120, *supra*, was distinguished upon the ground that the wording of the statute considered in that case was different and peculiar.

In that case it was held that, under Mo. act December, 1820, § 14, providing that the writs of error shall be made returnable to the first day of the next term unless applied for within twenty days next preceding the term, when the same shall be made returnable to the second term ensuing the date of the writ, a writ issued on the 2d day of October, returnable to the next term thereafter, which commences on the 22d of that month, will be dismissed, as the expression, "within twenty days next preceding the term," literally means after the commencement of the twentieth day next before the commencement of the term, and as the writ is tested on the twentieth day it is clearly within the twenty days next preceding such term.

Under the Vermont statute, providing that an appeal from probate in writing shall be filed in the registrar's office at the time of returning the commissioner's report or within twenty days after such return, the party appealing is entitled to twenty days after such return, within which to file his appeal, not including the day of the return, the statute being construed as though it read "within twenty days after the day of the return." *Robinson v. Robinson*, 32 Vt. 738.

In computing the time within which a suspensive appeal may be taken in Louisiana, neither nonjudicial days nor the day the judgment was signed nor the day the appeal was taken are to be counted in the computation. *State ex rel. Mercier v. Superior Dist. Ct. Judge*, 29 La. Ann. 223; *Tupery v. Edmondson*, 29 La. Ann. 850; *Garland v. Holmes*, 12 Rob. (La.) 421.

So, in computing the six months within which a certiorari may be filed after judgment sought to be reviewed, the estimate must be made with reference to first and last days of the period by including one and excluding the other. *Jones v. Smith*, 28 Ga. 41.

And a certiorari filed on the 12th of Septem-

ber, is not within the three months after rendition of the judgment sought to be reversed as provided for by Ga. Code, § 2920, where the case was tried and judgment rendered on the 12th of January. Barrett v. Devine, 60 Ga. 632.

Nor is a certiorari filed January 12, 1881, within the three months, where the verdict sought to be reviewed was obtained on the 12th of October, 1880. Western & A. R. Co. v. Carson, 70 Ga. 388.

And a certiorari filed on the 28th of May, 1858, to review a judgment rendered on the 27th of November, 1857, is too late, as, excluding the 28th of November, the period will expire on the 27th of May. Jones v. Smith, 28 Ga. 41.

So, a notice to magistrates of an intention to apply for a certiorari to review an order made by them for the allowance of accounts of surveyors of highways on the 25th day of the month, served upon the 20th of that month, is not a sufficient six days' notice as required by 13 Geo. II. chap. 18, § 5. Rex v. Cumberland, 4 Nev. & M. 378. 1 Harr. & W. 16; Rex v. Goodenough, 2 Ad. & El. 403.

As to appeals in probate court, see also Cawfield v. Brown, 45 Ala. 552, and Field v. Gamble, 47 Ala. 443, *supra*, VII. 1.

8. Steps taken to perfect appeal.

The general rule that the day on which an act was done from which time is to be computed must be excluded from the count applies to the computation of the time within which appeal bonds are required to be given. Bach v. Glinacchio, 1 Tex. App. Civ. Cas. (White & W.) § 1315; Brainard v. Norton, 14 Ill. App. 643; Ewing v. Bailey, 5 Ill. 420.

And an undertaking filed on the tenth day after the rendition of judgment is within ten days. McKinley v. Chapman, 37 Neb. 378, 55 N. W. 882.

And where the giving of an appeal bond is required to be within thirty days, performance on the 30th day is sufficient. Morgan v. Stittigan (Ohio) 10 West. L. J. 74.

But under Miss. Code 1892, § 1525, providing that when process shall be required to be served or notice given any number of days, the day of serving the process or of giving the notice shall be excluded, and the day of appearance included; and in all other cases, when any number of days shall be prescribed, one day shall be excluded and the other included, and when the last day falls on Sunday it shall be excluded; but in other cases Sunday shall be reckoned in the computation of time, when the last day of the period falls on Sunday, as it is to be excluded, the first day is of necessity included; and therefore an order made November 24, 1897, requiring additional security within sixty days from date, is not complied with by the filing of a new bond on the 24th day of January, 1898. Nickles v. Kendrick, 76 Miss. 334, 24 So. 534.

And in Bennet v. Nichols, 4 T. R. 121, it was held that a defendant has four clear days after final judgment to put in bail in error. See, also Bushong v. Graham, 4 Ohio C. C. 138; Hax v. Lels, 1 Colo. 171; Burr v. Lewis, 6 Tex. 76; and Daley v. Anderson (Wyo.) 48 Pac. 839, *supra*, VII. f, 2, in which it would appear that the act of filing an undertaking constituted taking an appeal.

So, the time given by the court in a case within which appellants may file their bills of exceptions is under authority conferred by statute, and the statutory rule for computing time, excluding the first day and including the last and if the last day be Sunday also excluding it, 49 L. R. A.

applies. State *ex rel.* McCoy v. Thorn, 28 Ind. 306; St. Louis & S. F. R. Co. v. Gracy, 128 Mo. 472, 28 S. W. 736, 29 S. W. 579.

And where an appeal in chancery is entered on the 20th day of June, and on the 80th of the same month assignments of error are filed, they are filed within the time prescribed by special rule 4 of the Florida supreme court regulating appeals in chancery requiring such filing within ten days after the bill is entered. Jacksonville, M. & P. R. & Nav. Co. v. Broughton, 38 Fla. 139, 20 So. 829.

But under § 23 of the Iowa Code, providing that in computing time the first day shall be excluded and the last day included, where judgment is rendered on the 21st of October, and ten days are given to file a bill of exceptions, a bill of exceptions signed by the judge on the 1st day of November is too late. Manning v. Irish, 47 Iowa, 650.

So, where the court allows appellants thirty days' time to prepare their bill of exceptions upon the 12th day of May, and the bill of exceptions is filed on the 11th day of June following, excluding the 12th day of May and including the 11th day of June in the computation brings the filing to the thirtieth day, which is in time. State *ex rel.* McCoy v. Thorn, 28 Ind. 306.

In the above case, Brown v. Busan, 24 Ind. 194, *supra*, VII. b, 1, was distinguished upon the ground that there the question arose upon the construction of a contract, and that the doctrine of that case is not applicable to the question here presented.

And under an agreement that a bill of exceptions may be signed within sixty days after the adjournment of the court, the sixty days expire where the court adjourns on May 2, on the 1st of July following. Loosse v. Vogel, 80 Ala. 308.

And sixty days from date, given a defendant on the 9th day of August to file his bill of exceptions, expires October 8, excluding the 9th day of August from the computation; and where the bill is filed October 9, it is too late and will not be considered on appeal. State v. Harris, 121 Mo. 445, 26 S. W. 558.

And a bill filed on the 2d of February, 1874, is one day too late under such an allowance, within the Indiana rule for the computation of time, where the cause was tried December 3, 1873. Schoonover v. Irwin, 58 Ind. 287.

And so is a bill of exceptions filed on the 30th day of July, when final judgment was rendered on the preceding 30th of May. Byers v. Hickman, 36 Ind. 359.

And a bill filed on February 26 is one day too late where the motion for a new trial was overruled on the preceding 27th of December. Citizens' Street R. Co. v. Albright, 14 Ind. App. 438, 42 N. E., 1028, Rehearing denied in 14 Ind. App. 433, 42 N. E. 238.

So, under the rule for the computation of time requiring that the first day be excluded and the last day included, where ninety days' time was given to file a bill of exceptions, and the bill was presented to the judge on September 17, and signed by him on the 18th, it is one day late, where the motion for a new trial was overruled and judgment was rendered on the preceding 18th of June. Kelly v. John, 13 Ind. App. 579, 41 N. E. 1069.

And in a criminal prosecution in which the defendant was sentenced September 15, 1890, a bill of exceptions required to be filed ninety days from date was too late where it was not filed until the 15th day of December, 1890, as that was the ninety-first day, and the bill will not be deemed to have been filed. State v. Seaton, 106 Mo. 198, 17 S. W. 169.

And so where an appellant has ninety days from the date at which a motion for a new trial was overruled in which to file his bill of exceptions, the first and last days are both to be excluded; and where the bill was presented for signature September 24, and the motion for new trial was overruled June 24, the bill is too late. *Keeler v. Helms*, 126 Ind. 382, 26 N. E. 81.

Likewise, in computing the time under the 28th rule of court providing that unless a declaration be filed within twelve months of the first day of the term to which an appeal is entered, a *non pros.* shall be entered, the first day of the term is excluded; and where appeals were filed September 16, 1850, the twelve months have not yet expired so as to authorize a *non pros.* on September 16, 1851. *Wayne v. Duffy*, 1 Phila. 367.

So, as a general rule when time is given until a day certain to file a bill of exceptions, if it is filed on or before that day it is in time. *Newport News & M. Valley R. Co. v. Thomas*, 96 Ky. 613, 29 S. W. 437; *Gottlieb v. Fred W. Wolf Co.* 75 Md. 126, 23 Atl. 198; *St. Louis & S. F. R. Co. v. Gracy*, 126 Mo. 472, 28 S. W. 736, 29 S. W. 579; *CONWAY v. SMITH MERCANTILE CO.*

Though the contrary rule obtains in Indiana. *Hartman v. Ringgenberg*, 119 Ind. 72, 21 N. E. 464; *Corbin v. Ketcham*, 87 Ind. 138; *Erb v. Moak*, 78 Ind. 569; *De Haven v. De Haven*, 46 Ind. 296.

So, in computing the time given by the court to make and serve a case on appeal, the first day is excluded and the last day is included. *Scruton v. Hall*, 6 Kan. App. 714, 50 Pac. 964.

And where the last day of a term given by the court to a party to make and serve a case on appeal is Sunday it is excluded, and the case may be filed upon the following day. *Ibid.*

And where an order is granted extending the time to a designated date, the party has all of that time within which to file his case. *St. Louis Commission Co. v. Calloway*, 5 Okla. 393, 47 Pac. 1088.

And under an order granting a party to the 28th of January in which to file and serve a statement of facts, a statement filed on the 27th of January and served on the 28th is in season. *State ex rel. Bickford v. Benson*, 21 Wash. 865, 58 Pac. 217.

So, notice of application for settlement of a statement of facts, required by the Washington statute to be served not less than three days before the time of hearing, given on the 9th of July for a hearing on the 12th, is in time, under Wash. Code Proc. § 794, prescribing that in the computing of time the first day shall be excluded and the last day included. *Martin v. Sunset Teleph. & Teleg. Co.* 18 Wash. 260, 51 Pac. 376.

But a statement of grounds of appeal under 4 & 5 Wm. IV. chap. 76, § 81, requiring them to be served at least fourteen days before the sessions of the court to which the appeal is taken, is not duly served unless fourteen days elapse between the day of service and the first day of the sessions computed exclusively. *Queen v. Shropshire Justices*, 8 Ad. & El. 173.

So, it was held under Ky. Code, § 343, requiring that the record on an appeal must be lodged with the clerk of the appellate court within sixty days from the act of rendering the judgment, that the day on which the judgment was rendered must be included in the computation of the sixty days. *Wood v. Com.* 11 Bush, 220.

But the rule is different under the more modern cases, as well as under the statutes for the computation of time.

Thus, the rule that in computing time the day on which the time commenced to run is to

be excluded, and the day to which it is to run is to be included, applies to the computation of time within which a certified copy of the record must be filed in the appellate court on appeal under the Illinois practice act, providing that if ten days shall have intervened between the date of the judgment appealed from and the commencement of the term of the appellate court, the certified record of the cause shall be filed on or before the tenth day of the succeeding term. *Chicago, B. & Q. R. Co. v. Evans*, 39 Ill. App. 261.

And under the New Mexico statutes, requiring the record on a writ of error to be filed in the supreme court at least ten days before the first day of the term, either the day of filing or the first day of the term may be included in the computation; and if the record was filed December 27, and the court convened on the 6th of January, the rule is substantially complied with. *Albuquerque v. Zeiger*, 5 N. M. 518, 25 Pac. 787.

So, under Hill's (Or.) Anno. Laws, § 541, providing that upon an appeal being perfected the appellant must by the second day of the regular term of the appellate court file a transcript of the cause, such second day is included, and the filing of a transcript upon that day is in time. *Wachsmuth v. Routledge* (Or.) 51 Pac. 413.

But when the statute requires that where ten days intervene between the last day of the term of a court from which an appeal is taken and the first day of the term of the appellate court the record shall be filed in the appellate court on or before the 10th day of its term, the record filed on the 15th of March when the term began on the 5th is too late. *Metropolitan Accl. Asso. v. Froiland*, 59 Ill. App. 513.

So, Ohio Rev. Stat. § 4951, prescribing the method for the computation of a period of time, applies to magistrates, so that if the last day for filing a transcript on appeal falls on Sunday, it may be filed the next day. *Riders v. Green* (Ohio) 9 Am. Law Rec. 634.

And where a delay of ten days for filing a transcript is granted, and the ninth day is Christmas and the tenth day Sunday, it is sufficient to file it on the eleventh day, as the two last days of the delay, not being legal days, should not be counted. *Gueringer v. His Creditors*, 33 La. Ann. 1279.

And where leave is given to a defendant on the 14th day of April to file a bill of exceptions within sixty days the last day is June 13, and if that be Sunday the bill may be filed on the following Monday. *Evans v. Chicago & A. R. Co.* 76 Mo. App. 468.

But Ohio Code Civ. Proc. § 597, providing that if the last day to perform an act falls on Sunday, it may be done on Monday is applicable only to cases provided for in the Code, and does not apply to the filing of a transcript under § 113 of the Justices Code, *Swan & S. 419*, making it the duty of the appellant to file a transcript with the clerk of the court of common pleas on or before the 30th day from the rendition of the judgment appealed from; and if the 30th day falls on Sunday the transcript cannot be filed on the next succeeding day. *McLees v. Morrison*, 29 Ohio St. 155.

And under Mich. Comp. Laws 1871, §§ 5432, 5433, providing that a party taking an appeal from a justice's court must present to the justice an affidavit and bond within five days after the rendition of the judgment, the fact that the 5th day is Sunday does not authorize the presenting of such affidavit and bond on the following Monday. *Dale v. Lavigne*, 31 Mich. 149.

Under the provision of the Louisiana Code,

that in all cases where delay is given either to do something or to answer, neither the day of serving the notice nor that on which the act is to be done or the answer filed is included, a transcript filed in the appellate court on the 22d of June is in season, under a rule that the record must be filed in the appellate court before the expiration of the tenth day after filing the bond where the bond was filed on the 11th of June, as there is no difference between requiring the performance of an act within ten days of a given time and a rule which requires the same thing to be done before the expiration of the tenth day of the same time. *State ex rel. Solari v. Ellis*, 40 La. Ann. 793, 5 So. 63.

g. To executions.

1. Notices and sale under, generally.

Where there is no provision of law for the computation of time, in order to determine whether an execution has been issued within five years after the entry of judgment, the period must necessarily commence with the day on which the judgment was entered. *Aultman & T. Co. v. Syme*, 91 Hun. 632, 30 N. Y. Supp. 528, 87 Hun. 295, 84 N. Y. Supp. 379.

And N. Y. Laws 1892, chap. 677, as amended by Laws 1894, chap. 447, declaring that the day from which any specified number of days, weeks, or months of time is reckoned shall be excluded in making the reckoning, does not apply to a computation of years, no similar provision being made for such a computation, and the five years from the entry of final judgment during which an execution can be issued under N. Y. Code Civ. Proc. § 1377, is not to be reckoned by that rule. *Aultman & T. Co. v. Syme*, 163 N. Y. 54, 57 N. E. 168, 91 Hun. 632, 36 N. Y. Supp. 528.

And see *Williams v. Lane*, 87 Wis. 152, 58 N. W. 77, *supra*, VI. b. But see *Grant v. Pad-dock*, 30 Gr. 812, 47 Pac. 713, *supra*, IV. b.

So, in computing the twenty-one days during which a sheriff is required to advertise lands to be sold under execution, the day of the commencement of the advertisement and the day of sale may both be counted. *Manning v. Dove*, 10 Rich. L. 395.

And where execution upon a judgment was stayed for a designated number of days from the time of signing the judgment, as execution could have issued upon the judgment on the day it was signed had it not been stayed, that day must be included in the computation of the duration of the stay. *Tucker v. White*, 19 Ind. 253.

In the above case, it was said that this is not a case where the statute requires an act to be done, like the granting of a new trial, for example, within a given number of days, the question being simply, When did the designated number of days from the act done expire?

So, in *Spencer v. Champion*, 13 Conn. 11, it was said that upon notices of sales under execution the day of the publication of notice has always been computed.

But in *Commercial Bank v. Ives*, 2 Hill, 355, it was held that computation of the thirty days after the expiration of which from the entry of a judgment a *fi. fa.* may be issued, excludes the day of entering the judgment, as either the first or last day is to be counted, one exclusive and the other inclusive, and an issue of a *fi. fa.* on November 26 is not irregular where judgment was entered October 27, 1841.

And an advertisement of a sheriff's sale of land on the 9th of the month to sell on the 19th is a sufficient ten days' notice within the Kentucky statute, the day of posting up the notice or that of making the sale, but not both, be-
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ing excluded. *Sanders v. Norton*, 4 T. B. Mon. 464.

So, 2 Ind. Rev. Stat. 1876, chap. 217, § 467, providing that the time and place of making a sale of real estate on execution shall be publicly advertised by the sheriff for at least twenty days successively before the day of sale, by posting up written or printed notices, intends that the first advertisement should be made fully three weeks or twenty-one days before the sale, excluding either the day of the first publication or the day of sale in the computation. *Meredith v. Chancey*, 59 Ind. 466.

And the provision of the Indiana statutes requiring the advertisement of a sheriff's sale of real estate by publication in a newspaper of the county for three weeks successively intends that the first advertisement shall be made fully three weeks or twenty-one days before the sale, excluding either the day of the first publication or the day of the sale. *Smith v. Rowles*, 85 Ind. 264.

And notice of a sheriff's sale under that provision, published in a newspaper January 24, and 31, and February 7, is sufficient under the statutory rule for the computation of time, where the sale was to occur February 14. *Hill v. Pressley*, 90 Ind. 447.

But notice of a sheriff's sale, required to be given by publication once a week during three successive weeks previous to the sale, published on October 23d, sale to take place November 12, is insufficient, as the last day is to be excluded. *Erle Sav. Fund & Bldg. Assn. v. Thompson*, 13 Phila. 511.

And the three weeks required by Pa. act June 16, 1836, for the advertisement of the sale of real estate by the sheriff, must be computed by excluding both the first and the last days, and where the first advertisement was December 9, the counting would be of three weeks from December 10 and the last day of the period would expire on the 30th, and as the required time of publication must be previous to the day of sale, the sale could not take place until December 31. *Athens Nat. Bank v. Frost*, 3 Pa. Dist. R. 601.

In the above case, *Duffy v. Ogden*, 64 Pa. 240, *infra*, VII. m, was distinguished upon the ground that in that case the first and last days were counted to make up the time on the ground that the notice required was measured by the terms of the act itself.

So, Ohio Code, § 597, providing for the inclusion of the last and the exclusion of the first day in computing time, does not apply to notice of the time and place of a sale on execution, required to be given for thirty days before the day of sale, as that is not a case where an act is to be done within a certain time; and in computing the time for such notice, the day of sale is excluded, and the day upon which the advertisement was first made may be included. *Hagerman v. Ohio Bldg. & Sav. Assn.* 25 Ohio St. 186.

But a sale under La. Sess. Acts 1817, p. 34, § 14, requiring that property should not be sold in less than thirty days after advertisement of notice, made on the thirtieth day after the advertisement, was sufficient under the rule existing in Louisiana previous to the adoption of the Code of Practice, the rule then being to exclude one day and include the other. *Robinet v. Compton*, 2 La. Ann. 846.

And in computing the thirty days under the Kansas statute requiring publication of notice of sheriff's sale of real estate for at least thirty days before the day of sale, the day of the first publication is to be included and the day of sale excluded, and thirty full days need not elapse between the day of the first publication and the

day of sale; and where the first publication was October 13th and the sale November 12th, the notice is sufficient. *Northrup v. Cooper*, 23 Kan. 432.

In the above case, *Garvin v. Jennerson*, 20 Kan. 371, *supra*, VII. d. 5, was distinguished on the ground that the filing of the deposition in that case was a single and instantaneous act, while the publication in the case at bar was a repeated and continuous act.

But an execution issued on July 30 upon a judgment rendered July 26 is not issued after the expiration of four days in accordance with a provision of law therefor, under Ga. Code, § 4, providing that where the number of days is prescribed for the exercise of any privilege or the discharge of any duty only the first or last day shall be counted. *Knoxville City Mills Co. v. Lovinger*, 83 Ga. 563, 10 S. E. 230.

And the purpose of R. I. Judiciary act, chap. 37, § 11, providing that in case of a levy upon real estate notice thereof shall be given for the space of three months after such levy and before the real estate shall be exposed for sale, is to provide a notice of three full calendar months, and time is to be reckoned both after the levy and before the sale, excluding each, and a sale on December 5, of real estate levied on September 5, is void. *Goldsworthy v. Coyle*, 19 R. I. 323, 33 Atl. 466.

So, the words "without interval of more than ninety days," in the Alabama statute providing for saving and continuing the lien of an execution, mean the same as no more than ninety days, and the ninety days from the first day do not expire until the ninety-first has passed. *Lang v. Phillips*, 27 Ala. 312.

And where under that act the original execution was returned April 14, and an alias was issued on the 14th of July next thereafter, the lien is not lost. *Ibid*.

And Delaware act of 1832, providing that no person imprisoned by virtue of execution process shall be detained or kept in prison by virtue thereof longer than five days from the date of such commitment inclusive, unless fraud be alleged or recognizance entered into, requires in express terms that the day of commitment shall be excluded in computing the five days. *Re Fortner*, 2 Harr. (Del.) 461.

But under the rule of the mayor's court of the city of New York, requiring a ca. sa. against the principal, issued for the purpose of charging his bail, to lie four days in the sheriff's office exclusive of the return day, it is only the return day which is exclusive, and the day on which the writ is delivered to the sheriff need not also be reckoned exclusively, and it is sufficient that a writ returnable on the 19th was delivered to the sheriff on the 15th of the same month. *Gillespie v. White*, 16 Johns. 117.

And in reckoning the time under a statute requiring a justice to fix the day of trial of a claim of right of property in goods taken in execution which must be five days after the claim is filed, the day on which the claim was filed must be counted. *Long v. McClure*, 5 Blackf. 319.

And an execution dated July 29, 1819, is properly made returnable on the 28th of August, under a statute providing that thirty days at least shall elapse between the teste and return, counting the day of the teste exclusive, and the day of the return inclusive, as the statute does not provide that the thirty days shall elapse between the day of the teste and the day of the return. *Ogden v. Redman*, 3 A. K. Marsh. 234.

So, a constable holding an execution dated March 7 and returnable in thirty days from the date, has the whole of the 6th day of April 49 L. R. A.

within which to execute and return it, as the thirty days do not expire until that time. *Homan v. Liswell*, 6 Cow. 659.

And a one year period within which an execution may be returned expires upon the same day and month of the year following the one upon which the execution is dated, and where that day is Sunday the execution may be returned upon the following Monday without a breach of the sheriff's bond. *Williams v. State*, 5 Ind. 235.

And where a fieri facias was issued by a justice, dated on the 21st of July, the thirty-six days from the date of the execution within which the constable is bound to return it expires on the 25th of the following August, and a scire facias against the constable dated on the 26th of that month for not returning the execution is not objectionable as having issued too soon. *Ryman v. Clark*, 4 Blackf. 329.

But under the old common-law rule the six months during which, after the expiration of his office, a sheriff was not liable to be called upon to return process, under 20 Geo. II. chap. 37, § 2, was to be computed by reckoning the day on which he went out of office as part of the six months. *Kling v. Adderley*, 2 Dougl. 463.

So, a return of an execution in less than ninety days computed by the statutory rule is irregular under the Missouri statute making executions issued by a justice of the peace returnable ninety days from date. *Huhn v. Lang*, 122 Mo. 600, 27 S. W. 345.

And in *Adams v. Cumiskey*, 4 Cush. 420, it was said that there is not, and never has been, any difference in the legal effect of the different words used to prescribe the times of returning executions, and that "within," "at the end of," and "in" a certain number of days or months have the same meaning; but the question in the case was as to the right to return an execution before the prescribed time, and not as to counting the first or last day.

2. Redemption from sale under.

The modern rule, both at common law and under the statutes, is that in computing the time allowed by law for redemption from a sale under execution, the day on which the sale was made is excluded. *Roan v. Rohrer*, 72 Ill. 582; *Bigelow v. Willson*, 1 Pick. 485; *Gorham v. Wing*, 10 Mich. 486; *Jones v. Planters' Bank*, 5 Humph. 619, 42 Am. Dec. 471; *Rothwell v. Gettys*, 11 Humph. 135; *Backer v. Pyne*, 130 Ind. 288, 30 N. E. 21. And the year provided for by the Illinois statute would include, where the sale was on the 9th of September, the 9th of September in the following year. *Roan v. Rohrer*, 72 Ill. 582.

A period of time prescribed for redemption from a sale under execution is computed by allowing the full number of calendar months from the date of the sale, so that where the sale was had on the 15th of August, 1822, a creditor entitled to fifteen months has the whole of the 15th of November, 1823, in which to redeem. *Snyder v. Warren*, 2 Cow. 518, 14 Am. Dec. 519.

Redemption of land, however, the last day for which falls on Sunday, must be made the day before. *Lindenmuller v. People*, 33 Barb. 548, *dictum*.

But where, under a statute providing that a redemption from a sheriff's sale may be made by a creditor on or after the last day of the fifteen months limited for redemption by the debtor at the sheriff's office within twenty-four hours after the making of the previous redemption, if a Sunday intervenes after the previous redemption, as the sheriff's office is not required to be kept open on Sunday, it will be deemed

dies non within the contemplation of the statute, and the statute will be deemed to provide for redemption within twenty-four hours of the day or days in which the sheriff is required to be in attendance at his office to enable the creditor to exercise his right. *Porter v. Pierce*, 120 N. Y. 217, 7 L. R. A. 847, 24 N. E. 281.

The three months given by law to a creditor after the expiration of the year, given to a debtor to redeem from a sale under execution in New York, commences to run on the day succeeding the expiration of the year, and that day is counted inclusively, so that if the year expires on the 18th day of a month, the succeeding day is counted as part of the three months. *People ex rel. Collier v. Sheriff of Broome*, 19 Wend. 87.

And under a statute providing that persons seeking to redeem from a sheriff's sale shall give to the purchaser or redemptioner, as the case may be, two days' notice of his intention to apply to the sheriff for that purpose, notice given on August 4 of an intention to redeem on the 6th is sufficient, as, excluding the day of service, two clear days are left, including the day of redemption. *Scott v. Patterson* (Wash. Terr.) 20 Pac. 593.

h. To sales under mortgages and trust deeds.

The general rule in regard to notices of sale on foreclosure or under a trust deed is that the day of performance is to be included, and the day from which the notice begins to run is to be excluded. *Gantz v. Toles*, 40 Mich. 725; *Magnusson v. Williams*, 111 Ill. 450; *Teucher v. Hiatt*, 23 Iowa, 527, 92 Am. Dec. 440.

And a right to redeem mortgaged property at any time within one year from the day of the sale under the mortgage will exist up to and during the whole of the same day of the succeeding year. *Teucher v. Hiatt*, 23 Iowa, 527, 92 Am. Dec. 440.

So, in computing the time when a notice of sale of premises under a mortgage foreclosure shall be affixed to the door of the courthouse under a statute providing therefor, one of the days upon which the acts are to be done is excluded and the other included. *Bunce v. Reed*, 16 Barb. 347.

And a sale under a deed of trust requiring the land to be sold after an advertisement of ten days is void where the first publication was made October 8, and the sale was made October 18, as the day upon which the advertisement is first published is to be excluded in computing the time when the publication should begin. *Lerch v. Snyder*, 2 Tex. Civ. App. 421, 21 S. W. 183.

So, under Md. act 1826, chap. 192, requiring at least twenty days' notice in two or more of the daily papers published in the city, of the time, place, manner, and terms of a mortgage sale, an advertisement inserted in two daily newspapers on the 2d of November, which was continued in those papers until a week previous to the day of the sale, which took place November 29, 1858, is sufficient. *White v. Malcolm*, 15 Md. 529.

But a sale under a trust deed passes no title where by its terms twenty days' notice was to be given, and the advertisement was published first on May 14 noticing the sale for June 2. *Siemers v. Schraeder*, 14 Mo. App. 346.

And when thirty days' notice by publication is required by a deed of trust, thirty days should intervene between the first day of publication and day of sale. *German Bank v. Stumpf*, 73 Mo. 311.

But publication of a notice of sale in a newspaper on the 25th day of June, and continuously thereafter daily to and including the 25th 49 L. R. A.

of July, on which day the sale was made at noon, is a sufficient publication under such a trust deed. *Mallory v. Kessler*, 18 Utah, 11, 54 Pac. 892.

And a notice of sale under a trust deed authorizing a sale on default, thirty days' notice having been previously given of the day of such sale, published on the 23d day of August, stating that the lands would be sold on the 22d day of the following September, upon which day the lands were sold, was published the requisite length of time. *Magnusson v. Williams*, 111 Ill. 430.

And where the day before the day for which a sale of real estate is set is Sunday, it is to be reckoned in the thirty days during which notice of sale is to be given by law. *Matthews v. Arthur* (Kan.) 59 Pac. 1067.

So, the notice in a proceeding to foreclose a mortgage by advertisement published August 3d, and from that time successively once in each week, to and including September 14, the day of the sale, is a sufficient six weeks' publication under the statutory rule excluding the first day of publication and including the day of sale, where there is nothing in the statute to indicate that the six weeks are to be exclusive of the day of sale. *Worley v. Naylor*, 6 Minn. 102, 6 Ill. 123.

And under a statute requiring notice of sale under a power in a mortgage to be published for twelve weeks previous to the time fixed for the sale, the first publication of the notice must be eighty-four days or twelve full weeks before the sale, one day being included and the other excluded, and publication must be in every intervening week, and it will not do to publish it twelve times in twelve different weeks, if twelve full weeks have not elapsed. *Bunce v. Reed*, 16 Barb. 347.

In Georgia, however, in computing the time of service of a rule *nisi* to foreclose a mortgage on land, the day on which the rule was served should be counted, so that if it were served on the 2d of January, 1877, the required three months would elapse before the 2d day of April, 1877, and such service would be sufficient. *English v. Oxburn*, 59 Ga. 392.

But a notice of publication and sale in a mortgage foreclosure under a statute requiring six months' notice, in which, in order to make six months the day of publication and sale must be both included in the computation, is not sufficient. *Jackson ex dem. Hyer v. Van Valkenburgh*, 8 Cow. 200.

So, personal service of notice of postponement of a mortgage sale, made on the 1st for the 15th of the month, constitutes a sufficient fifteen-day notice, as one day is included and the other excluded. *Westgate v. Handlin*, 7 How. Pr. 372.

And in computing the one year during which an adverse possession will foreclose a right of redemption under a mortgage, a tender on the 3d of October in one year is good, where the entry was made on the 3d of October in the previous year. *Ricker v. Blanchard*, 45 N. H. 39.

So, under Mass. Rev. Stat. chap. 107, § 18, providing for a bill in equity for the redemption of real estate sold under mortgage at any time within three years, during which peaceable possession must be held and continued by the mortgagee in order to foreclose the right of redemption, the day of the entry is to be excluded in computing the three years. *Fuller v. Russell*, 6 Gray, 128.

And in computing the three years after entry for condition broken, within which a mortgagor may redeem under the Maine statutes, the day

of entry is to be excluded. *Wing v. Davis*, 7 Me. 31.

But where, under 2 N. Y. Rev. Stat. 295, § 16, allowing ten years after the termination of infancy within which an heir at law may redeem lands of his ancestor under foreclosure, one who becomes of age December 13, 1841, has all that day in which to sue, and that day will be included in the computation of the ten years, so that his right of action expires with the expiration of the 12th day of December, 1851. *Phelan v. Douglass*, 11 How. Pr. 193.

And under Mass. Gen. Stat. chap. 140, § 1, with reference to redemption of land from a mortgage providing that possession continued peaceably for three years shall forever foreclose the right of redemption, where the three years of peaceable possession expires on Sunday, a tender on the following Monday is not within the three years, and is too late. *Haley v. Young*, 134 Mass. 364.

1. To mechanic's liens.

The computation of time under mechanic's lien laws is, with a few exceptions, governed by the same general rules, applied to actions, contracts, statutes, etc.

Thus, under the Rhode Island statutory provision that no lien shall attach for materials furnished, unless the person furnishing them shall within sixty days after the materials are placed on the land give notice, the sixty days are to be counted as prior to the date of notice, and where notice was given on January 6, 1890, counting backward from that day and beginning with the 5th, the sixty days go back to and include November 7, 1889, so that the party entitled to the lien would be warranted in including all completed materials furnished on and after that day. *Paterson v. Saint Thomas' Church*, 18 R. I. 349, 27 Atl. 449.

And a mechanic's lien for materials furnished, the last item of which was delivered on the 9th of January, 1873, filed for record on the 9th of July, following, is filed before the expiration of the six months allowed by Md. Code, art. 61, § 23, in which to file a claim for lien, as the day upon which the last item is charged is to be regarded as a mere point of time, and is to be excluded in the computation of the six months. *German Lutheran Evangelical St. Matthews Cong. v. Helse*, 44 Md. 453.

So, in the computation of time under the New York statute requiring the filing of a new docket before a year expires from the original filing to sustain a mechanic's lien, the day of filing should be excluded, and the last day on which the same could be continued should be included. *Haden v. Buddensick*, 49 How. Pr. 241, 6 Daly, 3.

And in computing the ten days before the filing a lien in which a subcontractor is required by law to give notice, the first day must be excluded under the Missouri statutory rule, and the last day included. *Hahn v. Dierkes*, 37 Mo. 574; *Schubert v. Crowley*, 33 Mo. 564.

And notice served September 1 is not a sufficient ten days' notice when the lien was filed September 10. *Schubert v. Crowley*, 33 Mo. 564.

And in computing the six months provided for by Pa. mechanic's lien law June 16, 1836, § 14, providing that the lien remains until the expiration of six months after the work shall have been finished or materials furnished, although no claim shall have been filed therefor, either the day on which the last work is done or the day on which the claim is filed must be excluded. *Re Martin*, 4 Fed. Rep. 208.

And a claim filed July 23, for materials furnished January 22, is too late. *Hoops v. Parsons*, 2 Miles (Pa.) 241.

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So, no lien can arise for materials furnished for the improvement of realty, under Ga. Civ. Code, § 2801, unless, as provided in § 2804, the claim of lien be recorded within three months after such material shall have been furnished, and, when it was furnished on the 6th day of May, recording on the 6th day of August is too late. *Jones v. Kern*, 101 Ga. 309, 28 S. E. 850.

Neither the statutory nor the common-law rule with reference to excluding the last day when it falls on Sunday, however, seems to have been applied to computations of time with reference to mechanic's liens.

Thus, when the last day of the year within which, in Wisconsin, an action to enforce a lien must be brought, is Sunday, the action is not in time if not brought until the next day. *Williams v. Lane*, 87 Wis. 152, 58 N. W. 77.

And under N. Y. mechanic's lien law 1875, chap. 379, providing that no lien shall bind the property longer than ninety days after it is filed, unless within that time an action be commenced and a *lis pendens* filed and an entry of the notice made on the lien docket, *lis pendens* filed on the ninety-first day after the notice of lien is of no effect, though the ninetieth day fell on Sunday, as the question is not governed by the rule applicable to the computation of time for the service of bills or the publication of legal notice. *Bowes v. New York Christian Home*, 64 How. Pr. 509.

So, under the Missouri mechanic's lien law, the four months after an indebtedness accrues within which a lien therefor must be filed, is to be computed by excluding the first day, and including the last, so that if the last day be Sunday the filing must be done on the previous Saturday. *Patrick v. Faulke*, 45 Mo. 312.

And in *Miner v. Tilley*, 54 Mo. App. 627, it was held that the statutory rule for the computation of time does not apply to an action upon a mechanic's lien, required by Mo. Rev. Stat. § 6720, to be commenced within ninety days after the filing of the lien, and if the ninetieth day after the filing of the lien is Sunday it must be brought on Saturday or some previous day.

In the above case, *Patrick v. Faulke*, 45 Mo. 312, *supra*, was criticised, but followed.

j. To taxes.

1. Assessment and collection.

Periods of time prescribed in provisions for the assessment and collection of taxes are governed by the same general rules; though as tax laws are subject to strict construction, the rule that such a construction as will avoid a forfeiture will be adopted is frequently applied.

Thus, the proper rule for the computation of time for the service of a notice of application for confirmation of an assessment is to exclude the day on which the notice was first inserted or posted, and include the day on which the term of court commenced. *Brown v. Chicago*, 117 Ill. 21, 7 N. E. 108.

And such a notice given on January 30, where the first day of the next term of court was the following February 9, is in time to confer jurisdiction under a provision of the act of incorporation requiring the commissioners to cause at least ten days notice to be given. *Ibid*.

But where the rules of a board of equalization require a notice to be mailed to persons whose interests are to be affected, to appear within seven days from the date thereof, the time for appearance is to be computed as including the date of the notice, so that a notice mailed on the 11th of the month would give the board jurisdiction to act on such notice on the 18th. *Hagenmeyer v. Mendocino County Bd. of Equalization*, 82 Cal. 214, 23 Pac. 14.

And a notice for the hearing of complaints against an assessment published upon September 2, and upon each day thereafter, Sundays excepted, to and including September 16, the day appointed for the meeting, is published a whole two weeks as required by law, without counting the publication on the 16th. *Klein v. Tuhey*, 13 Ind. App. 74, 40 N. E. 144.

So, in *Yocum v. First Nat. Bank*, 144 Ind. 272, 43 N. E. 231, it was held that the rule for computation of time under Ind. Rev. Stat. 1894, § 8543, providing that the duration of the session of the board of review of a county shall not exceed eighteen days, is fixed by Ind. Rev. Stat. 1894, § 1304, providing that the term shall be computed by excluding the first day and including the last day, and if the last day be Sunday it shall be excluded; but the question in the case was as to the exclusion of intermediate Sundays.

A notice of assessors, however, that an assessment is to be raised, served on the 17th to show cause against it on the 21st, is not a sufficient five days' notice. *Lewis v. Bishop*, 10 Wash. 312, 53 Pac. 165.

And under a provision that when no person shall appear to discharge the taxes duly assessed on lands owned by nonresidents within nine months from the date of the assessment the collector shall certify the same to the treasurer of the town, the owner of the land is entitled to the full term of nine months to pay his taxes without additional costs; and where the assessment was made on August 14, 1844, the collector should wait during all the business hours of the 14th day of May, 1845, for the owner of the land to pay the tax upon it before making his certificate to the town treasurer. *Flint v. Sawyer*, 30 Me. 226.

But the words "at least five days" in the Illinois statute providing for the filing of the delinquent list at least five days before the commencement of the term of court at which application for judgment for taxes is to be made, do not affect the statutory rule for computation of time by excluding the first day and including the last, such expression not requiring that the period shall be five full days. *Prior v. People ex rel. Seipp*, 107 Ill. 628.

So, in computing the four days provided for in N. H. Rev. Stat. chap. 48, § 6, providing that the tax collector shall keep goods distrained for taxes four days at the cost of the owner before advertising them for sale, the day of the distraint and the day of the advertisement are both to be excluded. *Lefavour v. Bartlett*, 42 N. H. 555.

And in such a case if a seizure is made on Wednesday no sale could be made on the succeeding Saturday as the four days would not then have elapsed, and the sale must therefore be made on Monday. *Cressey v. Parks*, 75 Me. 387, 46 Am. Rep. 406.

It has been held, however, that in computing the six days' notice required to be posted for a tax sale the day of posting is to be included as one of them, and a notice posted on the 15th of the month, of a sale on the 21st of the same month, is proper and lawful. *Faulds v. People*, 66 Ill. 210.

But a notice of a tax sale posted April 16, when the sale was to be had May 14, does not give at least four weeks' previous notice within the meaning of Wis. Rev. Stat. § 1130, providing therefor, as the whole number of weeks designated must intervene between the days mentioned. *Ward v. Walters*, 63 Wis. 39, 22 N. W. 844.

And a notice of a tax sale published on the 15th of March, the sale to take place on the 14th of April following, is insufficient under Md. 49 L. R. A.

Local Code, art. 4, § 874, providing that notice of sale for the payment of taxes shall be thirty days by advertisement published twice a week in two daily papers, and that the day of sale shall be after the expiration of the thirty days' notice, as in making the computation the day of sale should be excluded from the computation; and the sale is invalid. *Steuart v. Meyer*, 54 Md. 454.

But a notice of a sale of land for taxes, published on the 15th of March, the day of sale specified being April 14, under N. Y. Laws 1885, chap. 405, § 1, providing that the registrar shall publish a notice at least once a week in each week for four weeks in designated papers, that the land will be sold at public auction at a time and place specified, not less than thirty days after the first publication thereof, is sufficient under the general rule for the computation of time, excluding the first day and including the last, as by excluding March 15, the statutory period still remains. *Kane v. Brooklyn*, 114 N. Y. 586, 21 N. E. 1053.

In the above case it was said that authorities based upon statutes requiring an act to be done after the expiration of a specified period have no application.

2. Redemption from tax sales.

The same rules apply to periods prescribed for redemption from tax sales as to other periods of time with reference to taxation, but owing to the different circumstances they are somewhat differently applied.

Thus, the rule that in the computation of time the first day shall be excluded and the last day included, applies to tax sales both under Kan. Civ. Code, § 722, and on principle, and for the purpose of preventing a forfeiture; so that when the last day of the period for redemption from a tax sale is Sunday the owner will have all of the following Monday in which to redeem. *English v. Williamson*, 34 Kan. 212, 8 Pac. 214.

And a redemption notice that land sold for taxes on September 4, 1878, would be conveyed to the purchaser on September 4, 1881, unless redeemed prior to that date, prevents the owner from redeeming on that day or any day thereafter, and is therefore erroneous, as in computing the time the day of sale should be excluded, and all of that day given him for redemption. *English v. Williamson*, 34 Kan. 212, 8 Pac. 214.

And where a tax sale was had September 4, 1878, and the redemption notice stated that the land must be redeemed on or before September 5, 1881, a tax deed issued on the latter date and filed for record at 2 o'clock P. M. of that date, is prematurely issued, and is voidable by the owner of the land, as he had three years from the day of sale, and in computing the three years the day of sale is to be excluded, and therefore he had all of September 5 within which to redeem. *Cable v. Coates*, 36 Kan. 101, 12 Pac. 931.

So, in *Hicks v. Nelson*, 45 Kan. 51, 25 Pac. 563, it was held that where land is sold for taxes on September 5, 1882, the three years for redemption expires on September 5, 1885, where that day is not Sunday, and it is immaterial that the next day is Sunday.

And in that case, in denying a rehearing, the court explained *Cable v. Coates*, 36 Kan. 191, 12 Pac. 931, saying that it followed *English v. Williamson*, 34 Kan. 212, 8 Pac. 214, but that the opinion failed to state, as it should have done, that September 4, 1881, which was the last day of the three years for redemption, was Sunday.

So, the import of Neb. Gen. Stat. 922, § 64, providing that the owner or occupant of any

lands sold for taxes, or any other person, may redeem the same at any time within two years from the day of the sale, and § 67 thereof, providing that if no person shall redeem his land within two years, at any time after the expiration thereof, and on production of the certificate of purchase the treasurer of the county shall execute to the purchaser in the name of the state a conveyance of the land sold, is that the owner of land sold for taxes, or other interested person, shall have full two years after the day of the sale within which to redeem, excluding the day of the sale from the period within which redemption may be made, and where a sale was made June 15, 1874, June 15, 1870, is the last day for redemption, and a deed made on that day is unauthorized. *McGavock v. Pollack*, 13 Neb. 535, 14 N. W. 659.

And land sold for taxes June 10, 1850, may be redeemed June 10, 1852, under Pa. act March 13, 1815, authorizing redemption within two years after the sale. *Cromellen v. Brink*, 29 Pa. 523.

And where a collector's deed was given May 4, 1866, the one year for redemption from tax sales provided for by the New Hampshire statute had not expired where the sale was had May 4, 1865. *Annan v. Baker*, 49 N. H. 161.

In *Cromellen v. Brink*, 29 Pa. 523, *supra*, *Thomas v. Afflick*, 16 Pa. 14, *supra*, II., and *Barber v. Chandler*, 17 Pa. 48, 55 Am. Dec. 533, *supra*, VII. d, 2, were criticised and in effect overruled, and *Marys v. Anderson*, 24 Pa. 272, *supra*, VII. b, 4, was distinguished upon the ground that that case was put expressly on the understanding of the country respecting the end of a tenant's term.

So, a notice to redeem, given by a purchaser at a tax sale, required by law to be given thirty days previous to the expiration of the time for redemption or before the purchaser applies for a deed, served on the 25th day of July, fixing August 23 as the time when he would apply for a deed, gives only twenty-nine days, and under the California statute excluding the first day and including the last in the computation of time he would not be entitled to a deed, and a deed given him would be invalid. *Landregan v. Peppin*, 86 Cal. 122, 24 Pac. 859.

And a notice that the right to redeem under a tax sale will expire on the 3d day of November, which fell on Sunday, given under an imperative provision of the statute requiring a purchaser at a tax sale, or his assignee, to notify the persons in possession of the lands when the time of redemption will expire, is defective, and a deed issued pursuant thereto is illegal and passes no title. *Gage v. Davis*, 129 Ill. 236, 21 N. E. 788; *Gage v. Davis* (Ill.) 11 West. Rep. 612, 14 N. E. 36.

And a notice to redeem from a tax sale, stating that the time of redemption thereof will expire on the 2d day of September, and that, said last-named date being Sunday, redemption may be made on or before Monday the 3d day of September, is improper where the period of time for redemption expired on Sunday as that day being Sunday the time for redemption did not expire until the next day, and a deed issued pursuant to such notice is void. *Brophy v. Harding*, 137 Ill. 621, 27 N. E. 523, 34 N. E. 253.

k. To eminent domain.

The ordinary rules, both common-law and statutory, apply to the computation of periods of time prescribed by law with reference to eminent domain.

Thus, under the Kentucky statutes for the government of certain cities, § 2834, providing that no ordinance for any original improvement mentioned in the act shall pass both 49 L. R. A.

boards of the general council at the same meeting, and at least two weeks shall elapse before the passage of any such ordinance from one board to the other, the passage of an ordinance by the lower board on April 5, and by the upper board on April 19, is proper and a sufficient compliance with the statute, as the time required is between the passage by one board and the passage by the other, and not between the day on which the act is passed by one board and the day on which it is passed by the other. *Fehler v. Gosnell*, 99 Ky. 380, 35 S. W. 1125.

But How. (Mich.) Stat. § 1298, providing that notice of a meeting to view premises and ascertain the necessity of opening a highway, and to appraise the damages for the taking of land for such highway, must be served ten days before the time of meeting, excludes the day on which the meeting is to be held, and the rule of computation in Michigan excludes also the day of service necessitating ten full days' notice, and therefore a notice given January 15 of a meeting to be held January 25, is improper. *Coguard v. Boehmer*, 81 Mich. 445, 45 N. W. 996; *People ex rel. Platt v. Clay Twp. Highway Comrs.* 38 Mich. 247.

And where the statute requires ten full days' notice of proceedings to discontinue a highway or lay out a new one, a notice dated May 9, when the hearing was fixed for May 19, is insufficient. *Cox v. Hartford Twp. Highway Comrs.* 83 Mich. 193, 47 N. W. 122.

And a notice of an application for a jury to ascertain the necessity for using property intended to be taken to continue a street must, under a statutory provision that a marshal shall make return thereof at least six days before the day appointed for the hearing, be returned six clear days before the hearing, the language being imperative, and the service being necessary to give jurisdiction. *Re Powers*, 29 Mich. 504.

So, in computing the five days mentioned in Mich. Pub. Acts 1875, p. 166, §§ 2, 3, defining the duty of a drain commissioner in proceedings to lay out ditches, directing him to appoint a time and place for examination, and to give notice thereof in writing to all persons interested in the ditch or drain, which notice shall be served upon each person at least five days before the day appointed, both the date of notice and examination are excluded in the computation. *Lane v. Burnap*, 39 Mich. 736.

And a notice of the time and place of making an application for the impaneling of a jury in condemnation proceedings under a charter provision that notice shall be given by publishing the same for three weeks in one of the newspapers of the city if personal service on all the parties interested cannot be had, the first publication of which shall be at least thirty days before the time fixed for the application, a notice first published February 22, 1890, the day of the application being fixed on March 24, 1890, is not in season, as, excluding the day of the hearing, and also the first day of the publication, there would be but twenty-nine days of the publication. *Rifenburg v. Muskegon*, 83 Mich. 279, 47 N. W. 231.

In the above case, *Arnold v. Nye*, 23 Mich. 286, and *Eaton v. Peck*, 26 Mich. 57, *supra*, VII. d, 5, were explained, the court saying that although the statute in those cases provided that the notice should be served at least ten days before the application, in all cases in Michigan where the condemnation of land has been involved, it has uniformly been held that both the day upon which notice is served and the day of the meeting are excluded.

So, a law requiring objections to condemna-

tion proceedings to be filed at least one day prior to the meeting of the council must be construed as intending that a day shall intervene between the last publication of notice thereof and the action of the council, and where the intervening day is Sunday, and no secular day intervenes, the period granted by the statute to the owner to file objections one day before the action taken by the council is wanting, and the assessment proceedings are vitiated. *Chicago v. Vulcan Iron Works*, 93 Ill. 222.

1. To matters of administration of estate.

Matters pertaining to the administration of estates are also within the general common-law rules, and usually within the statutory rules.

Thus, in computing the ten days from the death of a testator within which a will is not to be admitted to probate in New Jersey the day on which the death occurred is to be excluded. *Re Evans*, 29 N. J. Eq. 571.

And where money is to be paid under a devise a specified period after the testator's death the day of the testator's death should be excluded in the computation of the time within which the payment is required to be made. *Sands v. Lyon*, 18 Conn. 18.

So, where a testator whose will directs the income of his property to be accumulated for a term of twenty-one years from his death, dies January 5, 1820, that day is to be excluded in the computation of the term for accumulation, and any dividends on stock becoming due on the 5th day of January, 1841, are subject to the trust. *Gorst v. Lowndes*, 11 Sim. 434, 10 L. J. Ch. N. S. 161, 5 Jur. 457.

And where a bequest is made in trust on condition that the legatee shall, within six months after the testator's death, give security not to marry a designated person, with a provision to go over if she shall refuse or neglect to give such security, the six months are exclusive of the day of the testator's death, and where he dies on the 12th of January, and security is given on the following 12th of July, though at a later hour, it is sufficient. *Lester v. Garland*, 15 Ves. Jr. 248.

So, in *Mercer v. Ogilvie*, 3 Paton. 434, cited in *Lester v. Garland*, 15 Ves. Jr. 254, it was held that within the meaning of the act of Parliament in Scotland, 20 Geo. II. chap. 37, § 2, for regulating deeds done on death-bed, where a man had lived sixty days after the making and granting of the deed, the day on which the deed was made and granted was to be excluded.

Likewise in estimating the twenty days from the time of the making of a decree of the probate court, allowed by Ala. Rev. Code, § 2246, for an appeal, the day of the rendition of the decree should be excluded, and the filing of a bond October 11 is in season, where the decree was rendered September 22. *Cawfield v. Brown*, 45 Ala. 552.

And under Ala. Rev. Code, §§ 2446, 2095, providing that the confirmation of a sale made by an administrator under an order of the court of probate is such a final order as will support an appeal to the supreme court if taken within twenty-one days from its rendition, where an order is made March 10 that day is to be excluded in the computation, and the day on which the appeal bond is approved is to be excluded, and if the bond is approved March 30, it is in season. *Field v. Gamble*, 47 Ala. 443.

So, under 1 Purdon, Dig. 585, Pamph. Laws, 183, requiring an administrator to give notice of a sale of a decedent's real estate at least twenty days before the day appointed therefor, the day of the sale must by the terms of the 49 L. R. A.

act be excluded, and a notice advertised for the first time on August 31 is insufficient where the sale was held September 18, though the papers left the office August 30. *Zech's Estate*, 4 Pa. Dist. R. 250.

The object of the legislature of Missouri in the enactment of the statute of 1817, however, providing for the administration of estates, and prohibiting the sale of lands, tenements, or hereditaments of the deceased until eighteen months from the death of the ancestor, was to give a stay of execution for eighteen months in order that the administrator might have an opportunity of collecting the assets of the deceased and applying them to the discharge of his debts, and the day on which the letters issued might be used for that purpose as effectually as any other, and therefore that day will ordinarily be reckoned in computing the eighteen months. *Griffith v. Bogert*, 18 How. 158, 15 L. ed. 307.

And a petition and notice of a guardian to sell the land of his ward, required by law to be served at least ten days prior to the time fixed for the application, served on April 18, 1870, providing that the hearing is to be had on April 28, 1870, is served in season. *Howbert v. Heyle*, 47 Kan. 58, 27 Pac. 116.

In the above case, *Garvin v. Jennerson*, 20 Kan. 371, *supra*, VII. d. 5, was distinguished, and said to have no application to the question before the court, for the reason that the statute there commented on required that the act to be done should be done at least one day before the day of trial, and not at least one day before the trial.

Louisiana Code of Practice, par. 318, providing that where delay is given either to do something or to answer, neither the day of serving the notice nor that on which the act is done or the answer to be filed, is included, has reference to the delay granted for the performance of certain judicial acts, and does not apply to the computation of time of a settlement between a guardian and ward under La. Civil Code, art. 361, nullifying all agreements entered into between minors arriving at the age of majority and their tutors, unless the same are preceded by an account rendered and vouchers delivered, the whole being made to appear by the receipt of the person to whom the account was rendered ten days previous to the agreement. *Hodgson v. Roth*, 33 La. Ann. 941.

m. To proceedings to dispossess tenant or dis-train for rent.

Proceedings to dispossess a tenant or to dis-train for rent are in the nature of a civil action, and would appear to be governed by the rules applicable to civil actions with reference to the computation of periods of time.

Thus, a tenant under an agreement to leave the leased premises on receiving ten days' notice is entitled to ten full days exclusive of the day on which notice was given before an action can be legally instituted against him to expel him from the premises. *Alken v. Appleby*, *Morris* (Iowa) 8.

And a month's notice to quit, given to terminate a tenancy at will, served on the 2d day of October, 1895, gives the tenant under the N. Y. statutory construction law of 1884, § 27, providing for the exclusion of the first day in the computation of time, all of the 2d day of November, in which to leave, and proceedings to dispossess him, commenced on the second day of November, are premature. *Hungerford v. Waggoner*, 5 App. Div. 590, 39 N. Y. Supp. 369.

So, a notice to quit under a lease made on the 26th of a month to continue from month to

month until either party should give the other one month's notice, previous to the expiration of the then current month, served on the 26th of the previous month, is too late. *Williams v. McAnany*, 1 Pa. Dist. R. 128.

In *Duffy v. Ogden*, 64 Pa. 240, however, it was held that a notice given on the 25th of December, 1868, by a landlord, of his intention to repossess himself of demised premises, the lease of which expired March 24, 1869, is a sufficient three months' previous notice of such intention under the Pennsylvania landlord and tenant act.

So, a notice by a landlord to a tenant to quit on May 12, served February 12, is a good three months' notice. *McGowen v. Sennett*, 1 Brewst. (Pa.) 397.

In the above case, *Marys v. Anderson*, 24 Pa. 272, *supra*, VII. c. 4, was distinguished upon the ground that that case simply ruled that a lease for one year from the first of April expires on the last day of March of the next year, that case referring to the length of the tenancy under a lease, and not to the question of notice to quit.

Likewise, the six months given to tenants to redeem under the English statutes of ejectment for nonpayment of rent are computed by excluding the day on which the writ was executed. *Dowling v. Foxall*, 1 Ball. & B. 193.

Though the five days allowed by law before property distrained for rent can be sold are reckoned inclusive of the day of sale. *Wallace v. King*, 1 H. Bl. 13.

But under 1 Stat., 2 W. & M. chap. 5, § 3, authorizing the sale of goods distrained within five days next after the taking, the five days must be calculated under the existing rule as in other cases, inclusively of the last and exclusively of the day of the taking. *Robinson v. Waddington*, 13 Q. B. 753, 18 L. J. Q. B. N. S. 250, 13 Jur. 537.

And the English statute requiring that a landlord shall wait five whole days before he sells goods distrained for rent is designed to give the tenant five days in order to replevy the goods; and the landlord must wait five times twenty-four hours before he sells, and where a distress is made on Friday at 2 P. M. and the sale is had on the following Wednesday at 11 A. M., such sale is wrongful. *Harper v. Taswell*, 6 Car. & P. 160.

So, the rule that time shall be computed excluding the day on which the act was done from which the count is to be made, applies to computation of time under Pa. act of assembly of March 1, 1772, providing that a tenant shall have five days next after a distress and notice thereof within which to replevy the goods, and in such case after such distress and notice an appraisement shall be made, after which six days' notice of sale shall be given. *Brisben v. Wilson*, 60 Pa. 452.

And in reckoning the five days allowed by the Pennsylvania act of assembly to a tenant to replevy his goods when distrained for rent, the day of the distress should not be included. *McKinney v. Reader*, 6 Watts, 34.

And an appraisement on the 2d of December when a distress was made on the 27th of November and notice given that day, is too early under Pa. act of assembly March 21, 1772, giving a tenant five days next after a distress and notice within which to replevy the goods after which an appraisement is required. *Brisben v. Wilson*, 60 Pa. 452.

In the above case, it was said that *Wallace v. King*, 1 H. Bl. 13, *supra*, has been expressly overruled as to the question of computation of time by *Robinson v. Waddington*, 13 Q. B. 753, 18 L. J. Q. B. N. S. 250, 13 Jur. 537, *supra*. 49 L. R. A.

So, in conducting proceedings upon a distress for rent under a statute providing that, if after the expiration of five days from the day of service of notice the rent due with costs of distress shall not be paid, and the goods shall not be replevied, the officer is to procure an appraisal to be made and then give five days' notice of sale, five days must elapse after the day on which notice of distress was given, before an appraisal can be made or notice of sale given; so that where the notice of distress was given on the 9th, the appraisal could not take place before the 15th. *Butts v. Edwards*, 2 Denio, 166.

And under Pa. act March 21, 1872, providing that if goods distrained are not replevied with sufficient security the person distraining may, after the expiration of five days, cause them to be appraised preliminary to selling them, if the fifth day falls on Sunday it is to be excluded from the count within the Pennsylvania statutory rule for computing time, and where the seizure was made on Tuesday, Sunday is excluded from the count, and the appraisement cannot properly be made until the following Tuesday. *Davis v. Davis*, 128 Pa. 100, 18 Atl. 514.

n. To bankruptcy and insolvency laws.

Special provisions have been inserted in the bankruptcy laws similar to the regular statutory rules for the computation of time, and insolvency laws would seem to be governed by the general rules, either statutory or at common law, as the case may be on that subject.

Thus, the rule for computing the number of days prescribed for the performance of an act, under the United States bankruptcy act, is, that in all cases in which any particular number of days is prescribed thereby for the doing of any act the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall fall on Sunday, in which case the time shall be reckoned exclusive of that day also. *York's Case*, 1 Abb. (U. S.) 503, Fed. Cas. No. 18,139.

Under this rule, in calculating the three months under the English bankruptcy act of 1863, § 6, providing that a creditor shall not be entitled to present a bankruptcy petition against a debtor unless the act of bankruptcy on which the petition is founded has occurred within three months before the presentation of the petition, the day on which the petition is presented is to be excluded. *Ex parte Foster*, 56 L. T. N. S. 573, 35 Week. Rep. 456, 4 Morrill, Bankr. Cas. 98.

And the day a petition in bankruptcy was filed must be excluded in making the computation of the four months before the filing of such petition within which assignments to give preferences to particular creditors are fraudulent under the bankruptcy act. *Dutcher v. Wright*, 94 U. S. 553, 24 L. ed. 130.

And an attachment made on September 9, 1876, is within four months next preceding the commencement of bankruptcy proceedings by a petition filed January 9, 1877, and is dissolved thereby under the bankruptcy act. *Richards v. Clark*, 124 Mass. 491.

And an attachment of the bankrupt's property will be deemed dissolved under that act by subsequent proceedings in bankruptcy, where the time between the two events was four hours and ten minutes less than four months, as in such case the rule that fractions of a day will not be observed, and that the first or last day will not be computed, will not be observed. *Westbrook Mfg. Co. v. Grant*, 60 Me. 88, 11 Am. Rep. 181.

So, under the English bankruptcy act of

1883, § 4, subd. g, providing that a debtor commits an act of bankruptcy if a creditor has served on him a bankruptcy notice and he has not complied with it within seven days after the service, noncompliance with a bankruptcy notice by a debtor, served on him November 20, is complete so as to constitute an act of bankruptcy on November 27, under the statutory rule for computing time provided by that act, requiring that the period shall be taken exclusive of the day of the date. *Ex parte Townsend*, 64 L. T. N. S. 743, 40 Week. Rep. 47, 8 Morrell Bankr. Cas. 144.

And under act 1890, § 1, making it an act of bankruptcy on the part of a debtor if execution against him has been levied by seizure of his goods and the goods have been held by the sheriff for twenty-one days, the twenty-one days which the sheriff must hold are whole days in the computation of which the day of seizure is to be excluded. *Re North* [1895] 64 L. J. Q. B. N. S. 694, 2 Q. B. 264.

So, under Kan. Gen. Stat. 1889, pars. 1200, 1204, providing that an action may be brought against certain corporations in certain cases where they have suspended business for more than one year, an action may be maintained against a bank, commenced on July 20, 1894, where the bank commissioners took possession of it July 19, 1893, though the bank ran all that day. *Crocker v. Ball* (Kan. App.) 59 Pac. 691.

And where the goods of a bankrupt are sold and delivered to a purchaser on the day on which the bankrupt is put in prison for debt, and the goods are paid for on the next day, the payment is defeated under the English bankruptcy act where the debtor remained in prison for two months including the day of the arrest. *Saunderson v. Gregg*, 3 Starkie. 72; *Sadler v. Leigh*, 4 Campb. 195, 2 Rose, Bankr. 287.

So, notice under 32 Geo. II. chap. 28, requiring that notice of bankruptcy proceedings shall be given to a creditor at least fourteen days before the petition is presented, must be given fourteen clear days, exclusive both of the day of service and the day of presenting the petition. *Zouch v. Empey*, 4 Barn. & Ald. 522.

And the protection of an order made by a commissioner in bankruptcy granting protection to a bankrupt debtor until the "29th of July next" includes the whole of the 29th of July designated. *Bellhouse v. Mellor*, 28 L. J. Exch. N. S. 141, 4 Hurlst. & N. 116, 5 Jur. N. S. 175.

It has been held, however, probably under the old common-law rule, that transactions had on March 14 will be deemed to have been had more than two calendar months previous to May 14, upon which a commission in bankruptcy against a party thereto issued, and such dealings and transactions will be held to be valid. *Cowie v. Harris*, *Moody & M.* 146.

And that an execution issued August 13, under which goods were sold ten days afterwards, is issued more than two months before the issuing of a commission in bankruptcy against the debtor on the 18th of October, and is therefore protected by 6 Geo. IV. chap. 16, § 81, and is not taken out of that section by the proviso in § 108, that proviso applying only to executions issued and seizure made two calendar months before the issuing of the commission. *Godson v. Sanctuary*, 4 Barn. & Ad. 255, 1 Nev. & M. 52.

And under 21 Jac. I. chap. 19, § 2, providing that a debtor lying in prison the two lunar months after an arrest for debt shall be adjudged a bankrupt, the computation of the two months should include the day of the arrest. *Glassington v. Rawlins*, 3 East, 407.

In computing the two calendar months within 49 L. R. A.

which a fiat must be issued upon the act of bankruptcy under 1 & 2 Vict. chap. 100, § 8, the day on which the affidavit of debt was filed must be included, and where affidavit was filed April 27, and the fiat issued June 27, the fiat is void as being too late, though issued earlier in the day than the affidavit was filed. *Re Whitby*, Mont. & C. Bankr. 671, 4 Deacon, Bankr. 139, 8 L. J. Bankr. N. S. 55.

So, under U. S. bankruptcy act, § 48, providing that when any particular number of days is prescribed by the statute for doing any act or for any other purpose, and the last day falls on a Sunday or holiday, the last day shall be excluded from the computation, application for a discharge, made by a bankrupt November 27, 1868, when an attachment was had November 26, 1867, is within the one year from the attachment required by the statute, where November 26 was Thanksgiving day. *Re Lang*, 2 Nat. Bankr. Reg. 480, Fed. Cas. No. 8,056.

And under U. S. Rev. Stat. § 5044, by which an assignment in bankruptcy dissolves any attachment of the bankrupt's property made within four months next preceding the commencement of the bankruptcy proceedings, the computation of the four months is not to be made exclusively both of the day of the attachment and of the filing of the petition in bankruptcy, but is to be reckoned exclusive of the first day, and if the last day falls on Sunday exclusive of that day also. *Cooley v. Cook*, 125 Mass. 406.

And if the last of the three clear days' notice of an application to commit a person for contempt of court is allowed in bankruptcy proceedings for failure to obey an order to file an amended statement be Sunday, it is not to be counted in the computation. *Re Ferrige*, L. R. 20 Eq. 289, 44 L. J. Bankr. N. S. 96, 32 L. T. N. S. 507, 23 Week. Rep. 612.

So, under an assignment by a debtor of all his effects for the benefit of such of his creditors as shall release their debts in sixty days from the date of the assignment, the day on which the assignment was made is to be excluded in the computation of the time within which a creditor may release. *Pearpoint v. Graham*, 4 Wash. C. C. 232, Fed. Cas. No. 10,877.

And in the computation of time previous to the Maine Revised Statute of 1857 within which creditors were allowed to become parties to an assignment, the day of publication of notice of the assignment was to be excluded, the words "after" and "from" in the provision therefore being words of exclusion. *Page v. Weymouth*, 47 Me. 238.

So, in calculating the time under Pat. (N. J.) Stat. 186, § 7, providing that creditors in insolvency must file their plea within twenty days after the debtor has filed his declaration, one of the days on which the declaration and plea are filed is included and the other excluded, and a plea filed on the 17th of November is in season, where the declaration was filed on the 28th of October. *State v. Jackson*, 4 N. J. L. 323.

And the ten days' notice by the sheriff to a creditor to pay the board of his imprisoned debtor is to be computed by excluding the day of the notice, and where such notice is given on the 18th of October the jailor is not authorized to discharge the debtor in case of non-payment on the 28th of that month. *Millard v. Willard*, 3 R. I. 42.

So, in computing the five days after registration of a deed of assignment within which a schedule of preferred debts is required to be filed, in North Carolina, the first day is to be excluded and the last included, and where the deed of assignment was filed for registra-

January 6, and the schedule was not filed until January 12, it is not in time. *Glanton v. Jacobs*, 117 N. C. 427, 23 S. E. 335.

And under the New Hampshire rule an attachment levied October 3 is dissolved under N. H. Pub. Stat. chap. 201, § 26, providing that proceedings in insolvency shall dissolve all attachments made within three months before the beginning thereof, where the debtor was decreed to be insolvent on petition filed January 2 following. *Bernard v. Martel* (N. H.) 41 Atl. 183.

So, one who is entitled to discharge from imprisonment under the insolvent law upon making the requisite affidavit after he had remained in prison thirty days, who was put there on the 26th of August, cannot be discharged until the 26th of September, as entire days only can be computed. *Judd v. Fulton*, 4 How. Pr. 298, 10 Barb. 117.

And under the South Carolina prison bound act, 5 Stat. 78, entitling a person committed to the custody of the sheriff to the benefit of the prison-bound ordinance providing he shall within forty days render to the clerk of the court a schedule on oath or affirmation of his whole estate or of so much as will pay and satisfy the same, the forty days will be computed by excluding the day of the bond, where including it would work a forfeiture of his right to the prison bound. *McKlwee v. White*, 2 Rich. L. 95.

And under Mass. Rev. Stat. chap. 97, § 63, providing that a prisoner in execution who gives bond shall surrender himself to close confinement if he shall not be lawfully discharged within ninety days from the day of his commitment, in computing the time of the surrender the day of the commitment is to be excluded, as he is entitled to the whole of the ninety days to obtain his discharge, and the condition of the bond is saved if he surrenders himself on the ninety-first day. *Wiggin v. Peters*, 1 Met. 127.

In *Morley v. Vaughan*, 4 Burr. 2525, however, it was said that, under 32 Geo. II. chap. 28, providing for relief of debtors with respect to imprisonment, but requiring the debtor before exhibiting his petition to give previous notice of it in writing to all his creditors, fourteen days at least before such petition is presented, the computation might be made so as to include either the first or last day of the fourteen; but the case seems to have been decided upon other grounds.

o. To poor debtor acts.

The modern common-law rule for the computation of time applies to the poor debtor acts, and the statutory rules of construction apply whenever they are applicable to the construction of statutes generally.

Thus, the day of the date of a bond given under the Maine poor debtor act of 1835 and 1836 should be excluded in the computation of the time at which the six months for the performance of the conditions thereof expires, as it was the intention of the legislature to allow the debtor full six months to fulfill the conditions of the bond. *Moore v. Bond*, 18 Me. 142.

And the ten days within which a poor debtor may surrender himself after giving a bond to the officer making the arrest do not commence to run until the justice to whom the poor debtor applies to be admitted to the oath of insolvency has disallowed the oath, where the debtor has done all in his power to take it, and in computing the ten days the day appointed for taking the oath is excluded. *Pease v. Norton*, 6 Me. 233.

So, under the New Hampshire statute pro- 49 L. R. A.

viding that a party arrested on execution may give bond conditioned that within one year from the day of his arrest he will apply to the proper authority and take the oath prescribed for poor debtors, or in default thereof surrender himself up to the creditor as prescribed by law, the year is to be computed by excluding the day of the arrest; and where an arrest was made on the 22d of November, a surrender on the 23d of the next November is within the terms of the condition. *Odiorne v. Quimby*, 11 N. H. 224.

And in computing the time within which he may take the oath prescribed by law for the relief of poor debtors, the day of the arrest is to be excluded. *Bell v. Adams*, 10 N. H. 181.

And under the New Hampshire statutory rule for the computation of time the year within which a debtor is required to take poor debtor's oath, after giving the jail bond, is computed by excluding the day of the date of the bond, and where the jail bond was given December 10, 1849, the year commenced December 11, 1849, and terminates December 10, 1850, at night, and an oath taken December 11, 1850, is too late. *Scovell v. Holbrook*, 22 N. H. 260.

And in computing the fifteen days at the expiration of which from the time of commitment to jail a debtor may apply to have the poor debtor's oath administered to him, the day of commitment is to be reckoned as one of the fifteen days. *Priest v. Tarlton*, 3 N. H. 93.

So, in computing the thirty days within which a town liable for the support of a pauper is required, under Mass. Rev. Stat. chap. 40, § 15, to remove him from the town in which he has received support in order to exempt the former town from liability therefor at a greater rate than \$1 per week, the day on which notice is received that the support has been furnished is to be excluded. *Seekonk v. Rehoboth*, 8 Cush. 371.

And in the computation of the two months mentioned in Me. Stat. 1821, chap. 122, § 17, with reference to the settlement of paupers, providing that if the removal of a pauper from one township to another is not effected or objected to in writing after notice in writing, within two months after such notice to the overseers of the town, etc., the day of giving the notice is to be excluded. *Windsor v. China*, 4 Me. 298.

p. To provisions for recording and filing instruments.

The usual course in computing time in recent periods has been to construe the day exclusive whenever anything is to be done in a certain time after a given event or day, and consequently the time for enrolling a specification within the six months given by the statute is reckoned exclusively of the day of the date. *Russell v. Ledsam*, 14 Mees. & W. 582, 14 L. J. Exch. N. S. 353, 9 Jur. 557.

And the six months for enrolment of deeds of bargain and sale, provided for by 27 Hen. VIII. chap. 16, is exclusive of the day of the date and any instant of the last day of six lunar months will be deemed to be within that period. *Thomas v. Popham*, 2 Dyer, 218b.

And in computing the eight months within which a deed of gift of slaves was required to be recorded under the Kentucky statutes, the day of the date of the deed was excluded. *Pyle v. Maulding*, 7 J. J. Marsh. 202.

So, under the first section of the English act requiring annuity deeds to be enrolled within twenty days of the execution, the words "within twenty days" are to be taken as exclusive of the day of execution. *Ex parte Fallon*, 5 T. R. 288.

And where a patent dated May 10 contains a proviso that a specification should be enrolled within one calendar month after its date, the month begins on the 11th of May and includes the 10th of June, and a specification filed on that day is in time. *Watson v. Pears*, 2 Campb. 294.

So, under the Ohio act requiring depositions taken relating to land to be recorded in the office for recording deeds in the county where the lands lie within sixty days, depositions taken under that act may be read in evidence if recorded on the sixtieth day after they are taken. *Myers v. Anderson, Wright* (Ohio) 513.

And under the Indiana statutory rule, in estimating the ten days after the execution thereof, within which a chattel mortgage must be recorded in order to make it valid against third parties, the day upon which it was executed is excluded and the day of recording included. *Towell v. Hollweg*, 81 Ind. 154.

And a mortgage recorded on a specified day takes precedence over a mechanic's lien in which the material furnished is alleged to have been delivered between the day of the recording of the mortgage and a subsequent day, and the day of recording the mortgage will be excluded in computation. *Weir v. Thomas*, 44 Neb. 507, 62 N. W. 871.

But where the year for refilling a chattel mortgage under a provision requiring such filing as against creditors expires on Sunday, that day is not excluded in the computation of the year within thirty days of the expiration of which the refilling is required. *Paine v. Mason*, 7 Ohio St. 206.

And the rule for the computation of time excluding the first day of the period and including the last does not apply to a computation of time under the Ohio act in relation to mortgages and bills of sale of personal property, providing that they can be kept in force as against creditors only by refilling from year to year; and under that act the year within which such an instrument must be refilled begins to run from the exact time of the preceding filing, and is completed at the corresponding day and hour of the following year. *Seaman v. Eager*, 16 Ohio St. 209.

And under Ky. Gen. Stat. chap. 44, art. 2, p. 2, providing for the setting aside of certain mortgages on petition of any person interested, filed within six months after the mortgage or transfer is legally lodged for record, the day on which the instrument is lodged for record is included in the computation of the six months. *Lebus v. Wayne Ratterman Co.* 14 Ky. L. Rep. 794, 21 S. W. 652.

So, in calculating the thirty days in which an order is required by statute to be lodged before a term of court to entitle the party to a change of venue, the day of depositing the order should be included, and the first day of the term of court excluded, from the calculation. *Woods v. Patrick, Hardin* (Ky.) 457.

But in computing the three months within which an extent on lands is required by the Maine statute to be recorded, the day on which the levy is made should not be counted, as the statute intended to give the levying creditor fully three months within which to record his levy. *Berry v. Spear*, 13 Me. 187.

And under 3 Geo. IV. chap. 39, § 1, providing that warrants of attorney to confess judgment shall be filed within twenty-one days after their execution, and § 2 thereof providing that if they are not so filed, or unless judgment be signed or execution issued within the same period, they and the judgment thereon shall be fraudulent and void, as against the assignees of the party giving the warrant if he became bankrupt after the expiration of twenty-one days next after the execution of the warrant, the twenty-one days are to be reckoned exclusively of the day of execution, and a warrant executed December 9, and filed December 30, is in time. *Williams v. Burgess*, 12 Ad. & El. 635, 4 Perry & D. 443, 9 Dowl. P. C. 544.

So, under the Texas act requiring the return of field notes withdrawn from the land office within twelve months, a return of field notes on November 29, 1872, is within the prescribed time where the act was passed November 29, 1871. *Hill v. Kerr*, 78 Tex. 213, 14 S. W. 566.

And the word "by," in an order requiring that designated papers should be filed by a designated day, includes that day, so that the paper may properly be filed that day. *Higley v. Gilmer*, 3 Mont. 433.

And a provision that notice of the proposed incorporation of a town should be recorded for a period not less than thirty days, does not mean thirty clear days, which would exclude the day of posting, but falls within the ordinary rule of computing time within which notice must run which is to exclude the day on which the notice is given and include the day on which it expires. *State v. Winter Park*, 25 Fla. 371, 5 So. 818.

q. To enactment and taking effect of statutes and resolutions.

The rule that in computing time when an act has been performed within a particular time after a specified day the specified day should be excluded and the day upon which the act is to be performed included, applies in computing the ten days allowed the governor to consider bills which have been passed by the assembly and presented to him for signature, and when, on the last day thus computed the legislature adjourns, the governor would have until the first day of the next assembly to return the bill with his objections. *People ex rel. Harless v. Hatch*, 33 Ill. 9.

Thus, the period within which the governor is required to return a bill with his objections is to be computed by excluding the day in which the bill is transmitted to him. *Corwin v. Comptroller General*, 6 S. C. N. S. 390; *Re Soldiers' Voting Bill*, 45 N. H. 607; *Iron Mountain Co. v. Haight*, 39 Cal. 540; *Garnett v. Bost*, 39 Cal. 662. And see STATE PHARMACEUTICAL ASSO. V. MICHEL.

And under the provision of the Texas Constitution, that every bill presented to the governor one day previous to the adjournment of the legislature, and not returned to the house in which it originated before its adjournment, shall become a law and have the same force and effect as if signed by the governor, a bill which had passed both houses of the legislature, and been presented to the governor for his approval within less than twenty-four hours previous to the time of adjournment, and when an intervening day between the presentation and the adjournment could not have elapsed, does not become a law. *Hyde v. White*, 24 Tex. 143.

And a bill presented to the governor on the 5th of February and returned with his veto on the 17th, is returned within the ten days as required by the Constitution, under the rule excluding the first and including the last day in the computation of time, where two Sundays intervene, Sundays being expressly excepted by the Constitution. *Beauden v. Cape Girardeau*, 71 Mo. 392.

So, where an act provides that it shall take effect and be in force one year from and after its passage, the day of the passage of the act

is excluded from the computation of the time. *Duncan v. Cobb*, 32 Minn. 460, 21 N. W. 714.

And the ninety days until the expiration of which after its passage a law does not take effect under the West Virginia constitutional provision should be computed by excluding the day of the passage of the act and including the ninetieth day thereafter. *State v. Mounts*, 36 W. Va. 179, 15 L. R. A. 243, 14 S. E. 407.

See also *HALBERT v. SAN SABA SPRINGS LAND & LIVE-STOCK ASSO.*

And the word "passage" in that provision relates to the date of the passage of the act by the two houses, and not to the date of its approval by the governor, so that an act passing both houses on the 27th of February would go into effect on the 28th of May following. *State v. Mounts*, 36 W. Va. 179, 15 L. R. A. 243, 14 S. E. 407.

So, the three months within which an act takes effect under the Nebraska Constitution expires, when the legislature adjourns on the 8th day of April, upon the 9th day of July following, so that an act passed will take effect on that day. *McGinn v. State*, 46 Neb. 427, 30 L. R. A. 450, 65 N. W. 46.

And in computing the time at which a statute goes into effect under Me. Rev. Stat. chap. 1, § 8, providing that laws enacted shall become effective in thirty days after the recess of the legislature passing it, the day on which the legislature adjourns is to be excluded. *Simmons v. Jacobs*, 52 Me. 147.

But 1 N. Y. Rev. Stat. 157, providing that every law, unless a different time shall be prescribed therein, shall commence and take effect on and not before the twentieth day after the day of its final passage as certified by the secretary of state, applies to the act of May 2, 1874, prohibiting appeals to the court of appeals in certain cases, not prescribing when it should take effect, so that an appeal taken on the twentieth day after the passage of the act is governed by its provisions, as it becomes a law the instant that day begins. *Krom v. Levy*, 60 N. Y. 126.

And a statute with relation to appeals which by a general law is to be enforced from and after its publication in the official state paper, comes into effect at the instant of the issue of the state paper containing it, so as to affect an appeal filed later that day, the day of publication being included in the computation. *Leavenworth Coal Co. v. Barber*, 47 Kan. 29, 27 Pac. 114.

Under the provisions of the Kansas herd law, however, that it shall go into practical operation in any particular county only after an order of the board of county commissioners to that effect has been published for four consecutive weeks, the four weeks of publication would end only on the day next preceding the fifth issue of the paper, and the law would take effect on the beginning of the 29th day after the day of the first publication. *Reed v. Sexton*, 20 Kan. 195.

So, a statute repealing a former statute in which it is provided that it is to take effect from and after a day named does not take effect until after the expiration of such day. *Koltensbrock v. Cracraft*, 36 Ohio St. 584; *Handley v. Cunningham*, 12 Bush, 402.

And acts performed within that day are not within its purview. *Handley v. Cunningham*, 12 Bush, 402.

In *State v. Mounts*, 36 W. Va. 179, 15 L. R. A. 243, 14 S. E. 407, however, it was held that in computing the time within which or after the expiration of which an act of the legislature is to take effect, it is immaterial whether the day of the passage of the act is included and 49 L. R. A.

the day of the ending of the period is excluded, or whether the day of the passage is excluded and the day of the ending is included.

An interval of not less than fourteen days which is to elapse between a meeting passing a special resolution of a company and that at which it is confirmed under the English company's act of 1862, § 51, is an interval of fourteen clear days exclusive of the respective days of meeting, as the word "at" means after the interval or at some time after the interval, referring grammatically rather to a point of time than a period; and a special resolution for the reduction of capital, passed at a meeting held on the 25th of February and confirmed at a meeting held on the 11th of March, is bad. *Re Railway Sleepers Supply Co.* 54 L. J. Ch. N. S. 720, L. R. 29 Ch. Div. 204, 52 L. T. N. S. 731, 33 Week. Rep. 595.

But under a statutory provision that a resolution for designated purposes should lie over at least four weeks after its introduction, and that no action should be taken by the common council if within that time a remonstrance should be presented, a week is the period of time extending from Monday of one week to Monday of the next week following, and not until Tuesday of such week; and a resolution, if introduced on Monday, has laid over four weeks, within the meaning of the provision, when the fourth Monday thereafter arrives, and the council are then at liberty to act upon it. *Wright v. Forrester*, 65 Wis. 848, 27 N. W. 52.

As to time of the passage of a statute, see note to *State v. Mounts* (W. Va.) 15 L. R. A. 243.

r. To elections and offices.

Election notices and terms of office are construed under the same general rules, though there are some exceptions and variations, especially with reference to election notices, which are usually to be computed backward from the time of the election.

Thus, under a statute providing that certificates of nomination for candidates shall be filed with the secretary of the commonwealth at least sixty-six days before the day of the election, a certificate filed on the 13th day of September is in season within the rule for the computation of time requiring the last day to be excluded but including the first, where election was to be held November 8. *Re Certificates of Nomination*, 1 Pa. Dist. R. 759.

And the term "five days exclusively" in a statute providing for notice of town meeting means five days inclusive of the day on which the notice is posted, but exclusive of the day on which the meeting is to be held, so that, therefore, a meeting warned on the 26th of September, to be held on the 30th of September, is not legally warned. *Brooklyn Trust Co. v. Hebron*, 51 Conn. 22.

But where a voter is required by law to file an oath in a designated office at least five days before the day of election, the five days will be computed by excluding the day of filing, where including it would lead to a forfeiture of the office. *State ex rel. Reitemeyer v. Gasconada County Ct.* 83 Mo. 102.

So, under South Carolina act of 1819, requiring the voters of a certain place to register at least a month before the day of election, registration on August 3 is in time, where the election is held September 3, the day of the date of registration being included, as there would be a forfeiture if it were excluded. *State ex rel. Stock v. Schnlerle*, 5 Rich. L. 299.

And in computing the three calendar months under the Pennsylvania act of April 15, 1851, to provide for the election of justices, provid-

ing for filling vacancies by appointment and for an election by general electors at the first general election which shall happen more than three months after the vacancy shall occur, one of the terminal days of the period is to be included, and the other excluded. *Com. v. Maxwell*, 27 Pa. 444; *Re Judges' Commission*, 2 Chester Co. Rep. 317.

So, the provision of the Kentucky statute directing the sheriff to deposit the poll books within two days next after an election, excludes the day of election, the two next or following days being the days referred to, as, the election occupying the whole of the day on which it took place, the expression "within the two next days" clearly means the two days after the day of election, and both of these days are included in the time allowed for depositing the poll books, the last day as well as the day of election being excluded in the computation. *Batman v. Megowan*, 1 Met. (Ky.) 533.

Notice of an intention to contest an election of a jailer, however, who had obtained a certificate of his election from the board of examiners, required to be given within ten days after the final action of the board of examiners, given on the 16th of the month, is too late, where the final action was had on the 6th of that month. *Ibid.*

But a notice of illegal votes expected to be proved in an election contest provided for by Cal. Code Civ. Proc. § 1116, providing that a party shall not give evidence of illegal votes unless he gives his adversary at least three days before trial a written list of the number of illegal votes he expects to prove and by whom given, served on the 7th of December, can properly be relied on and proved at the trial on the 10th of December, the period being computed by including the first day and excluding the last. *Misch v. Mayhew*, 51 Cal. 514.

So, the statutory rule for computing time excluding the first day and including the last unless it be Sunday, when it must also be excluded, means that Sunday, when the last day, must be excluded from the count of the time, and where an election is held on November 8, and an alternative writ of mandamus to inquire into its validity is served on the 14th of that month in time for the election board to reassemble on that day, it is within the five days limited by law for the returns to be cast by the canvassing board where the 13th was Sunday. *State ex rel. Steadley v. Stuckey*, 78 Mo. App. 533.

And under the Canadian Interpretation act, chap. 1, § 7, subd. 27, providing that if the time limited by any act for any proceeding or the doing of any thing under its provision expires or falls upon a holiday, the time so limited shall be extended to, and such thing may be done on, the next day following which is not a holiday, a petition in an election contest required by the Dominion controverted election act to be presented not later than thirty days after the day fixed for the nomination in case the candidate or candidates have been declared elected on that day, and in the other cases forty days after the holding of the poll, to be presented in such forty days, is properly presented on the forty-first day, where the fortieth day is Sunday, Sunday being a legal holiday. *Nicolet Election Case*, 29 Can. S. C. 178.

Where, however, by the terms of the commission of a justice of the peace the term of office was for four years from a designated day, and he might have qualified and discharged the functions of his office on that day, his term of office begins on that day, and that day must be counted as a part of his term. *Vogel v. State ex rel. Land*, 107 Ind. 374, 8 N. E. 164. 49 L. R. A.

But an official act by an officer who was commissioned to hold office during the term of four years from the 2d day of March, 1845, performed on the 2d day of March, 1849, is lawful and within his term of office. *Best v. Polk*, 18 Wall. 112, *sub nom.* *Rest v. Doe ex dem. Polk*, 21 L. ed. 805.

And in *Elmendorf v. New York*, 25 Wend. 687, the court, in considering the question as to the time when the term of an officer begins to run, where he was to be sworn into office on a certain day, laid down the general rule excluding the day on which an act is to be done from time which is to be computed under a statute; but the case was decided upon other grounds.

So, under Ind. Rev. Stat. 1881, §§ 4735, 4736, 4737, providing that on the day following an election of certain officers the inspectors shall make out and deliver to the successful candidate a certificate of election, and that such certificate shall entitle the holder to qualify and enter upon the discharge of the duties of the office at the expiration of ten days from the date of such election, the general rule applies, and in the computation of such ten days the day of election is to be excluded. *Vogel v. State ex rel. Land*, 107 Ind. 374, 8 N. E. 164.

In the above case, *Tucker v. White*, 19 Ind. 253, *supra*, VII. g, 1, was distinguished and explained, the court saying that that was a case where the reason of the thing controlled.

So, statutory notice of a special election held to obtain the sentiment of a majority of the legal electors on the question of the acceptance of the provisions of an act to enable cities to supply the inhabitants with pure and wholesome water, required by law to be given at least six days previous to the day of election, given June 24, when the election was to be held June 30, is insufficient, the notice being only five days instead of six. *State, Stroud, Prosecutor, v. Consumers' Water Co.* 56 N. J. L. 422, 28 Atl. 575.

But notice of an election for the relocation of a county seat under an order allowing it, made and given September 1 to be held October 1, 1885, is sufficient within the Kansas rule for the computation of time, under Kan. Comp. Laws 1870, chap. 26, § 5, requiring thirty days' notice of the election. *State ex rel. Lewis v. Eggleston*, 34 Kan. 714, 10 Pac. 3.

And under Minnesota Special Laws 1875, chap. 132, providing for a special meeting of the legal voters of a village to vote upon the question of issuing bonds to aid in the construction of a railroad, and requiring that notice of the time, place, and subject of the meeting shall be posted in three public places at least ten days prior thereto, sufficient time is given by notice posted on the 13th of May of a meeting to be held on the 23d of the same month. *Coe v. Caledonia & M. R. Co.* 27 Minn. 197, 6 N. W. 621.

And a notice of election under Minnesota act of 1891 providing for the submission of the question of issuing bonds to the voters at a special election to be called by a village council, giving not less than ten days' previous notice thereof by publishing the same in some newspaper, published May 16, calling the election for May 26, is in season, as the day of the first publication is to be excluded and the day of the election is to be included. *Brady v. Moulton*, 61 Minn. 185, 63 N. W. 489.

So, under the Kentucky local option act, providing that an election thereunder shall not be held earlier than sixty days after an application therefor is lodged with the county judge, the time begins to run after the act of lodging the application, and not after the day on which

application is lodged, and in estimating the sixty days the day on which the application is lodged must be included. *Com. v. Shelton*, 99 Ky. 120, 35 S. W. 128.

And under the Texas statute, requiring an election under the local option law to be held not less than fifteen nor more than thirty days from the date of making the order therefor, the day of the entry of the order should be excluded, and the day of the election included, in computing the time limited. *King v. State*, 33 Tex. Crim. Rep. 547, 28 S. W. 201.

And a special election under the local option law, held on the 25th of November, the order for which was made on the 10th of that month, is fifteen days from the day of the order within the meaning of that act. *Winston v. State*, 32 Tex. Crim. Rep. 59, 22 S. W. 138.

So, under Mo. Laws 1887, chap. 181, providing that notice of an election for local option shall be given by publication for four consecutive weeks, and the last insertion shall be within ten days next before such election, the computation is to be made by excluding the day of notice and including the day of election, so that a notice published December 28, 1887, of an election to be held January 24, 1888, is one day short. *State v. Kaufman*, 45 Mo. App. 656; *State ex rel. Weber v. Tucker*, 32 Mo. App. 620; *Leonard v. Salline County Ct.* 32 Mo. App. 633.

And the meaning of the first clause is not limited or affected by the second clause with relation to the last insertion. *State ex rel. Weber v. Tucker*, 32 Mo. App. 620; *Leonard v. Salline County Ct.* 32 Mo. App. 633.

The rule of the Ohio Code, that when the last day to perform an act falls on Sunday, the act may be done on Monday, is an exception to the general rule, and only applies to proceedings provided for in the Code itself, and does not apply to a notice of appeal in an election case under a statute providing therefor; and in such case when the last day falls on Sunday the notice must be given previous to that day. *Taylor v. Wallace*, 2 Ohio L. J. 115.

s. Miscellaneous provisions for time.

Where original letters patent are granted for a term of fourteen years, and dated on the 26th of February, 1825, renewal letters dated on the 26th of February, 1839, will be deemed to have been granted after the original letters patent have expired, as in computing the fourteen years the day of the date must be reckoned inclusively. *Russell v. Ledsam*, 14 Mees. & W. 582, 14 L. J. Exch. N. S. 353, 9 Jur. 557.

And the provision of § 15 of the act of Congress of March 3, 1875, that the title of lands acquired of any Indian by virtue of the act shall remain inalienable for five years from the date of the patent issued therefor, is to be so construed that in the computation of such five years the day the patent issued will be included; and where a patent issued to an Indian June 15, 1880, a deed of the lands by the Indian dated June 15, 1885, is good, and not within the limitation. *Taylor v. Brown*, 147 U. S. 640, 37 L. ed. 313, 13 Sup. Ct. Rep. 549, 5 Dak. 335, 40 N. W. 525.

Under the laws of Texas for the sale of school lands, however, after one application another cannot be made for the same land during ninety days after the first one; and where the ninetieth day is Sunday another application cannot be made until the following Monday. *Monroe Cattle Co. v. Becker*, 147 U. S. 47, 37 L. ed. 72, 13 Sup. Ct. Rep. 217.

So, an act laying an embargo for a designated number of days from and after the passing of the act may be construed to include or exclude the day of the date of the statute, and will be 49 L. R. A.

construed the one way or the other with a view of not impairing an existing contract. *Lorent v. South Carolina Ins. Co.* 1 Nott & McC. 503.

In computing the statutory time within which an importer must serve his protest with reference to the amount of duties to be paid on his goods, Sunday cannot be excluded and the protest served on the following Monday, as there is no Federal statute authorizing such exclusion, and the law regulating bankruptcy proceedings, providing for its exclusion in matters arising thereunder, shows the intent of Congress that it should not be excluded unless expressly so provided. *Shefer v. Magone*, 47 Fed. Rep. 872.

And in computing the ten days within which a collector is required to give an order to importers to return goods to the public stores to be opened and examined under U. S. Rev. Stat. § 2890, if the tenth day falls on Sunday, notice given on the Monday following is too late. *Hermann v. United States*, 66 Fed. Rep. 721.

But under the Nebraska statute relating to the license and sale of intoxicating liquors, providing that no action shall be taken upon an application for a license until at least two weeks notice of the filing of the same has been given, the two weeks must be computed under the Nebraska statutory method of computation of time by excluding the day of publication, and where a notice was published Saturday, June 5, the two weeks would expire with Saturday, June 19, and, excluding Sunday, Monday the 21st would be the first day on which the board could take any action upon the application. *Pelton v. Drummond*, 21 Neb. 492, 32 N. W. 593.

And an action on the fourteenth day after the first publication of notice is premature. *Pislar v. State*, 56 Neb. 455, 76 N. W. 869.

But under the Indiana statutory method of computing time a remonstrance provided for by Nicholson law, with relation to intoxicating liquors, of March 11, 1897, making it unlawful to grant a license if three days before any regular session of the board of commissioners of any county it is filed with the auditor, filed Thursday, August 29, is in season, where the regular session of the board occurs Monday, September 2. *Flynn v. Taylor*, 145 Ind. 533, 44 N. E. 546; *Conwell v. Overmeyer*, 145 Ind. 698, 44 N. E. 548.

So, under the Illinois statute providing that the governor shall receive written sealed bids for certain property from all persons until a designated date, at which time all the bids received shall be opened and compared by him, his power to sell is limited to bids received before that date. *Webster v. French*, 12 Ill. 302.

And under a statute providing that a brook on which a mill has been erected shall be kept open and free for the passage of fish from the 5th day of May to the 5th day of July in each year, the owner of the mill is entitled to the full use of the water until the 6th day of May, the word "from" being a word of exclusion. *Peables v. Hannaford*, 18 Me. 106.

So, a notice to perform street labor on the 22d day of August, given in the latter part of the 19th of August, is sufficient three days' notice under a statutory method for computing time. *Wahl v. Nauvoo*, 64 Ill. App. 17.

But a warning given late on Saturday evening, to attend to work on the road on the following Tuesday morning, is not sufficient under Gault's Digest, 5324, providing for at least three days' actual notice, as in that case only two full days' notice is given. *Jones v. State*, 42 Ark. 93.

So, under the Vermont statute requiring a

person who finds straying beasts to advertise the same within six days, the day when the advertisement was posted is excluded in the computation. *Chaffee v. Harrington*, 60 Vt. 718, 15 Atl. 350.

And a provision in an ordinance giving the owner of hogs impounded five days in which to redeem, means five days exclusive of that on which the hogs were impounded, and until the five days have expired no power is conferred to sell the hogs or proceed for their forfeiture. *White v. Hawarth*, 21 Mo. App. 439.

And a sale under a municipal ordinance providing for the sale of hogs running at large, requiring notice of the time and place to be given for six successive days, given on the 22d of the month, of a sale on the 28th thereof, is premature. *Montgomery v. Adams*, 51 Ala. 449.

So, under 2 Wm. IV. chap. 39, § 11, by which it is required that every writ of distringas shall be made returnable on some day in the term, not less than fifteen days from the teste thereof, the fifteen days should be computed exclusive both of the day of the teste and the day of the return. (*Chambers v. Smith*, 2 Dowl. P. C. N. S. 1057, 12 Mees. & W. 2.

And under Vt. Rev. Laws, 1450, providing that a tender of damages by trespass may be made at any time until three days before the commencement of the term in which the action therefor is returnable, neither the day on which the tender is made, nor the first day of the term, can be counted as one of the three days. *Willey v. Laraway*, 64 Vt. 560, 25 Atl. 435.

But a railroad company which begins to rebuild a bridge crossing a navigable river on January 7, and finishes the work on March 2, is liable for damages for obstructing navigation upon the last two days, within N. J. act 1874, Rev. p. 87, § 10, providing that the person or corporation repairing or rebuilding a bridge across any navigable water shall not be liable for obstructing navigation, provided it be done between the 1st day of January and the 1st day of March. *Delaware, L. & W. R. Co. v. Mehrhof Bros. Brick Mfg. Co.* 53 N. J. L. 205, 23 Atl. 170.

So, under N. Y. Code Civ. Proc. §§ 787, 788, providing that the time within which publication of legal notice is required to be done shall be computed by excluding the first day and including the last, a notice of a meeting of directors of a corporation published on May 8 for a meeting on May 28, and on every week thereafter including the 28th is sufficient under a by-law requiring notice of the time and place of holding such meeting to be published not less than twenty days previous thereto. *The Vigilancia*, 68 Fed. Rep. 781.

But under a rule of a company empowered to forfeit shares of stockholders in arrear, provided that the company shall give ten clear days' notice to each stockholder of a meeting called for the purpose of declaring such a forfeiture, a notice given on the 27th of February of a meeting to be held upon the 9th of March next is insufficient to warrant a forfeiture, as it gives notice of but nine clear days. *Watson v. Eales*, 23 Beav. 294.

And under 33 Geo. III. chap. 95, incorporating a canal company, and providing for commissioners, enacting that no meeting whatsoever of the commissioners shall be had unless previous notice of the time, place, and purpose of such meeting shall be given in some newspaper published or circulated within designated counties, or in such manner as the company or proprietors shall direct or appoint, at least sixteen days before such meeting, a notice that a meeting will be held February 12, published in a county paper dated the 27th of January, 49 L. R. A.

is insufficient, though it appears by affidavit that copies of a newspaper like that were published and circulated on the 26th. *Queen v. Aberdare Canal Co.* 14 Q. B. 554, 19 L. J. Q. B. N. S. 251, 14 Jur. 735.

So, where notice of the time and place of paying stock subscriptions is required to be published in a newspaper thirty days before the time on which payment is required, but one publication is required to be made, and it is sufficient if, counting the day on which the notice was published, thirty days intervene before the day upon which payment is required; and it is sufficient, in an action upon a subscription to such stock, to allege that notice was given on March 2 for payment to be made on the 1st day of the following April, as by adopting the ordinary rule of including one of the days and excluding the other there would be a publication thirty days before the specified time. *Fox v. Allensville*, C. S. & V. Turnp. Co. 46 Ind. 31.

Likewise, the month provided for by 2 Geo. II. chap. 23, § 23, directing that no attorney shall commence an action for his fees until the expiration of one month or more after he shall have delivered his bill, is to be reckoned exclusively of the days on which the bill is delivered and the action is brought. *Blunt v. Heslop*, 8 Ad. & El. 577, 3 Nev. & P. 553.

And under the rule of Hil. 6 Wm. IV. § 5, requiring that three days' notice at the least before the commencement of the term be given to the master by persons applying to be admitted as attorneys, the three days are to be computed exclusive of the day on which the notice is given, and of the first day of the term to which it relates. *Re Prangley*, 4 Ad. & El. 781, 6 Nev. & M. 421, 2 Harr. & W. 65.

VIII. Conclusion.

There seems to be one general rule with reference to counting the first and last days in the computation of a period of time which, subject to exceptions based upon the language of the provision for time or upon the surrounding circumstances, seems to have remained the same throughout the whole period of the common law, and which remains practically the same under the statutes and rules of court. That rule is that in the computation of time one of the first and last days of the period shall be included and the other excluded. The question as to which of the two days shall be included and which excluded, however, has been differently decided in different periods and different jurisdictions, and has given rise to much conflict of opinion. The general common-law rule as it originally existed was that the first day was to be counted when the computation was to be from an act or event, but that it was not to be counted when the reckoning was to be from a day or from the day of an act or event. The more modern decisions have changed this rule, and, in the absence of a statute or rule of court controlling the question, the courts now compute time, as a general rule, by excluding the first day and including the last day. But this rule was subject to exceptions with reference to the language of the provision for time or the surrounding circumstances, and in many instances in which the words "within" or "between" or "at least" or "not less than" were used, both the first and last days were excluded, and such days were included or excluded, as the case might be, so as to avoid a penalty or forfeiture. This rule was subsequently put in statutory form or adopted as a court rule in most jurisdictions, but in construing the statutes and rules, though

the courts could not depart from or change the language used, they generally construed them to be a re-enactment of the common-law rule on the subject, and held them to be subject to the same exceptions; and the general rule now existing, whether at common law or under the statutes, probably is that the first day of a period of time is to be excluded and the last day is to be included, but that either or both days may be either included or excluded, if the language of the provision for time is such as to require it, or if by so doing a penalty or forfeiture will be avoided.

These rules are held generally to apply to all cases. Many of the statutes were enacted with express reference to civil actions, but, with a few exceptions, they have been held to apply generally to all provisions for time, and though they are not deemed to apply the common-law rule must be resorted to which is practically the same.

The question as to what will be done when

the last day falls on Sunday or a holiday is treated in a note to *Brown v. Valles* (Colo.) 14 L. R. A. 120, and is not included in this note. All that is here considered on that question is the construction of the statute or court rule existing in many of the states, to the effect that if the last day of a period of time should fall on Sunday or a holiday that day should be excluded from the computation, the general rule being that in such case the time is extended to include the following day. In some of the states, however, among which are Alabama and Missouri, the courts have construed the rule to mean that, Sunday being excluded, the act must be done on Saturday, or in case of a holiday other than Sunday, on the preceding day, and a few of the statutory provisions with reference to computation of days, weeks, and months have been held not to apply to years, but as a general rule they are treated as alike applicable to all periods of time. F. H. B.

KENTUCKY COURT OF APPEALS.

R. P. WARREN *et al.*, Appts.,

v.

S. C. TANNER *et al.*

(.....Ky.....)

1. A court is not deprived of jurisdiction to grant an injunction against numerous persons, many of whom live within the county, against the violation of an exclusive ferry franchise for a ferry across a river which was a boundary of the county, merely because the franchise was granted by the county court of the adjoining county.
2. A ferry established by numerous persons, who buy ferry boats and hire a person to run the ferry within limits for which an exclusive franchise has been granted to another party, violates his exclusive privilege, although their ferry is established exclusively for themselves and families.

(*Du Relle, J., dissents.*)

(March 20, 1900.)

APPEAL by defendants from a judgment of the Circuit Court for McLean County in favor of plaintiffs in a proceeding to enjoin the alleged illegal operation of a ferry. *Affirmed.*

The facts are stated in the opinion.

Messrs. Yeaman & Lockett, with Messrs. Sweeney, Ellis, & Sweeney, for appellants:

The ferry franchise does not prohibit persons singly or collectively from providing a boat and crossing the river, but only makes it unlawful for any person to transport persons or things for reward across the stream within 1 mile of their ferry.

Ky. Stat. § 1810; *Weid v. Chapman*, 2 Iowa, 524; *Hargrave's Law Tracts*, chap. 2, p. 6; *Alexandria, W. & K. Ferry Co. v.*

NOTE.—As to the right to operate a ferry without a franchise, see note to *Virginia Canon Toll Road Co. v. People ex rel. Vivian* (Colo.) 37 L. R. A. on page 712.
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Wisch, 73 Mo. 655, 39 Am. Rep. 535; *Hunter v. Moore*, 44 Ark. 184, 51 Am. Rep. 589.

The license to run the ferry is a franchise, and nothing can be implied therefrom against the rights of the citizen. The holder has no privilege that is not expressed in the statute authorizing the license.

Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 11 Pet. 420, 9 L. ed. 773; 3 Kent, Com. 11th ed. 592; *Richmond & L. Turnp. Road Co. v. Rogers*, 1 Duv. 135.

In granting the license the holder did not become entitled to any particular amount of patronage, for no one was obliged to use the ferry and pay tolls. It is a franchise similar to a tavern license.

Richmond & L. Turnp. Road Co. v. Rogers, 1 Duv. 135.

A riparian proprietor may use the waters of a navigable stream for all domestic purposes, and such use is a vested right of which he cannot be deprived except by voluntary grant or adverse possession.

Williamsburg Boom Co. v. Smith, 84 Ky. 372, 1 S. W. 765; *Berry v. Snyder*, 3 Bush, 277, 96 Am. Dec. 219; *Miller v. Hepburn*, 8 Bush, 328; *Washburn*, Easem. 4th ed. 316, 317; *Pom. Riparian Rights*, § 152; *Benton v. Johncox*, 17 Wash. 277, 39 L. R. A. 107, 49 Pac. 495; *Luz v. Haggin*, 69 Cal. 255, 10 Pac. 674; *Wiggins v. Muscupiabe Land & Water Co.* 113 Cal. 182, 32 L. R. A. 667, 45 Pac. 160.

Messrs. Little & Little and W. A. Taylor, with Mr. Lawrence F. Tanner, for appellees:

The ferry privilege granted appellees, by the Webster county court, gives them the exclusive privilege of transporting passengers and property across Green river, within less than a mile, in a straight line of their ferry.

Ky. Stat. §§ 1800, 1802, 1820; 3 Kent, Com. 2d ed. 590; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178,

38 Am. Rep. 410; *Newport v. Taylor*, 16 B. Mon. 779; *Owens v. Roberts*, 6 Bush, 608; *Hazelip v. Lindsey*, 93 Ky. 14, 18 S. W. 832; *Lindsey v. Stevens*, 5 Dana, 104; *Carroll v. Campbell*, 108 Mo. 550, 17 S. W. 884; *Capital City Ferry Co. v. Cole & O. Transp. Co.* 51 Mo. App. 228; *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 11 Pet. 549, 9 L. ed. 773; *Nixon v. Reid*, 8 S. D. 507, 32 L. R. A. 320, 67 N. W. 57.

Appellants had no right to band themselves together and employ one of their number, or anyone, at a fixed wage, to operate a ferry, at which they, their families, servants, and property can be crossed, without further charge, within about 200 yards of appellees' ferry.

Conway v. Taylor, 1 Black, 632, 17 L. ed. 191; *Capital City Ferry Co. v. Cole & O. Transp. Co.* 51 Mo. App. 228; *Dinner v. Humberstone*, 26 Can. S. C. 252; *Norris v. Farmers' & Teamsters' Co.* 6 Cal. 590, 65 Am. Dec. 535.

A ferry franchise is property, and its infringement, even by a free ferry, will be enjoined.

3 Kent, Com. 12th ed. 450; 7 Am. & Eng. Enc. Law, pp. 945, 946; *Patterson v. Wollmann*, 5 N. D. 608, 33 L. R. A. 536, 67 N. W. 1040; *Carroll v. Campbell*, 108 Mo. 550, 17 S. W. 884.

The McLean circuit court had jurisdiction of this action, and of appellants.

Galloway v. Hamilton, 1 Dana, 576; *Ford v. Jefferson County*, 4 Iowa, 566; *Campbell v. Ayres*, 6 Iowa, 339; *Marvin v. Hampton*, 18 Fla. 131; *Lyon v. Tallmadge*, 14 Johns. 511; *Jourdon v. Massengill*, 86 Tenn. 81, 5 S. W. 719; *Herman, Estoppel*, 111, 163.

On petition for rehearing.

The grant of a ferry by the sovereign is of very ancient origin, and it has always been the rule that the privilege was exclusive.

3 Bl. Com. 219; 3 Kent, Com. 590; *Smith v. Barkins*, 38 N. C. (3 Ired. Eq.) 613, 44 Am. Dec. 83; *Norris v. Farmers' & Teamsters' Co.* 6 Cal. 590, 65 Am. Dec. 537.

Under our statutes all regularly established ferries are exclusive.

Ky. Stat. § 1820; *Nixon v. Reid*, 8 S. D. 507, 32 L. R. A. 320, 67 N. W. 57; *Mills v. St. Clair County*, 7 Ill. 197, 8 How. 569, 12 L. ed. 1201; *Com. v. Bacon*, 13 Bush, 210, 26 Am. Rep. 189; *California State Teleg. Co. v. Alta Teleg. Co.* 22 Cal. 398; *Hanson v. Webb*, 3 Cal. 237; *Norris v. Farmers' & Teamsters' Co.* 6 Cal. 594, 65 Am. Dec. 535; *Chard v. Stone*, 7 Cal. 117; *Murray v. Menefee*, 20 Ark. 561; *Power v. Athens*, 99 N. Y. 592, 2 N. E. 609; *Walker v. Armstrong*, 2 Kan. 198; *Phillips v. Bloomington*, 1 G. Greene, 498.

The vitality of such a franchise lies in its exclusiveness.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; *Pennsylvania v. Wheeling & B. Bridge Co.* 13 How. 518, 14 L. ed. 249; *Fanning v. Gregoire*, 16 How. 524, 14 L. ed. 1043; *Conway v. Taylor*, 1 Black, 603, 17 L. ed. 191.

If the Kentucky statutes did not in express terms make a ferry license exclusive, 49 L. R. A.

still it would be regarded as exclusive by the courts as against those operating a ferry without license.

Douglass's Appeal, 118 Pa. 65, 12 Atl. 834; *Tugicell v. Eagle Pass Ferry Co.* 74 Tex. 480, 9 S. W. 120, 13 S. W. 654; *Carroll v. Campbell*, 108 Mo. 550, 17 S. W. 884; *Patterson v. Wollmann*, 5 N. D. 608, 33 L. R. A. 538, 67 N. W. 1040.

The right to operate a ferry is not common to all citizens. This right emanates from the sovereign power. In the absence of a prescriptive right no one can lawfully maintain a ferry without authority from the state.

Douglass's Appeal, 118 Pa. 65, 12 Atl. 834; *Mills v. St. Clair County*, 8 How. 581, 12 L. ed. 1206; *McRoberts v. Washburne*, 10 Minn. 23, Gil. 8; *Stark v. Miller*, 3 Mo. 470; *Power v. Athens*, 99 N. Y. 592, 2 N. E. 609; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178, 38 Am. Rep. 407; *Conway v. Taylor*, 1 Black, 603, 17 L. ed. 191.

No rights are taken from the public when a ferry franchise is granted.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Gordon v. Winchester Bldg. & Accumulating Fund Asso.* 12 Bush, 114, 23 Am. Rep. 713; *Com. v. Bacon*, 13 Bush, 212, 26 Am. Rep. 189; *Memphis v. Memphis Water Co.* 5 Heisk. 525; *Crescent City Gaslight Co. v. New Orleans Gaslight Co.* 27 La. Ann. 138; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273.

A ferry franchise, being a portion of the prerogative of the sovereign, reposed in the subject, is not at all dependent on the ownership of the land at the river's edge; riparian rights and ownerships are not elements of the franchise, nor are they sufficient, or any foundation for, the ferry rights.

Columbia Delaware Bridge Co. v. Geisse, 38 N. J. L. 39; *Sullivan v. Lafayette County Supers.* 58 Miss. 790; *Trustees of Schools v. Tatman*, 13 Ill. 27; *Walker v. Armstrong*, 2 Kan. 198.

White, J., delivered the opinion of the court:

This action was brought by appellees, seeking an injunction preventing appellants from operating a ferry across Green river at Eastwood Landing, near Sebree. The lower court granted an injunction, and to reverse that judgment this appeal is prosecuted.

The facts, as admitted or clearly proved, seem to be that appellees are the owners of the land on either side of Green river at Eastwood Landing, and own and operate a ferry at that place under a license duly granted by the county court of Webster county. Before the granting of the present license to appellees, and after the expiration of a former license to appellees, two gentlemen by the name of Sellers established a ferry across Green river on their own land, and about 200 yards from Eastwood Landing. The Sellers gave notice, and were

granted a license by the county court of Webster county to operate a ferry at Eastwood. This license to the Sellerses was declared void by an action in the circuit court. After the judgment of the circuit court enjoining the Sellerses from operating their ferry under the license, because the license was void, these appellants (about sixty-seven in number) bought the boats from the Sellerses, and the use of a half acre, and a right of way over the lands on either side of the river from the public road; and these appellants then hired a person, at the price of \$150 per year, to run the ferry at Sellers Landing. It is shown by the proof that only the appellants and their families and property are ferried over this ferry, and that the only compensation paid is the \$150 per year to the person employed. It is shown that the public is not permitted to use appellants' ferry at all,—neither for compensation nor free. Appellees run their ferry regularly under the license granted to them.

The questions presented are: (1) Had the McLean circuit court jurisdiction to grant the injunction to protect the ferry franchise granted by the Webster county court? (2) Is the judgment granting the injunction, on the merits of the case, the law?

We are of opinion that the circuit court of McLean county had jurisdiction of the case. Appellants, or at least many of them, reside in McLean county, and the ferry runs across Green river, at that point the boundary between Webster and McLean counties. The court had jurisdiction of the subject-matter as well as of the parties. The fact that the ferry franchise was granted by the Webster county court would not give the circuit court of that county exclusive jurisdiction. Nor would the jurisdiction of the McLean circuit court be precluded by reason of an injunction issued by the Webster circuit court against the Sellerses. As it here appears, the injunction against the Sellerses was against operating a ferry for toll, and it did not prohibit them from crossing the river in their own boats.

The second question presents more difficulty. Appellants jointly purchased from the Sellerses the land and right of way, taking a deed therefor. This deed is dated June 21, 1897, and the granting clause reads: "That the grantors, in consideration of four hundred dollars in hand paid, the receipt whereof is here acknowledged, do grant, sell, and convey to the grantees the right of way over their land in Webster and McLean counties, Ky., from a point on the Sebree and Beach Grove road, where a passway begins on the Webster county side, and leads to the ferry recently established across Green river by the grantors, and from the opposite bank of the river over the lands of grantors along the passway laid out to the said Sebree and Beach Grove road on the McLean county side, to be 27 feet wide on the Webster side and 27 feet wide on the McLean side, and also the use of one-half acre of land on each side of the river where said

ferry is established, to be laid off in convenient shape for the management of said ferry, and the ferryboat and appurtenances now in use at said ferry, to have and to hold unto the grantees, their heirs or assigns, forever, except that the grantors retain the same interest in said property which is hereby granted to the grantees, respectively; the property hereby conveyed to be used as a passway and ferry for the parties herein named, but for no other purpose, and the grantors give no license to any of the parties named to use said ferry for the crossing of any other person for reward, direct or indirect." It will thus be observed that the use was limited to appellants, and was not assignable to others. The grant of a ferry franchise by the sovereign is of very ancient origin, and it has always been the rule that the privilege was exclusive. The reason of this exclusive grant was to insure to the traveling public that at all times ample and safe accommodation was given for crossing the stream. The owner of the ferry must execute a bond for the faithful performance of his undertaking, and his charges are fixed by the court or authority granting the license or franchise. This franchise is properly in the owner, and in his undisturbed ownership, as well as exercise thereof, the public has an interest; for it is for the public good that it is granted. The law gives a preference in the grant first to the riparian owner, and, if another than the owner desires to acquire the franchise, he must obtain the right from the riparian owner. So careful has the law been to protect the rights of the ferry, that it has provided a penalty against its violation by other persons carrying persons over the stream for reward. This penalty is both by prosecution, and—additional—by civil action. We recognize that it is held universally that any person may cross any stream by any means he can,—by fording, boat, or otherwise. Indeed, the private citizen can at any place along the river keep his private boat, and cross and recross at will. On all navigable streams he may use and enjoy the privilege of the stream in any way he desires, except he cannot in any way exercise the right to ferry persons across the river for hire. This rule applies to all persons. A person, of course, can in his own boat ferry his family, servants, and goods, in the exercise of this right. Indeed, it has been held that he might occasionally lend his boat to another, or ferry with himself a friend, in both cases without compensation. But, in our opinion, the case here presented is entirely different from any of the rights suggested as belonging to the citizen. In the case at bar some sixty odd persons combine and establish for themselves a ferry, hire a common ferryman, and, presumably, pay equally for the whole expense. In our opinion, this is but a device resorted to, to avoid the payment of ferriage at appellees' ferry; and this is not one of the rights of the citizen, reserved for himself and family, to cross and recross, or to the free navigation of the river. We are of opinion that this common ferry estab-

lished, though used by appellants exclusively for themselves and families, is a violation of the exclusive grant of the privilege granted to appellees, and is such a violation as will be enjoined. The deed to appellants shows that the purchase was made for the express and only purpose of establishing a ferry. It was a combination established to evade, and to enable them to evade, the payment of ferrage to appellees. If these sixty-seven may combine, then any number may do so, and thus absolutely destroy the ferry, and leave the traveler to get across the stream as best he can. It does not follow, as learned counsel argue, that, because appellants may separately do a thing, they jointly may do the same. Each of the appellants may, separately and for himself, fix any price he pleases upon his farm products, and refuse to sell for less; but if all jointly were to agree to raise the price of corn, and refuse to sell for less than the agreed price, it would be an unlawful combination. Thus, in the case at bar, each citizen has a right to own his boat and cross at pleasure; but a joint and combined ownership of a common boat used for ferrying across the river within the prohibited distance is unlawful, and a violation of appellees' rights.

Judgment affirmed.

Du Relle, J., dissents.

Rehearing denied.

C. G. CAYE, *Appt.*,

v.

Philip FABEL, Assignee, etc., of John S. Pool.

(.....Ky.....)

1. A fund arising from the collection by an assignee for creditors of money on a contract, in the performance of which property subject to a carrier's lien has been used, is chargeable with such lien.
2. The lien of a common carrier for his charges upon property carried is not defeated by an assignment made for the benefit of creditors by the owner of the property shipped.
3. A delivery by a common carrier to an assignee for creditors, of property subject to the carrier's lien, is for the benefit of all creditors, including the carrier, according to their respective interests, and does not defeat the carrier's right to be paid out of the proceeds of the property.

(March 17, 1900.)

APPEAL by plaintiff from a judgment of the Circuit Court for Jefferson County in favor of defendant in an action brought to enforce a carrier's lien upon assets of the shipper in the hands of his assignee for creditors. *Reversed.*

NOTE.—The above decision seems to be one of first impression as to the right of a common carrier to a lien on freight after delivery to an assignee for creditors.

40 L. R. A.

The facts are stated in the opinion.

Mr. Newton G. Rogers for appellant.

Mr. R. C. Kinkead for appellee.

Paynter, J., delivered the opinion of the court:

On demurrer, the averments of the petition are taken as true, which are to the effect that the appellant, Caye, was carrying on business in Louisville, Kentucky, under the name and style of "Van Dyke Transfer Company;" that his business was to transport freight from depots to places, and deliver packages through the city at various points, and for that purpose he had a large number of horses and mules, transfer wagons, drivers, etc.; that he is a common carrier. It is further averred that it was his practice in his business to advance freight for various people upon goods consigned to them, and deliver them, and collect the money so advanced, as well as money for transporting the same; that he advances such transfer charges to the railroads which may have transported the freight, etc. He avers that he had been doing business for John S. Pool as such common carrier; that it had been his practice to advance freight for him, and, upon the full delivery of freight, Pool would pay for the deliveries, and also the amounts advanced by him. It is averred that prior to June 24, 1896, Pool had a contract with the estate of De Haven for the building and transporting of a granite monument of large dimensions; that it had been transported from Massachusetts by rail to Louisville; that the plaintiff had been hauling parts of the monument from the depot to Cave Hill Cemetery for the purpose of its erection; that on June 24, 1896, he had advanced to Pool by paying freight against the monument \$209.04, and his bill for hauling was \$115, making a total of \$324.04; that on June 24, 1896, when Pool made an assignment for the benefit of his creditors, he had in his possession a considerable portion of the monument, of the value of \$800 or \$900; that he had no notice that the assignment was made until the whole of the monument was delivered.

The court sustained a demurrer to the petition. We are of the opinion that it states a cause of action. The appellant was a common carrier. He was engaged in the business of transporting chattels for all persons who chose to employ and remunerate him therefor. Owners of stages, stage wagons, railroad cars, teamsters, cartmen, draymen, and porters are common carriers. Black, Law Dict.: 2 Kent, Com. 597. 1 Bouvier, Law Dict. p. 299, says that "stagecoach proprietors, railway companies, truckmen, wagoners and teamsters, carmen and porters," etc., are common carriers; and cites Story on Bailments and Kent's Commentaries to sustain the designation which he makes as to who are common carriers. The appellant had in his possession part of the monument, of the value of \$800 or \$900, at the time the assignment was made, and held a lien upon it for the amount of his charges,

and the assignment made by Pool' for the benefit of creditors could not deprive him of that lien. The trust estate received the full benefit of plaintiff's claim for hauling and the freight advanced, and also had the benefit of that part of the monument which was delivered at the time of the assignment. Plaintiff's lien followed the fund arising from the collection of the money on the monument contract in the hands of the assignee, and he is entitled to be paid out of it the amount ascertained to be due him.

A carrier has a lien upon goods and right of detention until the freight is paid. If he parts with the possession out of the hands of himself and his agent, he loses his lien upon the goods, and cannot afterwards reclaim them. *Boggs v. Martin*, 13 B. Mon. 243. When these goods were assigned, they were, not only for the general creditors of Pool, but for those who held liens upon the property assigned, so the assignee received the estate to be distributed according to the rights of the parties. He was acting in the trust capacity, and one of the beneficiaries of the trust was the appellant; so the delivery of the possession of the property to the assignee was for the benefit of all of Pool's creditors, including appellant, according to their respective interests.

The judgment is reversed for proceedings consistent with this opinion.

City of NEWPORT, Appt.,
v.
MASONIC TEMPLE ASSOCIATION.

(.....Ky.....)

A charity which is confined exclusively to the members of the Masonic order and their families, or to the widows and children of deceased members, or those who are directly or indirectly connected with the association, is not a "purely public charity," within the provisions of Const. § 170, relating to the exemption of institutions of purely public charity from taxation.

(Paynter, J., dissents.)

(April 20, 1900.)

APPEAL by plaintiff from a judgment of the Circuit Court for Campbell County in favor of defendant in an action brought to recover taxes alleged to be due and unpaid. *Reversed.*

The facts are stated in the opinion.

Messrs. Root & Root, for appellant:

An institution of purely public charity is one that extends charity indefinitely to all persons alike without regard to membership or other considerations. The claim of the appellee to be an institution of purely public

charity cannot, therefore, be maintained upon its own showing.

Masonic and similar associations are not purely public charities.

Bangor v. Rising Virtue Lodge No. 10, F. & A. M. 73 Me. 428, 40 Am. Rep. 369; *Massemburg v. Grand Lodge, F. & A. M.* 81 Ga. 212, 7 S. E. 636; *Morning Star Lodge No. 26, I. O. O. F. v. Hayslip*, 23 Ohio St. 144; *Delaware County Inst. of Science v. Delaware County*, 94 Pa. 163; *Donohugh's Appeal*, 86 Pa. 306; *Babb v. Reed*, 5 Rawle, 151, 28 Am. Dec. 660.

In case an institution of purely public charity could have one piece of real estate and rent it out and be exempted from taxation under the Constitution, it may have an hundred pieces or any other amount of property and claim the same exemption, thus shifting the burden of taxation from itself to the shoulders of others, greatly increasing their burdens and violating the principles of equality and uniformity which lie at the foundation of every just system of taxation.

Louisville v. Louisville Bd. of Trade, 90 Ky. 409, 9 L. R. A. 629, 14 S. W. 408; 1 *Desty*, Taxn. 119.

Messrs. C. J. Helm and W. W. Helm, for appellee:

An institution which expends all its revenue and income in paying its debt created in acquiring the property from which its revenue is derived, and then in relieving distressed or indigent persons of a certain class, and for no other purpose, is an institution of purely public charity.

Louisville v. Southern Baptist Theological Seminary, 100 Ky. 506, 36 S. W. 995; *Kentucky Female Orphan School v. Louisville*, 100 Ky. 470, 40 L. R. A. 119, 36 S. W. 921; *Louisville v. Nazareth Literary & Benev. Inst.* 100 Ky. 518, 36 S. W. 994.

The payment of a debt on such a building would not affect such an exemption.

Henderson v. Strangers' Rest Lodge No. 13, I. O. O. F. 17 Ky. L. Rep. 1041, 17 S. W. 215.

Hobson, J., delivered the opinion of the court:

The only question involved in this action is whether the appellee's property is exempt from taxation. This is the second appeal of the case. The opinion on the former appeal is reported in 20 Ky. L. Rep. 266, 45 S. W. 881. By the charter of the association enacted in the year 1886, it was provided that its property and income should be exempt from all taxation so long as it was entirely devoted to Masonic and charitable purposes. On the former appeal it was held that this provision of the charter was repealed by the present Constitution of the state, which took effect September 28, 1891. But whether the property of the association was subject to taxation or exempt under the provisions of the Constitution was not determined, as the case was not so prepared as to present this question. Section 170 of the Constitution is as follows: "There shall be exempt from tax-

NOTE.—For a case parallel to the above, see *Philadelphia v. Masonic Home* (Pa.) 23 L. R. A. 545.

ation public property used for public purposes; places actually used for religious worship, with the grounds attached thereto and used and appurtenant to the house of worship, not exceeding one-half acre in cities or towns, and not exceeding two acres in the country; places of burial not held for private or corporate profit, institutions of purely public charity, and institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education; public libraries, their endowments and the income of such property as is used exclusively for their maintenance; all parsonages or residences owned by any religious society, and occupied as a home, and for no other purpose, by the minister of any religion, with not exceeding one-half acre of ground in towns and cities and two acres of ground in the country appurtenant thereto; household goods and other personal property of a person with a family, not exceeding two hundred and fifty dollars in value; crops grown in the year in which the assessment is made, and in the hands of the producer; and all laws exempting or commuting property from taxation other than the property above mentioned shall be void. The general assembly may authorize any incorporated city or town to exempt manufacturing establishments from municipal taxation, for a period not exceeding five years, as an inducement to their location."

On the return of the case to the court below, appellee filed an amended answer, setting up the defense that it is an institution of purely public charity. To this answer appellant filed a reply, to which the court below sustained a demurrer, and dismissed the action.

It appears from the record that appellee is the owner of a four-story brick building and the ground on which it stands; that the lower floor is rented by the United States postmaster, and used as a postoffice at an annual rent of about \$1,000; that the second floor is rented out for offices and living rooms at an annual rent of about \$700; and that the third and fourth floors are used by the association for the purposes of its organization. It also appears that only the first and second stories which were rented out were assessed for taxation. It is admitted in the reply that all of appellee's income and revenue is devoted—First, to the payment of the balance of debt for erecting the building sought to be taxed; second, to relieve distressed and indigent members of the Masonic order and their families. But it is alleged that the association, so far as it dispenses charity at all, confines itself exclusively to its members and their families, or, if the members are dead, to their widows and children, or to those who are directly or indirectly connected with the association; that it does not extend charity to all alike, or to those not in any way connected with the association; and that its charity is governed by the following by-law: "The master and wardens of this lodge shall constitute a

charitable committee, whose duty it shall be, on application, carefully to inquire into the situation and circumstances of indigent brethren, their widows and orphans, and afford them the necessary relief; for which purpose they shall have power to draw on the treasurer in the recess of the lodge for any sum, not to exceed \$10 for any one person, and they shall at the next meeting after such relief has been granted report the same to the lodge, which shall be entered on the minutes."

The question in the case is therefore whether, under these facts, appellee is an institution of purely public charity, and as such exempt from taxation, under the section of the Constitution above quoted. By the statutes in force previous to the adoption of our present Constitution all property "devoted to charitable purposes" was exempt from taxation. Gen. Stat. p. 1036. If this rule was still in force, appellee's property would, under some authorities, be exempt, as it is, in one view, devoted to charitable purposes. But the Constitution was intended to modify the exemptions theretofore allowed, and now only institutions of purely public charity are exempt. While this is a new provision in this state, it has long been in force in a number of other states. The purpose of its adoption in this state was to exclude from exemption all charities not purely public. The words "purely public" need no definition. They do not include any restricted or private charities. These may be very valuable, and the spirit prompting them is much to be commended; but the exemption of property from taxation had assumed such proportions at the time of the adoption of our present Constitution that it was seen fit not to exempt property from taxation unless devoted to a purely public charity. A Masonic lodge, which provides for its members and their families, or the widows and orphans of those who are dead, is a commendable private charity; but it is in no sense purely public. This question has often been presented to the courts, and, so far as we have seen, under provisions like ours the decisions are uniform. The Constitution of Ohio is the same as ours. In *Morning Star Lodge No. 26, I. O. O. F. v. Hayslip*, 23 Ohio St. 144, the facts were substantially the same as here. The court said: "A charitable or benevolent association, which extends relief only to its own sick and needy members, and to the widows and orphans of its deceased members, is not 'an institution of purely public charity,' and its moneys held and invested for the aforesaid purposes are not exempt from taxation." The Constitution of Pennsylvania is also the same as ours. In *Philadelphia v. Masonic Home*, 160 Pa. 572, 23 L. R. A. 545, 28 Atl. 954, the question was whether the property of the Masonic Home, open only to those who were Masons, was exempt. The court said: "When the eligibility of those admitted is thus determined, it seems to us the institution is withdrawn from public, and put in the class of private, charities. A

charity may restrict its admissions to a class of humanity, and still be public. It may be for the blind; the mute; those suffering under special diseases; for the aged; for infants; for women; for men; for different callings or trades by which humanity earns its bread; and, as long as the classification is determined by some distinction which involuntarily affects or may affect any of the whole people, although only a small number may be directly benefited, it is public. But when the right to admission depends on the fact of voluntary association with some particular society, then a distinction is made which concerns not the public at large. The public is interested in the relief of its members, because they are men, women, and children, not because they are Masons. A home without charge, exclusively for Presbyterians, Episcopalians, Catholics, or Methodists, would not be a public charity. But then, to exclude every other idea of public as distinguished from private, the word 'purely' is prefixed by the Constitution. This is to intensify the word 'public,' not 'charity.' It must be purely public; that is, there must be no admixture of any qualification for admission, heterogeneous, and not solely relating to the public. . . . If this [charity] be purely public, then what is not purely public? This is not a question to be decided on sentiment; if it were, our inclinations would prompt to a different conclusion. But there is not much sentiment in the Constitution. It is a barrier erected by the whole people against encroachments on the rights of the people as a whole." In the previous case of *Delaware County Inst. of Science v. Delaware County*, 94 Pa. 163, an institute of science for "the promotion and diffusion of general and scientific knowledge among the community at large, and the establishment and maintenance of a library, and museum," the benefits of which were restricted to members except upon conditions prescribed by a board of managers, was held not exempt from taxation. The court said: "The plaintiff in error, so far from being a purely public charity, is not a public charity at all. It is a private corporation, for the benefit of its members, as much so as any other beneficial or literary society." In *Bangor v. Rising Virtue Lodge No. 10, F. & A. M.* 73 Me. 428, 40 Am. Rep. 369, a Masonic lodge was held subject to taxation under a statute much broader in its exemption than our Constitution. Among other things, the court said: "The just and honest rule in assessments for governmental purposes is equality of taxation. Whatever sacrifices it requires from the people should be made to bear as nearly as possible with the same pressure upon all. In this way only will there be the least sacrifice by all. If one bears less than his share of the public burden, some other must bear more. If one block of stores remains untaxed, the remaining stores and other taxable property must be unduly and disproportionately taxed. The more numerous the exemptions the more unequal and burdensome the taxation." Then, after showing that an ex-

emption must be construed with the utmost strictness, and that the party claiming it must bring his case unmistakably within the spirit and intent of the exception, the court said: "It is apparent that the defendant corporation cannot be regarded as a purely public charitable institution, because it wants the essential elements of a public charity. It has other objects than charity. Whatever its ultimate purposes, they are other than charitable. Its funds are derived, not from devises and gifts as in case of a public charity, but from fees and the assessment of its members. The funds so obtained are to be distributed among the poor and needy members from whom they were collected, and among their wives and children. It is an association for the mutual benefit of its members, and not a charitable institution, within the meaning of the statute." In *Babb v. Reed*, 5 Rawle, 151, 28 Am. Dec. 650, an Odd Fellows lodge formed for the purpose of employing certain funds for the mutual benefit of its members and their families was held not to be an association for charitable uses. See also *State ex rel. Richey v. McGrath*, 95 Mo. 193, 8 S. W. 425; *State v. Central St. Louis Masonic Hall Asso.* 14 Mo. App. 596. In *Young Men's Protestant Temperance & Benev. Soc. v. Fall River*, 160 Mass. 409, 36 N. E. 57, it was held that a temperance society, which used its funds exclusively for the benefit of its members, was not exempt from taxation as a charitable institution. The same rule was followed as to a Young Men's Christian Association having a similar rule in New Jersey, in *Young Men's Christian Asso. v. Paterson*, 61 N. J. L. 420, 39 Atl. 655. and in Maine, in *Auburn v. Young Men's Christian Asso.* 86 Me. 244, 29 Atl. 992; no question of religious uses being made in either of these cases. In South Carolina, in *State ex rel. Hibernian Soc. v. Addison*, and *State ex rel. Grand Lodge of Ancient Free Masons v. Addison*, 2 S. C. N. S. 499, the same rule was followed, and it was held that neither of the appellants was entitled to the exemption. Summing up the authorities, the learned author of 12 Am. & Eng. Enc. Law, 2d ed. p. 343, says: "While there are decisions to the contrary, the preponderance of authority is in favor of the doctrine that an exemption of benevolent and charitable institutions does not extend to a society which confines its benefits to members or their families." The contrary decisions to which he refers are all under provisions exempting simply charitable institutions. In none of them was the exemption confined to institutions of purely public charity, and in several of the cases this distinction is pointed out. The case of *Henderson v. Strangers' Rest Lodge No. 13, I. O. O. F.* 17 Ky. L. Rep. 1041, 17 S. W. 215, was decided under the statute then in force, which was materially different from our present constitutional provision. The cases of *Kentucky Female Orphan School v. Louisville*, 100 Ky. 470, 40 L. R. A. 119, 36 S. W. 921; *Louisville v. Southern Baptist Theological Seminary*, 100 Ky. 506, 36 S. W.

995, and *Louisville v. Nazareth Literary & Benev. Inst.* 100 Ky. 518, 36 S. W. 994, were based on grounds not appearing in this case, all these institutions being educational, and not charities, restricted to the members of any church or society; and, in view of the plain intent of the Constitution, we are not at liberty to extend the rule announced in those cases to an institution like appellee. There are many commendable organizations owning a large amount of property, and doing often much work of benevolence, such as the Knights of Pythias, the Elks, the Odd Fellows, the Red Men, Sons of Temperance, and the like; but so long as they confine their beneficence to their own members, or their widows and orphans, or are not designed for charitable purposes purely public, they cannot be regarded as institutions of "purely public charity," within the meaning of our Constitution. To so hold would be to give substantially no effect to the words "purely public" in that instrument, and leave few, if any, private charities which would not be exempt from taxation. The section is framed so minutely that it is impossible to escape the conclusion that it was designed to narrow exemptions from taxation, and to limit them to the objects expressly named. It must be fairly construed, with a view to promote its purposes, and the exemptions allowed by it cannot be extended by implication.

The judgment of the court below is therefore reversed, and the cause remanded, with directions to overrule the demurrer to the reply, and for further proceedings not inconsistent with this opinion.

Paynter, J., dissenting:

I dissent from the opinion of the court in this case, because it disregards the doctrine enacted in the cases of *Kentucky Female Orphan School v. Louisville*, 100 Ky. 470, 40 L. R. A. 119, 36 S. W. 921; *Louisville v. Southern Baptist Theological Seminary*, 100 Ky. 506, 36 S. W. 995; *Louisville v. Nazareth Literary & Benev. Inst.* 100 Ky. 518, 36 S. W. 994.

T. M. HIGHTOWER, Appt.,

v.

BAILEY & KOERNER.

(.....Ky.....)

1. **The lien given to a subcontractor, materialman, or laborer** by act March, 1896 (Ky. Stat. § 2463), though given irrespective of any notice of the claim, or of the state of the account between the owners and the contractors, is not unconstitutional, as to future contracts, as a taking of one

NOTE.—For constitutionality of statute creating mechanic's lien in favor of subcontractors and materialmen, see also *Merrigan v. English* (Mont.) 5 L. R. A. 837; and *Smith v. Neubauer* (Ind.) 33 L. R. A. 685.

For rights of subcontractors, see also *Monroe v. Hannan* (D. C.) 3 L. R. A. 549; *Schroeder v. Galland* (Pa.) 7 L. R. A. 711, and *note*; and *Glass v. Freiburg* (Minn.) 16 L. R. A. 335, and *note*.
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man's property to pay the debt of another without giving any day in court, or as an unwarrantable interference with the right to make contracts.

2. **A materialman who furnishes materials to another materialman** is not entitled to any lien therefor, under Stat. § 2463, giving a lien for labor performed or materials furnished under contract with the "owner, contractor, subcontractor, architect, or authorized agent."

(March 29, 1900.)

A PPEAL by claimant from a judgment of the Circuit Court for Henderson County denying his lien for materials which went into a building erected for A. Waller & Co. *Affirmed.*

The facts are stated in the opinion.

Mr. R. H. Cunningham, for appellant:

The mechanics' lien law (Ky. Stat. § 2463), as amended by the act of March 21, 1896, is constitutional.

The validity of an act is presumed until its nullity is shown beyond reasonable doubt.

Collins v. Henderson, 11 Bush, 74; *Cooley*, Const. Lim. 216, 433, 434; *Wellington, Petitioner*, 16 Pick. 87, 26 Am. Dec. 631; *Alexander v. People*, 7 Colo. 155, 2 Pac. 894; *Crowley v. State*, 11 Or. 512, 6 Pac. 70; *Kelly v. Meeks*, 87 Mo. 396; *Robinson v. Schenck*, 102 Ind. 307, 1 N. E. 698; *Talbot v. Hudson*, 16 Gray, 417; *Louisville v. Hyatt*, 2 B. Mon. 178; *Lexington v. McQuillan*, 9 Dana, 513, 35 Am. Dec. 159; *Waller v. Martin*, 17 B. Mon. 191; *Cumberland & O. R. Co. v. Barren County Ct.* 10 Bush, 613.

The owner by his contract authorizes the contractor to procure all such material, and to have done such work, as is necessary; and settlement with the contractor is no defense to a claim of lien by the subcontractor and materialman.

Smith v. Neubaur, 144 Ind. 95, 33 L. R. A. 685, 42 N. E. 40; *Phillips*, *Mechanics' Liens*, 2d ed. § 33; *Colter v. Freese*, 45 Ind. 96; *Barker v. Buell*, 35 Ind. 302; *White v. Miller*, 18 Pa. 52; *Neeley v. Searight*, 113 Ind. 316, 15 N. E. 598; *Hamilton v. Naylor*, 72 Ind. 175; *Adams v. Buhler*, 116 Ind. 100, 18 N. E. 269; *Ferguson v. Despo*, 8 Ind. App. 523, 34 N. E. 575; *Kellogg v. Howes*, 81 Cal. 170, 6 L. R. A. 588, 22 Pac. 509; *Parker v. Bell*, 7 Gray, 429; *Weeks v. Walcott*, 15 Gray, 54; *Clark v. Kingsley*, 8 Allen, 543; *Cole Mfg. Co. v. Falls*, 90 Tenn. 466, 16 S. W. 1045; *Reeves v. Henderson*, 90 Tenn. 521, 18 S. W. 242; *Bardwell v. Mann*, 46 Minn. 285, 48 N. W. 1120; *Mallory v. La-Crosse Abattoir Co.* 80 Wis. 170, 49 N. W. 1071; *Albright v. Smith*, 2 S. D. 577, 51 N. W. 590; *French v. Bauer*, 134 N. Y. 548, 20 L. R. A. 560, 32 N. E. 77; *Jones v. Great Southern Fireproof Hotel Co.* 58 U. S. App. 397, 86 Fed. Rep. 370, 30 C. C. A. 108.

On petition for rehearing.

The lien is given one who furnishes material by contract with, or by the written consent of, the owner, contractor, subcontractor, architect, or authorized agent. The language used was simply to guard against a claim of lien for work or material not au-

thorized by the owner. Wherever the improvement is made with the owner's consent in writing, the lien follows through the other parties mentioned as his agents.

The legislature considered "subcontractors" as embracing all persons who contracted, whether for work or material, except those who have contracts directly with the owner.

15 Am. & Eng. Enc. Law, p. 47.

The statute is plainly remedial, and should therefore be liberally construed.

Ky. Stat. § 460; *Sutton v. Sutton*, 87 Ky. 216, 8 S. W. 337.

Messrs. Yeaman & Yeaman, for appellees:

Statutes similar to the act of March, 1896, have been held unconstitutional.

John Spry Lumber Co. v. Sault Sav. Bank Loan & T. Co. 77 Mich. 199, 6 L. R. A. 204, 43 N. W. 778; *Schroeder v. Galland*, 134 Pa. 277, 7 L. R. A. 711, 19 Atl. 632; *Benedict v. Hood*, 134 Pa. 289, 19 Atl. 635; *Nice v. Walker*, 153 Pa. 123, 25 Atl. 1065; *Waters v. Wolf*, 162 Pa. 153, 29 Atl. 646; *Meyer v. Berlandi*, 39 Minn. 438, 1 L. R. A. 777, 40 N. W. 513; *Jones v. Great Southern Fireproof Hotel Co.* 79 Fed. Rep. 477; *Randolph v. Builders' & Painters' Supply Co.* 17 So. 721; *Selma Sash, Door, & Blind Factory v. Stoddard*, 116 Ala. 251, 22 So. 555.

And a stronger case is *Jones v. Great Southern Fireproof Hotel Co.*, tried in the circuit court of the United States at Cincinnati, and reported in 79 Fed. Rep. 477, Reversed in 58 U. S. App. 397, 86 Fed. Rep. 370, 30 C. C. A. 108.

Hazelrigg, Ch. J., delivered the opinion of the court:

A. Waller & Co., desiring to build a grain elevator on their lot in the city of Henderson, Kentucky, contracted with Bailey & Koerner to furnish all the necessary material, and to construct the improvement.

Bailey & Koerner, who were builders and contractors, contracted with H. W. Clark, Jr., a lumber merchant at Henderson, for a large quantity of the lumber necessary for the building. Clark then contracted with Hightower, a lumber dealer at Ragan, Alabama, for a quantity of lumber for the purpose of using it in filling his contract with Bailey & Koerner.

On the completion of the work it appears that Bailey & Koerner have paid Clark in full for the lumber furnished under his contract, including the Hightower lumber, but Clark has failed to pay Hightower. The latter has therefore brought this action in the Henderson circuit court claiming a lien on Waller & Co.'s lot and building for what Clark owes him.

It is the contention of counsel that under our statute Hightower, as a materialman, has this lien without regard to the state of the account between Waller & Co. and Bailey & Koerner or between the latter and Clark. But because there was no averment in Hightower's petition, as there could not truthfully have been, to the effect that Bailey & Koerner

or Waller & Co. were indebted to Clark, the chancellor dismissed the petition on demurrer, holding that while the statute as amended by the act of March 21, 1896 (Ky. Stat. § 2463), in terms gave Hightower the lien, the statute as so amended is unconstitutional, and this is the first question considered. The statute is as follows: "A person who performs labor, or furnishes materials in the erection, altering, or repairing a house, building, or other structure, or for any fixture or machinery therein, or for the excavation of cellars, cisterns, vaults, wells, or for the improvement, in any manner, of real estate by contract with, or by the written consent of, the owner, contractor, subcontractor, architect, or authorized agent, shall have a lien thereon, and upon the land upon which said improvements shall have been made, or on any interest such owner has in the same, to secure the amount thereof with costs; and said lien on the land or improvements shall be superior to any mortgage or encumbrance created subsequent to the beginning of the labor or the furnishing of the materials; and said lien, if asserted as hereinafter provided, shall relate back and take effect from the time of the commencement of the labor or the furnishing of the materials: Provided, that such lien shall not take precedence of a mortgage or other contract, lien or bona fide conveyance for value without notice, duly recorded or lodged for record according to law, unless the person claiming such prior lien shall, before the recording of such mortgage or other contract, lien or conveyance, have filed in the clerk's office of the county court of the county wherein he shall have performed labor or furnished material, or shall expect to perform labor or furnish materials as aforesaid, a statement showing that he has performed or furnished, or that he expects to perform or furnish, such labor or materials, and the amount in full thereof, and his lien shall not, as against the holder of said mortgage or other contract, lien or conveyance, exceed the amount of the lien claimed, or expected to be claimed, as set forth in such statement."

"The liens provided for herein shall in no case be for a greater amount in the aggregate than the contract price of the original contractor; and should the aggregate amount of liens exceed the price agreed upon between the original contractor and the owner, then there shall be a pro rata distribution of the original contract price among said lien holders."

This statute is radically different from our former laws on this subject, and has not heretofore been before this court for construction.

The preceding statute, while giving liens to contractors, subcontractors, materialmen, and laborers, practically thereby provided a process of garnishment in the hands of the owner of any money he might owe the contractor. Its purpose was merely to substitute the subcontractor, materialman, and laborer to the rights of the contractor, and

was effectual only in the event the owner was indebted to the contractor. It was entirely safe for the owner, without notice of the claims of others, to pay his contractor when he pleased, even in advance.

The present statute was clearly meant to fasten, and does fasten, on the property of the owner a lien for the claim of the subcontractor, materialman, and laborer, although the owner has no notice of such claims, and may owe the contractor nothing.

When applied to the facts of this case, assuming that Hightower is a materialman and Clark a subcontractor within the meaning of the statute, the law gives to Hightower a lien on the lot and improvement of Walling & Co., without regard to the state of account between the owners and the contractors or the contractors and Clark. This is, in effect, argue counsel, the taking of Waller & Co.'s property to pay the debt of another, and gives them no day in court, and is, moreover, an unwarrantable interference with the right of Waller & Co. to make such contract as they pleased with Bailey & Koerner, and discharge their obligations when and as they pleased. This contention is not without authority to support it. The Ohio courts seem to so hold, and perhaps also the courts of Michigan. But the weight of authority seems the other way. In *Laird v. Moonan*, 32 Minn. 358, 20 N. W. 354, the constitutionality of an act from which our act seemingly is copied is elaborately discussed and the act upheld. In Wisconsin the same conclusion was reached. *Mallory v. La Crosse Abattoir Co.* 80 Wis. 170, 49 N. W. 1071. So in Massachusetts, in *Donahy v. Clapp*, 12 Cush. 440; *Bowen v. Phinney*, 162 Mass. 593, 39 N. E. 283.

In *Cole Mfg. Co. v. Falls*, 90 Tenn. 466, 16 S. W. 1045, the court said: "It is true that a lien is provided for persons with whom the owner is supposed to have no direct contractual relations, but the fact alone does not invalidate the act; for the owner must be held to a knowledge of the existing law on the subject, and to the presumption that he employed the original contractor, and gave out his work with reference to that law. The right of lien to subcontractors and materialmen is, by operation of law, incorporated into and made a part of the owner's contract, as much as if expressly included and written therein. He contracts about a subject in which the law declares certain advantages to all persons concerned, whether by direct contract with him or by the employment of his contractor. The law declares that a lien shall exist in favor of the subcontractor and materialman in certain contingencies; hence the owner who makes the contemplated contract cannot justly complain of the legal result, especially when he receives the benefit of the labor and material of those for whom the lien is provided, and who often have no other means of compensation. The enforcement of this law does not necessarily result in loss to the owner, nor take from him something for nothing."

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In *Colter v. Freese*, 45 Ind. 96, the same conclusion was reached after an exhaustive examination. So, also, in *Hicks v. Murray*, 43 Cal. 515, the court thought the act constitutional. To the same effect are the cases of *Atwood v. Williams*, 40 Me. 409; *Gurney v. Walsham*, 16 R. I. 699, 19 Atl. 323; *Roanoke Land & Improv. Co. v. Karn*, 80 Va. 589; *Norfolk & W. R. Co. v. Howison*, 81 Va. 125; *Spokane Mfg. & Lumber Co. v. McChesney*, 1 Wash. 600, 21 Pac. 198; *Paine v. Tillinghast*, 52 Conn. 532. So, also, in Maryland in *Treusch v. Shryock*, 51 Md. 162.

An elaborate and learned discussion of this question is found in *Jones v. Great Southern Fireproof Hotel Co.* 58 U. S. App. 397, 86 Fed. Rep. 370, 30 C. C. A. 108, considered in the United States circuit court of appeals before Judges Lurton and Taft and District Judge Clark. After reviewing the authorities, the learned judge (Lurton) said: But "the validity of such statutes however, need not be rested upon mere authority. They find sanction in the dictates of natural justice, and most often administer an equity which has recognition under every system of law. That principle is that everyone who, by his labor or materials, has contributed to the preservation or enhancement of the property of another, thereby acquires a right to compensation. . . . The legal effect of the contract [between the owner and contractor] is to give a lien to all who, at the instance of his contractor, shall be employed to furnish labor or materials for the work which he has let out. So far as such a statute is limited to future contracts, it cannot be said to impair the obligation of a contract. If the law be subject to no other objections, it impairs no contract, for all thereafter made are entered into upon the basis of the law. . . . Neither can the owner be said to be thereby deprived of his property without due process of law. He has voluntarily made a contract with the law before him. He has thereby subjected his property to liability for certain debts of the contractor. His own voluntary consent is an element in the transaction. He knows what the law is, and makes a contract under the law. It is idle to say that under such circumstances he is deprived of his property without due process of law."

In *Henry & C. Co. v. Evans*, 97 Mo. 47, 3 L. R. A. 332, 10 S. W. 868, Judge Barclay, in an able opinion overruling a former and contrary opinion (*Henry v. Hinds*, 18 Mo. App. 497), sustained the validity of a statute similar to the Kentucky statute. Under the Nebraska statute the owner is liable for labor and material without regard to the state of the account between himself and the contractor. *Ballou v. Black*, 21 Neb. 131, 31 N. W. 673. So, in Nevada, *Hunter v. Truckee Lodge, No. 14* I. O. O. F. 14 Nev. 24.

In Phillips on Mechanics' Liens, 3d ed. § 65, the author thus states the doctrine: "The lien of the mechanic being a remedy by which the property of one man may be taken for the benefit of another, it necessarily fol-

lows that it can only arise by the free consent of him to whom it belongs. . . . It is, however, no more necessary that the contract from which the lien is to follow as an incident should be the personal act of the owner than in other matters. Necessity has created, and the law sanctioned, the performance of the affairs of life by means of agents duly authorized by principles. . . . This agency may be implied as well as expressly created. Every man must necessarily be presumed to know the public laws in existence, and to contract with reference to their provisions. Whenever, therefore, from public policy, it is found necessary to extend by statute a lien against the property of an owner, to answer to a subcontractor, or others with whom he is not in privity, and the owner shall thereafter make such contract from which the statute declares the lien to subcontractors and others shall flow, the original contract of the owner will be conclusively presumed to imply the consent that his property may be taken to pay indebtedness to subcontractors thus imposed by the law. On this ground contractors have been allowed to pledge the credit of property to subcontractors and materialmen."

An admirable statement of the grounds on which such statutes rest is found in *Albright v. Smith*, 2 S. D. 577, 51 N. W. 590.

We regard the authorities cited, and there are many other cases in point, as entirely sufficient to uphold the constitutionality of the statute. Notwithstanding this, we think the chancellor acted properly in dismissing the petition.

Whilst the case seems to have been heard below on the theory that Clark was a subcontractor and Hightower a materialman within the meaning of the statute, the pleadings do not sustain such theory. Hightower is a lumberman and furnished materials, it is true, but he furnished them to Clark, another materialman. The petition avers that he furnished the lumber to Clark at his special instance and request, and for which he agreed to pay the purchase price; and he so furnished it to Clark for the purpose of being used, and it was used, in building for A. Waller & Co. a certain elevator. He further avers that he filed his statement in the clerk's office as required by law, showing that he claimed a lien for the materials furnished Clark as subcontractor. But the averments of the pleading do not show that Clark was a subcontractor, but do show that he was merely a materialman, under contract with the contractors Bailey & Koerner to furnish certain lumber for the elevator. Clark and Hightower were both materialmen, but the statute does not give a lien to a materialman who furnishes materials to another materialman. The materials for which the statute gives a lien are those which are furnished to an owner, a contractor, subcontractor, architect, or authorized agent. We cannot extend the statute beyond its plain language and evident meaning. The hardships to owners are apt to be

considerable, even under the terms of the statute. If the right to the lien be extended beyond the terms, then it can be extended indefinitely, and there would be no safety in contracting for the erection of a building. The statute so extended would be impracticable.

In *Phillips, Mechanics' Liens*, 3d ed. § 51, it is said "that a lumber dealer, employed merely to furnish lumber, whether manufactured or not, is not a contractor for the erection of the building or any division of it. He is a materialman merely, or a workman, if he works up his lumber into frames, doors, etc., and is not employed to erect or put up the building or any of its primary divisions."

In *Merriman v. Jones*, 43 Minn. 29, 44 N. W. 526, it was held that one who sells materials to the dealer who has contracted to supply the contractor is not a subcontractor within the meaning of the Minnesota statute, and has no lien. This statute, we have seen, apparently furnished the model for the Kentucky statute.

A strict application of this rule should be made in this case because it appears from the plaintiff's pleadings that when he shipped the first lumber to Clark he did not know for what particular purpose or for whose building the lumber was intended, and he could not therefore have sold it on the credit of the building of Waller & Co. to be erected, but trusted alone in Clark's credit. It was simply an ordinary sale of lumber by one lumber merchant to another like merchant, and apparently on the sole credit of the purchasing merchant.

Wherefore the judgment denying the lien is affirmed.

Rehearing denied.

William S. TAYLOR, *Appt.*,
v.

J. C. W. BECKHAM *et al.*

John MARSHALL, *Appt.*,
v.

J. C. W. BECKHAM *et al.*

J. C. W. BECKHAM *et al.*
v.

William S. TAYLOR *et al.*, *Appts.*

(.....Ky.....)

1. The governor has no power to adjourn the legislature, when there has been no disagreement between the two houses.

NOTE.—For right to remove officers summarily, see *Trainor v. Wayne County Auditors* (Mich.) 15 L. R. A. 95, and note.

For proceeding to declare election void, see *Mason v. State ex rel. McCoy* (Ohio) 41 L. R. A. 291.

For denial of right to jury in contest for office, see *People ex rel. Akin v. Kipley* (Ill.) 41 L. R. A. 775.

under Const. § 36, providing for sessions to be held at the seat of government, "except in case of war, insurrection, or pestilence, when it may by proclamation of the governor assemble for the time being elsewhere," which seems to refer, not to an adjournment, but to a provision for a place to assemble and organize, and § 80, authorizing him to adjourn the legislature in case of disagreement between the two houses with respect to the matter.

2. The death of a governor elect pending a contest to determine the election of governor and lieutenant governor will not defeat the right of the person elected lieutenant governor to have the contest determined, and thus entitle him to the office of governor.
3. Evidence assailing the integrity of legislative journals which the Constitution requires to be kept, by showing the falsity of entries as to the presence of members when determining an election contest, is inadmissible, since the court is without jurisdiction to go behind the record made by the legislature under the Constitution.
4. It must be presumed that the legislature did its duty, and had before it such evidence as was satisfactory to it in determining an election contest on a report by a contest board, where the question required evidence, and the journals are silent as to what evidence the legislature heard.
5. A determination of an election contest for the offices of governor and lieutenant governor by the legislature, which by Const. § 90, is made the sole tribunal to determine such contest, and which proceeds under Stat. § 1596a, subs. 8, by referring the matter to a board, and receives its report before determining the contest, cannot be reviewed by the courts on the grounds that the notice of contest or the evidence was insufficient, or that the contest board was not fairly drawn by lot, as required by statute, or that the election should have been held void, where the findings by the legislature do not show that it was void.
6. A determination against the claim of a right to an office is not a deprivation of life, liberty, or property within the provision of U. S. Const. 14th Amend. as to due process of law.

(Du Relle, J., dissents.)

(April 6, 1900.)*

APPEAL by Taylor *et al.* from a judgment of the Circuit Court for Jefferson County in favor of Beckham *et al.* in proceedings to determine the title to the offices of governor and lieutenant governor and to enjoin attempted illegal action on the part of persons not elected to such offices. *Affirmed.*

The facts are stated in the opinion.

Messrs. W. O. Bradley, W. H. Yost, D. W. Fairleigh, A. E. Willson, and Breckenridge & Shelby, with Messrs. Helm, Bruce, & Helm, for appellants:

Where previously existing rights, whether of life, liberty, or property, are involved, there is no tribunal in the commonwealth

which has the absolute power to take away such a right and then claim "absolute immunity from judicial inquiry" as to how or why this was done.

Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377; *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240.

When plaintiff alleges that the general assembly "adjudged and determined" that Taylor was not entitled to the office to which the certificate of election then showed him to be entitled, and further "adjudged and determined" that Beckham was entitled to this office, and that the man who claims to have been elected by a majority of the people should be ousted from office, we have a right to inquire into the proceedings by which this adjudication was reached, and to see whether or not it was done "in conformity to the Constitution."

Jones v. Jones, 12 Pa. 350, 51 Am. Dec. 611.

Notice of some kind, actual or constructive, is essential, even in proceedings in rem.

Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914.

If the contest tribunal reached its conclusion that Goebel was elected by holding that there had been no election in the thin ballot counties, and that he had been elected by the remainder of the state, such a conclusion was so palpably contrary to the law of the land as not to be "authoritative."

Neocum v. Kirtley, 13 B. Mon. 515; *Hocher v. Pendleton*, 100 Ky. 726, 39 S. W. 250; *People ex rel. Wallace v. Salomon*, 46 Ill. 415.

Every ground of contest set forth in the notice was such a ground as, if established by proof, would simply show that the election was not "free and equal," and would vitiate the whole election, which, of course, would defeat the title of Goebel.

Leeman v. Hinton, 1 Duv. 37.

If the adjudication or determination of the general assembly was void, it can be of no effect or avail in any form of procedure.

The answer alleges that the determination of the general assembly was the result of a conspiracy entered into prior to the institution of the contest, by which it was agreed between the contestants and many of the members of the general assembly that such determination should be had.

A judgment rendered pursuant to an agreement made in advance between the judge and the litigant is fraudulent, and certainly voidable, if not absolutely void.

Slacum v. Simms, 5 Cranch, 363, 3 L. ed. 126; *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914; *Allsmiller v. Freutchenicht*, 96 Ky. 198, 5 S. W. 746; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 234, 41 L. ed. 983, 17 Sup. Ct. Rep. 581; *Wilson v. North Carolina*, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435.

Arbitrary power and the absence of due process of law are convertible phrases.

Hurtado v. California, 110 U. S. 536, 28 L. ed. 238, 4 Sup. Ct. Rep. 111, 292; *Brown v. Hummel*, 6 Pa. 80; *People v. Marx*, 99 N. Y. 386, 52 Am. Rep. 34, 2 N. E. 29; *Slaugh-*

*An appeal from this decision was dismissed by the Supreme Court of the United States on May 21, 1900, in an opinion reported in 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890. 49 L. R. A.

ter-House Cases, 16 Wall. 36, 21 L. ed. 394; *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *Cummings v. Missouri*, 4 Wall. 277, 18 L. ed. 356.

Messrs. T. L. Edelen and W. H. Sweeney also for appellants.

Messrs. Lawrence Maxwell, Jr., W. S. Pryor, Aaron Kohn, Zack Phelps, John K. Hendrick, and James A. Scott, with **Mr. Lewis McQuown**, for appellees.

Hobson, J., delivered the opinion of the court:

At the November election, 1899, appellant W. S. Taylor and William Goebel were opposing candidates for governor of Kentucky. Appellant John Marshall and appellee J. C. W. Beckham were opposing candidates for lieutenant governor. On the face of the returns, Taylor received a majority of 2,383 over Goebel, and Marshall a somewhat larger majority over Beckham. The state canvassing board, on the face of the returns, issued certificates of election to Taylor and Marshall. Goebel and Beckham then gave notice of contest, and the matter was brought before the general assembly, which, under the Constitution, is the tribunal to determine contests for these offices; § 90 providing as follows: "Contested elections for governor and lieutenant governor shall be determined by both houses of the general assembly according to such regulations as may be established by law." The statute passed pursuant to this provision of the Constitution regulating the determination of such contests is found in § 1596a, subsec. 3, Ky. Stat., and provides that on the third day after the organization of the general assembly a board shall be chosen by lot, and have power to send for persons and papers. Its decision shall be reported to the two houses, and the general assembly shall then determine the contests. The general assembly convened on January 2, 1900, and on the third day after its organization, as shown by the journals of the two houses, a board of contest was appointed pursuant to the statute. The journals also show that on February 2, 1900, the board in each of these contests reported to the two houses that they had heard all the evidence offered by the contestants and contestees, and that William Goebel had received the highest number of legal votes cast for governor; that J. C. W. Beckham had received the highest number of legal votes cast for lieutenant governor, and that they were duly elected, and entitled to said offices. The journals further show that on the same day both houses, with a quorum present, approved and adopted separately and in joint session the reports of the contest board, and declared that William Goebel and appellee J. C. W. Beckham were duly elected governor and lieutenant governor at the election referred to. Goebel and Beckham were on that day sworn in accordingly. On January 30, William Goebel was shot by an assassin, receiving a wound from which he afterwards died on February 3. On January 31, appellant Taylor, as governor, issued a proclamation declaring that

a state of insurrection existed at Frankfort, Kentucky, adjourning the general assembly to February 6, and ordering it to then assemble at the town of London, in Laurel county. The sessions of the general assembly on February 2 were not held at the state house for the reason that it was held by a military force of appellant Taylor that would not allow the assembly to meet there, and for this reason they met on that day at the Capital Hotel, in the city of Frankfort. On February 19 the legislature met again at the state house, and the senate on that day adopted the following resolution: "Whereas, on the 31st day of January, 1900, the acting governor of the commonwealth of Kentucky, by the use of armed force, dispersed the general assembly, and has until recently prevented the senate and house from assembling at their regular rooms and places of meeting; and whereas, the general assembly, and each house thereof, after public notice, met in joint and separate sessions in the city of Frankfort, a full quorum of such bodies being present, and adopted the majority reports and resolutions of the boards of contests for governor and lieutenant governor of the commonwealth of Kentucky, unseating the contestees, W. S. Taylor and John Marshall, as governor and lieutenant governor, and seating the contestants, William Goebel and J. C. W. Beckham, as governor and lieutenant governor, respectively, all of which proceedings, reports, and resolutions are set out in the journals of the two houses of the general assembly; and whereas, this joint assembly is now enabled to meet in its regular place of meeting, and, whilst it adheres to the belief beyond doubt that the action of the general assembly heretofore taken in reference to said contests is valid, final, and conclusive, to remove any doubt that may exist in the minds of any of the people of the commonwealth: Now, be it resolved, by the general assembly of the commonwealth of Kentucky in joint session assembled, to the end that all doubt may be removed, if any exists, as to the validity and regularity of the action and proceedings at the times and places shown by the journals of the two houses other than its regular rooms, provided by law, that all the acts, proceedings, and resolutions of the senate and house and of the joint assembly of the two houses upon or touching the report of the majority of the boards of contest for the offices of governor and lieutenant governor, unseating the contestees, and seating William Goebel and J. C. W. Beckham, and declaring them to have been elected governor and lieutenant governor, respectively, on the 7th day of November, 1899, is hereby reenacted, readopted, reaffirmed, and ratified at this, the regular place of meeting provided by law, at the seat of government in Frankfort, Ky." This resolution, though not filed with the exhibits in these cases, is copied in the petition, and is admitted by the answer to have been entered on the senate journal. The same resolution was adopted by the house, and by both houses in joint session, on February 20.

Appellants insist that all these proceedings were void, and did not affect in any way their rights to the offices of governor and lieutenant governor. A great many matters have been presented in the argument, but only such as seem decisive can be considered without unduly extending this opinion. It is insisted: (1) That the proceedings of the legislature on February 2 are void, because the legislature had then been adjourned by the governor until February 6, and no legal session could be held in the meantime. (2) That, Goebel having died on February 3, the contest for the office of governor thereby abated, and the action of the legislature on February 19 and 20 was therefore void. (3) It is averred that the legislature took no action on February 2, and that the journals of these meetings were fraudulently made by the clerk, and pursuant to a conspiracy between certain members of the assembly and the contestants. (4) It is averred that the general assembly acted without evidence, and arbitrarily. These contentions will be considered in the order stated.

1. As to the governor's power to adjourn the legislature. If the governor had the power to adjourn the legislature from January 31 to February 6, of course no valid action could be taken by it in the interim. It is therefore necessary to determine whether he had such power. The only authority relied on to sustain his action is § 36 of the Constitution, which is as follows: "The first general assembly, the members of which shall be elected under this Constitution, shall meet on the first Tuesday after the first Monday in January, 1894, and thereafter the general assembly shall meet on the same day every second year, and its sessions shall be held at the seat of government, except in case of war, insurrection, or pestilence, when it may, by proclamation of the governor, assemble, for the time being, elsewhere." At first blush it must strike anyone that the thing in the mind of the framers of this section was not an adjournment of the general assembly after it had assembled, but a provision for a place of assembling. Until an assembly is organized, it cannot control its movements; and in case of an insurrection or pestilence preventing it from meeting at the capital it was necessary for someone to have power to name another place at which it might assemble for the time being, and organize. This seems, on its face, to be all the section was intended to provide for, and that it was not intended to authorize such action as was taken in this case is clear from § 80, which provides, among other things: "In case of disagreement between the two houses with respect to the time of adjournment, he [the governor] may adjourn them to such time as he shall think proper, not exceeding four months." From this provision it is clear that the governor had no power over the time of adjournment of the two houses, except in case of disagreement between them. There had been no disagreement between the two houses here, and, if the governor could have

adjourned them from January 31 to February 6, he might have made the time one month or four months, and then, by a similar proclamation, adjourned them again, and indefinitely prevented action upon the contest. It is also to be observed that, while the Constitution gives the governor power with respect to the time of adjournment in case of disagreement between the two houses, it confers upon him no such power to name another place than that in which the legislature may be sitting. Section 41 provides: "Neither house, during the session of the general assembly, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which it may be sitting." Under familiar rules of constitutional construction, either house, by virtue of this section, may, with the consent of the other, adjourn for more than three days, or to any other place than that in which it is sitting. It was never intended by the Constitution that the two houses might name a time or place of adjournment, and that the governor could also have like power; for this would be, not only to create confusion, but to destroy the independence of the legislative branch of the government. By § 27, the powers of the government are divided into three distinct and independent departments, and by § 42 the regular sessions of the general assembly are limited to sixty legislative days. If the governor can, without its consent, adjourn it from time to time, or from place to place, as he may see proper, he might be able to prevent it from taking any action that he might be opposed to. The legislative branch of the government more nearly represents the people than any other branch, and it is charged by the Constitution and laws of this state with many important interests directly affecting the people, to secure which their independence of the executive is absolutely necessary. Section 41, above referred to, is taken literally from the Federal Constitution. After showing that Congress is, with the single exception of a disagreement between the two houses in respect of the time of adjournment, wholly independent of the President, Judge Story adds: "In no other case is the President allowed to interfere with the time and extent of their deliberations. And thus their independence is effectually guarded against any encroachment on the part of the executive." 1 Story, Const. § 843. The reasons leading to the insertion of such a clause in the Constitution of the United States and in all the Constitutions of this state were the danger of executive control over the legislature, and the fact that the colonial governors exercised this power to destroy the effectiveness of the colonial legislatures. We are clearly of the opinion that the state Constitution was intended to maintain the absolute independence of the legislative branch of the government; that the power claimed by the appellant Taylor is in conflict with both the letter and the spirit of the instrument, and that his attempt to adjourn the legislature from January 31 to February 6 was void, and did not

interfere with the right of the legislature to proceed with its sessions at Frankfort.

2. As to the death of Goebel. The death of Goebel on February 3 did not affect the right of the appellee Beckham. If Goebel was elected governor and Beckham lieutenant governor, in November, Beckham, upon Goebel's death on February 3, became entitled to the office of governor, and had the right to continue the contest to secure what the Constitution guaranteed to him. So that, if the legislature had not acted until February 19, it had a right then to act upon the contest, and its action would be none the less valid because not taken in Goebel's lifetime. But, as the legislative action of February 19 and 20 is assailed on substantially the same grounds as that on February 2, this view of the case is not important, as the question remains, Was either action valid? This brings us to the consideration of the third point.

3. As to the validity of the entries in the journal, and the effect to be given them. It is alleged that the journals are fraudulent, the work of a conspiracy between the clerks of the two houses, certain of the members, and the contestants, and that the facts shown by the journals as to the presence of the members of the two houses, and the action taken by them, are untrue. The question is, therefore, Can the court hear evidence of this character assailing the integrity of the legislative journals? Section 40 of the Constitution provides: "Each house of the general assembly shall keep and publish daily a journal of its proceedings; and the yeas and nays of the members on any question shall, at the desire of any two of the members elected, be entered on the journal." The journal of each house of the general assembly, kept pursuant to this provision of the Constitution under the supervision of the house, is, when approved by the house, not the act of the clerk, but the act of the house itself, and is entitled to the same respect as any of its other official acts. So far as we have seen, the authorities are uniform that evidence cannot be received in court to impeach the verity of the record provided by the Constitution as evidence of legislative proceedings. Thus, in *Cooley*, Const. Lim. p. 221, it is said: "And although it sometimes has been urged at the bar that the court ought to inquire into the motives of the legislature where fraud and corruption were alleged, and annul their action if the allegations were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon. The reasons are the same here as those which preclude an inquiry into the motives of the governor in the exercise of a discretion vested in him exclusively. He is responsible for his acts in such a case, not to the courts, but to the people." In *Wright v. Defrees*, 8 Ind. 293, which was a quo warranto proceeding, involving the exercise of a franchise under an act of the general assembly, it was alleged that the act was secured by fraud, corruption, and bribery. The court refused to hear

the evidence. It said: "The powers of the three departments are not merely equal,—they are exclusive in respect to the duties assigned to each. They are absolutely independent of each other. It is now proposed that one of the three powers shall institute an inquiry into the conduct of another department, and form an issue to try by what motives the legislature was governed in the enactment of a law. If this may be done, we may also inquire by what motives the executive is induced to approve a bill or withhold his approval, and, in case of withholding it corruptly, by our mandate compel its approval. To institute the proposed inquiry would be a direct attack upon the independence of the legislature, and a usurpation of power subversive of the Constitution." A similar question was presented in *McCulloch v. State*, 11 Ind. 424, where not only fraud, corruption, and bribery were alleged, but also that one member of the assembly, whose vote was recorded in the affirmative, in fact voted in the negative, and that, without his vote, the bill did not receive a constitutional majority. The court said: "The facts thus alleged raise the question whether the journals of the houses of the general assembly can be contradicted or impeached on the ground of mistake or fraud. The affirmative of this inquiry cannot, in our opinion, be maintained. Article 4, § 12, of the Constitution requires each house to keep a journal of its proceedings, and publish the same. This journal must be held conclusive evidence of the facts which appear on its face; because it must be presumed that the members, as a body, inspected it, and made all necessary corrections, before they allowed it to assume the character of a journal of their proceedings. As well might evidence be received to contradict a statute, to show that it contained certain provisions inserted through mistake, as to contradict an entry made upon the journal. The house keeping the journal is the only tribunal by which it can be corrected, and, until corrected by such authority, it must be considered conclusive as to the facts which it contains. *State ex rel. Loomis v. Moffitt*, 5 Ohio, 358; *Turley v. Logan County*, 17 Ill. 151. We must therefore hold that the members alleged to have been absent when the bill passed over the governor's veto were present and voted as averred in the journal, and that McMurray did vote in favor of the bill on its final passage in the house." In the case of *State ex rel. Loomis v. Moffitt*, 5 Ohio, 358, above referred to, the question was whether Lemuel Moffitt had been elected judge of the common pleas court by the general assembly. The senate journal showed his election by the senate, but the house journal showed the election of Samuel Moffitt. Depositions from members and officers of the general assembly were offered to prove that Lemuel and not Samuel Moffitt was the individual actually voted for and elected in the house, but the court held the evidence inadmissible to impeach the journal, and that Lemuel Moffitt was not entitled to the office. The court said: "In the ninth section and first

article of the Constitution it is required that 'each house shall keep a journal of its proceedings and publish them.' This journal, when taken in connection with the laws and resolutions, would seem to be the appropriate evidence of legislative action. It is not the action of a single member of the legislature of which I speak, but of the whole body of the 'general assembly.' The former might, with propriety, be proved by parol testimony, but the latter is evidenced by evidence of a higher nature. The testimony of an individual member could not be received to contradict a statute, and, if not, why receive it to contradict an entry upon the journal?" In *Wise v. Bigger*, 79 Va. 269, it was alleged that only nineteen senators voted aye on the passage of the bill, and that it did not receive, in fact, the affirmative vote of two thirds of the senators present, and never became a law, although the contrary appeared on the senate journal. The court said: "In the face of this solemn record, in which the senate of Virginia certifies its proceedings,—in a matter of fact,—relating to its own conduct,—in the apparent performance of its legal functions,—this court is asked to inquire into or dispute the veracity of that certificate. To do this would be to violate both the letter and the spirit of the Constitution; to invade a co-ordinate and independent department of the government, and to interfere with the separate and legitimate power and functions of the legislature." In a similar case the supreme court of Pennsylvania also said, where fraud and corruption were charged on the legislature, and the court was asked to hold its action void for this reason: "We cannot hesitate a moment on this question. We have no such authority, and ought not to have. However far the legislature may depart from the right line of constitutional morality, we have no authority to supervise and correct their acts on the mere ground of fraudulent or dishonest motives. We know of no such check upon legislation, and would not desire to see such an one instituted. The remedy for such an evil is in the hands of the people alone, to be worked out by an increased care to elect representatives that are honest and capable. If the judiciary have such authority, then every justice of the peace is competent to sit in judgment upon every act of legislation which disorderly moralists or knavish or ignorant anarchists may choose to charge as fraudulent. Nay, more, if the question may be raised in a judicial proceeding, the judges and justices of the peace will be bound to investigate and decide it, and the principal judicial business might then become that of testing, not cases by the standard of the law, but the standard itself by the infinitely various and uncertain judicial notions of morality." [*Sunbury & E. R. Co. v. Cooper*, 33 Pa. 283.] Any number of similar quotations may be made from other state courts. The decisions are all uniform. The same rule has been applied by the United States Supreme Court. *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162; *Ex parte McCordle*, 7 Wall. 506, 19 L. ed. 264; *United States*

v. Old Settlers, 148 U. S. 466, 37 L. ed. 523, 13 Sup. Ct. Rep. 650; *United States v. Des Moines Nav. & R. Co.* 142 U. S. 544, 35 L. ed. 1109, 12 Sup. Ct. Rep. 308. In the case last cited the court said that "the knowledge and good faith of a legislature are not open to question. It is conclusively presumed that a legislature acts with full knowledge, and in good faith."

The learned counsel for the appellants do not question the soundness of these decisions, but seek to distinguish them from the case before us on the ground that appellants have a pre-existing right, and that the rule referred to only applies to legislative acts operative for the future. But none of the cases rest on this ground. The ground of all the decisions is that the judiciary have no power to sit in judgment upon the motives of an independent branch of the government, or to deny legal effect to the record of its action solemnly made by it pursuant to the Constitution. If this were allowed, it would soon follow that the independence of the legislature would be destroyed altogether. When our system of government was formed, not a few publicists pronounced it impracticable, and foretold that sooner or later one of the three equal departments of the government would overshadow and supervise the others. So far these prophecies have proved groundless, but, if the contention of appellants were sustained, this court would, in substance, assume supervisory power over the action of the legislature; and, as our jurisdiction is only appellate, the same power might be exercised by every subordinate court in the state in cases within its jurisdiction. The Constitution of this state creates the offices of governor and lieutenant governor. It provides how they shall be filled by election. It also provides how the result of that election shall be determined. In each of the four Constitutions of this state the general assembly has been made the exclusive tribunal for determining this matter. This shows a clear and settled purpose to keep this political question out of the courts. We have no more right to supervise the decision of the general assembly in determining the result of this election than we have to supervise the action of the governor in calling a special session of the legislature, or in pardoning a criminal, or the action of the legislature in contracting debts, or determining upon the election of its members, or doing any other act authorized by the Constitution. There is no conflict between the action of the state canvassing board and that of the legislature in these cases. The state canvassing board were without power to go behind the returns. They were not authorized to hear evidence, and determine who was in truth elected, but were required to give a certificate of election to those who, on the face of the returns, had received the highest number of votes. For the state board to have received evidence to impeach the returns before them would have been for them, in effect, to act as a board for

trying a contested election; and, if they had done this, they would have usurped the power vested in the general assembly by the Constitution, for by its express terms only the general assembly can determine a contested election for governor and lieutenant governor. But the certificate of the state board of canvassers is no evidence as to who was in truth elected. Their certificate entitles the recipient to exercise the office until the regular constitutional authority shall determine who is the *de jure* officer. The rights of the *de jure* officer attached when he was elected, although the result was unknown until it was declared by the proper constitutional authority. When it was so declared, it was simply the ascertainment of a fact hitherto in doubt or unsettled. The rights of the *de facto* officer, under his certificate from the canvassing board, were provisional or temporary until the determination of the result of the election as provided in the Constitution; and upon that determination, if adverse to him, they ceased altogether. Such a determination of the result of the election by the proper tribunal did not take from him any pre-existing right, for, if not in fact elected, he had only a right to act until the result of the election could be determined. We are therefore unable to see how this case can be distinguished from any other legislative action taken in a matter over which the Constitution has given the legislature exclusive jurisdiction, and are therefore of the opinion that the courts are without jurisdiction to go behind the record made by the legislature under the Constitution. Such a record seems to us entitled to every presumption in its favor that the records of this court kept under its supervision would be entitled to receive at the hands of the legislature in a matter before it.

4. As to the action of the assembly being void because without evidence and arbitrary. The report of the contest board to the general assembly shows that it heard the evidence offered by the contestants and contestees, but the report does not, on its face, show that the evidence taken by the board was submitted by it to the general assembly. The journals also fail to show this fact. It is insisted that therefore the general assembly acted without evidence in determining the contest. But there is a clear distinction between the failure of the journal to show a fact where the journal is merely silent on the subject, and a fact expressly shown in the journal. Here the journals are only silent as to what evidence the general assembly heard, and, as it was a question requiring evidence for its proper determination, it must be presumed that the legislature did its duty, and had before it such evidence as was satisfactory to it. Thus, in *Cooley on Constitutional Limitation*, it is said, in disposing of the question of the constitutional power of the legislature: "In any case in which this question is answered in the affirmative the courts are not at liberty to inquire into the proper exercise of power. They must assume that the legisla-

tive discretion has been properly exercised. If evidence was required, it must be supposed that it was before the legislature when the act was passed, and, if any special finding was required to warrant the passage of the particular act, it would seem that the passage of the act itself might be held equivalent to such finding." *Cooley, Const. Lim.* p. 220. In *McCulloch v. State*, 11 Ind. 433, the court well said: "Presumptions are often indulged, in support of the proceedings of courts, and it would be difficult to perceive why their proceedings should be entitled to more favor than those of the legislature. It has been repeatedly decided that, where the record of a court possessing general powers is silent as to whether a party defendant had notice of suit, it will be presumed that the steps necessary to give jurisdiction of the person were properly taken. There is, indeed, no reason why legislative records should be more full and perfect than judicial." In those states where the enrolled bill is not held conclusive, it is uniformly held, where the journals are merely silent, that the presumption is absolute that the required steps were in fact taken. *Lafferty v. Huffman*, 99 Ky. 88, 32 L. R. A. 203, 35 S. W. 123. Under these principles it must be presumed that the legislature in the case before us did its duty. A copy of the proof taken before the contest board has been filed with this record, comprising about 1,700 typewritten pages. Of course, it is not presumed that each member of the legislature read all this. It is only meant that the legislature should learn the facts of the case from those appointed for that purpose, for this is all that is practicable in such bodies. There is nothing in the record before us to raise the presumption that this was not done.

It is also insisted that the notice of contest was insufficient, and that the evidence was equally insufficient; but these were matters to be determined by the legislature, which the Constitution has made the sole tribunal to determine such a contest. Whether their decision in these matters was right or wrong we have no power to inquire. In the distribution of the powers of the government certain power was, by the Constitution, assigned to the courts, and other powers to the general assembly. For us to attempt to review its action would be as improper as for it to interfere in a case that this court had decided. It is said that, if this is true, great injustice might be done by the legislature. To this the supreme court of Indiana, in *Evans v. Brown*, 30 Ind. 514, 95 Am. Dec. 710, responded thus: "Public authority and political power must, of necessity, be confided to officers, who, being human, may violate the trust reposed in them. This perhaps cannot be avoided absolutely; but it applies also to all human agencies. It is not fit that the judiciary should claim for itself a purity beyond others; nor has it been able at all times with truth to say that its high places have not been disgraced. The framers of our government have not constituted it with faculties

to supervise co-ordinate departments, and correct or prevent abuses of their authority. It cannot authenticate a statute; that power does not belong to it; nor can it keep the legislative journal. . . . It is neither modest nor just for judges thus to impeach the integrity of another department of government, and to claim that the judiciary only will be faithful to its obligation." Speaking of contested elections for public office, this court, in *Batman v. Megowan*, 1 Met. (Ky.) 538, said: "The law has designated the manner in which such questions shall be ascertained and determined. A board is to be constituted as prescribed by the statute to examine the poll books and issue certificates of election. Another board is to be organized in the case of a contested election for determining the contest between the claimants. Upon this last-mentioned board the law devolves the duty and confers the power of deciding who is entitled to the office. The courts have no right to adjudicate upon these questions, or to decide such contests." In the later case of *Stine v. Berry*, 96 K. 63, 27 S. W. 809, this court again said: "We understand, and so adjudge, that the statute in regard to contested elections for state and county officers is exclusive. . . . Such statutes are enacted with remedies providing for the speedy determination of such questions, and to take from the courts all original supervisory power over such contests." See also *Anderson v. Likens*, 20 Ky. L. Rep. 1001, 47 S. W. 867; *Booe v. Kenner*, 20 Ky. L. Rep. 1343, 49 S. W. 330. This whole subject was fully examined in the case of *Baater v. Brooks*, 29 Ark. 173, which was, like this, a contest for the office of governor. The court said: "The office of governor does not exist by virtue of the common law. It is a creation of the Constitution. And it is well settled that where a new right, or the means of acquiring it, is conferred by a constitution or a statute, and an adequate remedy for its infringement is given by the same authority which created the right, the parties injured are confined to the redress thus given." In a review of this contest, quoted in this opinion, Judge Cooley said (page 186, 29 Ark.): "To our mind, there can be no plausible suggestion that the decision of the general assembly on such a contest is open to judicial review afterwards; but it may not be inappropriate to refer to *Grier v. Shackelford*, 2 Treadway, Const. 642; *Batman v. Megowan*, 1 Met. (Ky.) 533; *State ex rel. Grisell v. Marlow*, 15 Ohio St. 134; *Powell ex rel. Royce v. Goodwin*, 22 Mich. 496,—as in point."

It is also argued that the contest board was not fairly drawn by lot; that certain of the board were liable to objection on the score of partiality, and that, therefore, this board was not properly constituted. If any of these objections were well founded, the general assembly had full power to take such action as was proper in the premises. It does not appear that any of the objections urged were presented to the general assembly, but, if they were, and it refused to make

a correction, it must be presumed that it had sufficient reasons for its action. Besides, the board was only a preliminary agency to take evidence, and report the facts to the general assembly. The assembly itself finally determined the contest.

It is also urged that under the specifications of the notice of contest, if all were true, the election was void, and the general assembly should have so determined. But we have no means of knowing that the general assembly reached such a conclusion. The presumption is in favor of their judgment, and when they have found as a fact that the contestants received the highest number of legal votes cast at the election in controversy we are not at liberty to go behind their finding. In *Com. v. Jones*, 10 Bush, 725, the board found that Jones had accepted a challenge to fight a duel, and was therefore disqualified to hold office. But as, under the Constitution, a conviction of the offense was necessary to disqualify Jones from holding office, this court disregarded the finding of the board, for the reason that it related only to an immaterial matter. In this case, however, the legislature finds the fact that determines the rights of the parties. There is nothing in their finding to show the election was void, and, as we cannot go behind it (10 Bush, 747, 748), the cases of *Leeman v. Hinton*, 1 Duv. 38, and *Hocker v. Pendleton*, 100 Ky. 726, 39 S. W. 250, have also no application.

It is also insisted that the legislative proceedings are in violation of the 14th Amendment to the Constitution of the United States, which provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law." The office of governor being created by the Constitution of this state, the instrument creating it might properly provide how the officer was to be elected, and how the result of this election should be determined. The provisions of the Constitution on this subject do not abridge the privileges or immunities of citizens of the United States. Such an office is not property, and in determining merely the result of the election according to its own laws the state deprives no one of life, liberty, or property. In creating this office the state had a right to provide such agencies to determine the result of the election, and it had a right to provide such a mode of procedure as it saw fit. It is wholly a matter of state policy. The people of the state might, by an amendment to their Constitution, abolish the office altogether. The determination of the result of an election is purely a political question, and, if such suits as this may be maintained, the greatest disorder will result in the public business. It has always been the policy of our law to provide a summary process for the settlement of such contests, to the end that public business shall not be interrupted; but, if such a suit as this may be maintained, where will such a contest end? To illus-

trate, § 38 of the state Constitution provides: "Each house of the general assembly shall judge of the qualifications, elections, and returns of its members, but a contested election shall be determined in such manner as shall be directed by law." Whatever inherent power either house might have had to determine the election of its members if the Constitution had been silent, its power under this section is limited to the grant. It will be observed that the phraseology is substantially the same as § 90, relating to contested elections of governor and lieutenant governor. Suppose these suits had been brought by two members of the general assembly, alleging, in effect, the same facts as are alleged in this case, would anybody suppose that the judiciary of the state would have the power to go behind the legislative journals, or to supervise the propriety of the legislative action, in determining the election of its members? Could a member of the general assembly, who had received a certificate from the canvassing board, and been afterwards ousted from the house to which he belonged on a contest, allege and show that the house had acted arbitrarily, depriving him of a pre-existing right, and denying to him the emoluments of the office for the term? Could it be maintained that such action by either house of the general assembly violated any protection afforded him by the Constitution of the United States, or that for this cause the action of the state authorities under the state Constitution, by virtue of which he claimed to have been elected, might be overruled? This question was presented to the United States Supreme Court in *Wilson v. North Carolina*, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435, where an officer arbitrarily removed from office applied to that court for redress. His case was dismissed for want of jurisdiction. If the state may arbitrarily remove an officer once appointed, we see no reason why it may not provide such means as it sees proper for the determination of its own elections. If it has not such power, then its sovereignty as a state exists only in name. The Congress of the United States has, by the Constitution, the power to judge of the qualifications, elections, and returns of its members. In not a few cases it has been supposed to have acted arbitrarily in such matters, but it was never maintained that one who was ousted of his seat in Congress on a contest could take the matter into the courts to supervise the action of Congress on such grounds as are alleged in this case. Yet the power of Congress, under the Constitution, in determining which of two claimants was in fact elected to a seat in that body, both being admittedly qualified, is, under the Constitution, just the same as the power of our general assembly in determining a contested election for governor and lieutenant governor.

It is earnestly argued that the general assembly was wrong in its decision of this case, and that it is a very serious matter thus to overthrow the will of the people. Whether the assembly was right or not in 49 L. R. A.

its decision, it is not our province to determine. But a much more important question is involved in the case, which is the integrity of our form of government as founded by our forefathers. If the action of the legislature may be disregarded by the courts, then it is no longer an equal and independent branch of the government within its constitutional jurisdiction, but the courts become the final depository of the supreme power of the state. Judicial tyranny is no less tyranny because couched in the forms of law. There was great wisdom in dividing the powers of a republic between three equal and independent sets of officers. One operates as a check upon the other, and no greater blow to the perpetuity of our institutions could be given than to destroy this check.

For these reasons we are of the opinion that the courts of this state are without authority to enter into the inquiry sought in this case, and that the journals of the general assembly are conclusive of the controversy.

The judgment of the lower court, being in accordance with these views, is therefore affirmed.

Burnam, J., concurring:

The general demurrer to the answer and amended answer of contestees, which was sustained by the chancellor in this proceeding, admits that on the 9th day of December, 1899, W. S. Pryor, as chairman, and W. T. Ellis, as member, of the state board of election commissioners, certified that William S. Taylor and John Marshall had received the highest number of votes given for the offices of governor and lieutenant governor, respectively, and were duly and regularly elected to fill these offices for the term prescribed by the Constitution; that at the election, under the operation of the statute known as the "Goebel Election Law," the entire election machinery of the state was in the hands of the friends and partisans of contestants; that all of the election officers, from the highest to the lowest, were selected by the state board of election commissioners, or by their appointees; that the members of the state board of election commissioners were themselves fellow partisans of contestants; that by the action of the election officers on the day of the election contestees were illegally, and in many cases fraudulently, deprived of a large number of votes in the various voting precincts of the state; that, subsequent to the election, contestants had entered into a conspiracy with divers members of the legislature to nullify this election of the people by the institution of a fraudulent contest before them; that, pursuant to this conspiracy so entered into, the contest boards were selected by a fraudulent device, not by lot, as required by law; that as a result of this trick ten out of the eleven members selected for the trial of the governor's contest were partisans of the contestant, and nine out of the eleven members selected as a contest board for the trial of the lieutenant governor's contest were partisans of the contestant; that a number of the members

of the general assembly selected on both of these contest boards were disqualified from sitting on the ground that they had advised that such contests should be made, and had promised to render them effective; that at least one member of the board selected to try the contest for the office of governor had wagered money on the result of the election; that the contest boards, in the trial of the contests, had acted throughout in an illegal, tyrannical, and arbitrary manner in the admission and rejection of testimony, and in the whole conduct of the trial; that they did not report to the general assembly any of the testimony which had been taken upon the trial; and that the general assembly, at the time they approved the decisions of the contest boards, did not have a particle of testimony before them, were not familiar with the facts, refused to hear argument, held their alleged meeting at which the contests were determined at a secret place without the knowledge of either contestees, or more than one third of the entire membership of the general assembly, who were thereby excluded from any participation in the action so taken at the time of the alleged determination of the contests in favor of contestants. It is also admitted that at the time the alleged action was taken by the general assembly on the 2d day of February, 1900, the legislature had been previously adjourned by the governor to meet in London, Kentucky. It is hard to imagine a more flagrant and partisan disregard of the modes of procedure which should govern a judicial tribunal in the determination of a great and important issue than is made manifest by the facts alleged and relied on by contestees, and admitted by the demurrer filed in this action to be true; and I am firmly convinced, both from these admitted facts and from knowledge of the current history of these transactions, that the general assembly, in the heat of anger, engendered by the intense partisan excitement which was at that time prevailing, have done two faithful, conscientious, and able public servants an irreparable injury in depriving them of the offices to which they were elected by the people of this commonwealth; and a still greater wrong has been done a large majority of the electors of this commonwealth who voted under difficult circumstances to elect these gentlemen to act as their servants in the discharge of the duties of these great offices. But we are met at the threshold of this case with the contention that the courts of the state, under the limitations imposed by the Constitution, have no power to go behind the legislative journals, and review the judgment of the general assembly in a proceeding over which they are given, by the Constitution, exclusive jurisdiction, and from whose determination of the question no appeal is provided. The Constitution defines the duties and limits the powers of each of the three co-ordinate departments of government, and in the discharge of these duties and exercise of these powers each department must, of necessity, be independent of the other so long as they remain within the constitutional

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limitations, and, "no person or collection of persons being of one of these departments can exercise any power properly belonging to either of the others, except in the instances expressly directed or permitted." See §§ 27 and 28 of the Constitution. By § 90 of the Constitution the determination of contested elections for the offices of governor and lieutenant governor is imposed upon the general assembly, to be exercised in accordance with such regulations as may be established by law. Pursuant to this provision of the Constitution, the legislature has, in § 1531 and subsections thereunder of the Kentucky Statutes, prescribed the regulations for their guidance in the determination of such contested elections; and it appears from the exhibits filed with the petition that the general assembly have, pursuant to these regulations, decided the contests for the offices of governor and lieutenant governor in favor of the contestants, and if no appeal or power to review their finding is given to the courts by the Constitution, which is the basis of all power both in the legislature and in the courts, their finding would seem to be conclusive of the question. Similar questions to that at bar have been before this court in quite a number of cases, beginning with the celebrated case of *Batman v. McGowan*, 1 Met. (Ky.) 533, in which the opinion was written by one of the ablest and most celebrated lawyers which ever adorned this bench; and after a careful consideration of all of these cases, and numerous authorities which have been cited from elementary writers and courts of last resort in other states, I have been led with some reluctance to the conclusion, and not without some misgivings as to its correctness, that there is no power in the courts of the state to review the finding of the general assembly in a contested election for the offices of governor and lieutenant governor as shown by its duly-authenticated records. Many questions have been raised and discussed with great ability by learned and eloquent counsel for appellants, but it will be unnecessary for me to consider them in view of the conclusion which I have reached on this fundamental question.

Gaffy, J.:

I concur in and adopt the foregoing as my view of the question involved.

Du Relle, J., dissenting:

Since Kentucky has had a government, the powers of the government have been divided into three distinct departments, and each of them is confined to a separate body of magistracy, to wit, those which are legislative to one, those which are executive to another, and those which are judicial to another. These departments are co-ordinate and coequal. The magistracy of each department is confined to its own powers and duties. As a matter of course, and in the nature of things, these co-ordinate departments are in some respects interdependent. From the very nature of things it results that, while the legislative branch is supreme

in saying what shall be law, and the executive in the execution of the laws enacted by the legislature, the power must rest somewhere of saying whether those departments have exceeded their powers, or have assumed powers which properly and constitutionally belong to another department. Were the sections of the Constitution (27 and 28) the only ones which limited the powers of the departments, such inquiry and determination would be limited to the decision of whether any of the three departments had transgressed upon the domain of one of the others. But the Constitution contains other limitations, and contains also grants of power which are exceptions to the fundamental division of powers. One of these exceptions is the grant to the legislature of power to determine contested elections for governor and lieutenant governor. In § 90 it is provided: "Contested elections for governor and lieutenant governor shall be determined by both houses of the general assembly according to such regulations as may be established by law." This is a grant to one of the departments of power which under the general division would not belong to it. A contest is a litigation over a right. The decision of a litigation over a right claimed by one party and denied by another is, in its essence, judicial. In the absence of express grant of power to the members of the body of magistracy who constitute the legislative department, they could not exercise this power. Therefore, when power of this description, judicial in its essence, is, by the organic law, delegated to the members of that body of magistracy, there is no implication of a grant beyond the letter of the granting clause, except as to such matters as are of necessity implied in the grant, and essential to the execution of the power. But this grant is not merely a grant of power. It is a grant of power with express limitations. It endows the persons who constitute the body of magistracy to whom are confided legislative powers with an additional power taken from the judicial department, and by the terms of the grant subjected to two limitations. One limitation is made by the statement of the power which is granted. The grant is of power to determine contested election for these two offices. The word "contest" as used in constitutions and statutes is a word of art having a well-defined meaning. It means a litigation between two parties who claim property or right. It carries with it distinctly the idea of a plaintiff, a defendant, and a thing in controversy. A contested election is a controversy between two over the question which one of them was elected,—which one of them received the highest number of legal votes at the election. That is a contest; and that, in the nature of things, is all that an election contest can be. The second limitation in the grant is that contested elections for these offices shall be determined by the grantees of this power "according to such regulations as may be established by law." Accordingly, we find that regulations have been established by law regulating the pro-

cedure, and providing for pleadings. A notice in writing must be given within a limited time, must state the ground of contest, and none other shall be heard as coming from such party. Ky. Stat. 1535. This notice is the declaration or petition. The same rule which applies to all other litigations applies to this. An issue must be made, either by the law or by the pleadings of the parties. In this litigation it is provided that it may be made in either way. A counter notice, equivalent to an answer or plea, may be given, or, if not given, the law denies the averments of the declaration, and the contestee may defend without actually filing a counter notice. Other regulations of a procedure in determining such a litigation are established by law, but they are not material to the present discussion, except as they tend to further illustrate the fact that this is a litigation before a tribunal. In exercising the powers granted of determining this contest, the legislature was a mere contest board exercising powers granted with both express and implied limitation, and powers which were not, in any sense, legislative. The legislature was, as to this matter, a tribunal created by the Constitution to try a litigation. In the exercise of this power, this tribunal was confined to the jurisdiction conferred. If it went beyond its jurisdiction, its action was void; just as void as if it had undertaken to grant a divorce in defiance of the constitutional inhibition, or as would be the judgment of a county court to sell land in Switzerland. Now comes the question, Who can determine whether this contest board has exceeded its jurisdiction, and upon what evidence of transgression can this determination be made? In the nature of the government it must be that this power rests with the courts, and with the courts alone. Universally, it is conceded that this power of determination, whether one of the departments has gone beyond its jurisdiction as defined by the Constitution, or has transgressed constitutional inhibitions upon its exercise, rests with the courts. In arriving at their determination upon a question of this kind, there is much dispute as to what evidence the courts may consider, and to what extent such evidence is conclusive upon them. But, in the nature of the government, it is essential that the power of determining whether constitutional limitations have been transgressed is with the courts, and the courts only. If the governor issues an edict, and undertakes to enforce it as law, the courts will declare it void. If the Constitution limited his power of pardon to specific cases, and inhibited its exercise in others, the courts would declare a pardon of one of the forbidden offenses void. It has been reiterated so many times that the repetition is wearisome, that the courts will not lightly, nor in a doubtful case, hold the action of a co-ordinate branch of the government unconstitutional; but, on the other hand, it has often been held that, when convinced that the legislature has exceeded its power,—has violated the inhibitions

of the Constitution,—or invaded the powers of co-ordinate branches of government, no court will hesitate to declare that the legislature acted without jurisdiction, and its action was unconstitutional and void; and this is done as to matters purely legislative. But in this matter the legislature or its members are not acting as a legislature. They are acting as a contest board. Now, if this contest board exceeds its jurisdiction, there can be no question of the power of the courts to inquire into the validity of its determination, and to say whether that determination—that judgment—was valid or void. *Com. v. Jones*, 10 Bush, 725.

In this case a suit is brought to recover an office, and as the basis for such recovery a record is relied upon,—the record of a so-called "trial and determination" by the legislature sitting as a contest board. Upon this record it is claimed that the contestant appears entitled to the office of governor. What does the record show? It shows that the contestee was duly certified to have received the highest number of votes as shown by the returns, and was thereupon duly inducted into office. After his qualification, his title to the office was perfect. I do not care whether, after the notice of contest was given, it be said he was governor *de jure* or governor *de facto*. Until that notice was given, he was governor by undisputed title. The record then shows that a notice of contest was given contesting the election, and claiming the office upon the ground that in the city of Louisville and some forty counties there was no legal election; that the election was void; that in the metropolitan city of the state, the equivalent in population and voters of thirty or forty counties of ordinary size, the election was void because of intimidation by the military, and interference by the judiciary, and no valid election was held there; that in some forty counties of the state the election was void because, in violation of the law, thin ballots were used. All other grounds alleged in the notice are merely cumulative to these, and the averment that the original contestant was duly elected is a mere deduction from the averment that the election in these counties was void. Now, if this be true,—and upon the verity and sufficiency of these averments the record stands,—there was no election in Kentucky, for the Constitution provides that the governor shall be elected by the qualified voters of the state, and, if the declaration of notice in this record is true, the qualified voters of the state had no election, for somewhere in the neighborhood of 50 per cent of the qualified voters of the state either had no opportunity to vote legally, or were intimidated from exercising the right of suffrage freely. The notice, therefore, in substance, alleges that there was no election in the state of Kentucky, and that, therefore, the contestant was entitled to the office. This is the fair construction of the language used in the notice. This is what the record relied on shows, and this record and the judgment which was claimed to be rendered upon it 40 L. R. A.

is the basis of this litigation to secure the actual possession of the office. The record on which this suit is brought shows on its face that the question presented to the tribunal which rendered the decision was not one which it had jurisdiction to try. It had jurisdiction to try a contest. The only authority given to it was to try the question, Which candidate received the highest number of votes? A contest board cannot try the question whether there was an election, or whether an election was void. That is not for its consideration. The only question a board of contest has authority to try is, Which of the two litigants received the highest number of legal votes cast? That question was not presented to it, and its action upon any other question was a nullity; as much a nullity as if it had undertaken to grant the contestant a divorce upon an averment that the election was void. Where there is a lawful election in a part only of the territory over which the election should be held, the election is void in its entirety. *People ex rel. Wallace v. Salomon*, 46 Ill. 415. See also *Hovee v. Perry*, 92 Ky. 263, 17 S. W. 575. Now, if the election was void because it was not free and equal in the whole or any substantial part of the territory, because in any considerable extent of the territory the voters were prevented by intimidation of troops or judges from exercising freely their right of suffrage, because in any considerable extent of the territory the officers of election did not do their duty, and violated the requirements of the Constitution as to secrecy in the ballot, and thereby deprived the voters of the privilege of legally casting their votes, what tribunal can decide the question that there was no election? The most recent utterance of this court is the case of *Hocker v. Pendleton*, 100 Ky. 726, 39 S. W. 250. That case was a bill in equity to declare an election void because sufficient ballots were not furnished by the officers to enable all the voters to express their preferences, and therefore the election was not free and equal. The sole authority relied on by counsel who sought to have the election declared void was the case of *Leeman v. Hinton*, 1 Duv. 37. In the *Hocker Case* this court held distinctly that a court of equity had the power to declare that there had been no election. The averments in the record relied on in this suit admit of the application of no other remedy. It is not a contested election. It is a litigation of the question whether there was an election or not. It is not a litigation over an office. It is a litigation to determine whether any office was filled by the people. Properly, this jurisdiction, as is abundantly shown by the cases of *Leeman v. Hinton* and *Hocker v. Pendleton*, belongs to courts of equity. Now, it is true that in *Wilson v. Hines*, 99 Ky. 221, 35 S. W. 627, 37 S. W. 148, one division of this court held that, where an election tribunal decided that the law under which the election contested was held was unconstitutional, it was not exceeding its powers. This was a short cut to practically the same end, which might have

been obtained by the proper procedure. The contest board decided the act under which the election was held to be unconstitutional, and dismissed the contestant's case. What it ought to have done was to refuse to act at all, upon the ground that no election had been held, for an election under an unconstitutional law is no election. When the case was appealed, the appeal should have been dismissed, for the proper procedure of the party who thought himself aggrieved was by mandamus to compel the election board to act. The practical result, however, was the same; and this court, in the subsequent appeal, affirmed the judgment of the circuit court. But in the *Hocker Case* the court returned to the true doctrine that the question whether an election had been held at all, or whether the election attempted to be held was void, was a matter for courts of equity to determine, as has been the law of Kentucky for forty years, and was the undisputed law at the time the present Constitution was adopted by the people. It is objected that the legislature is given plenary power to determine a contested election as to these two offices, and that, having determined it, no inquiry can be made into the regularity of the procedure. If § 90 had read, "Elections for governor and lieutenant governor . . . shall be determined by both houses of the general assembly," this would be a grant of plenary power, and there would be no question in this case except the question whether the action of the legislature had been the exercise of arbitrary power, or had been taken as to the contestee without due process of law. But it is a power with limitations, given to a contest board. The question is not here presented whether the courts shall interfere to prevent the exercise of legislative power. It is a question whether that body, acting, not as legislature, but as a board of contest, has acted within its jurisdiction. In its delicacy as to invading the jurisdiction of the co-ordinate legislative branch of the government this court seems to me to have been somewhat over-nice. No question of the propriety or infamy of a legislative act has been suffered to resolve doubt of its constitutionality into certainty. Neither the criminal purpose of the present election law, nor its potential spawn of force and fraud, now realized, availed to engender anything beyond mild doubt of its constitutionality. But it should be remembered that while the legislature is co-ordinate and co-equal, the judiciary has rights also. It is also a co-ordinate and co-equal branch of the government, and should be a little jealous of its own rights; and one of the essential rights of the judiciary is its right and power, not only to restrain itself within constitutional limitations, but to announce when other departments go beyond them; to say finally and authoritatively when either of the other branches of the government has exceeded its jurisdiction.

In my opinion, the record upon which the petition in this case is based shows on its face affirmatively that the board of contest

had not jurisdiction of the matter which it undertook to try. It is not a mere defective notice. It excludes the possibility of jurisdiction. I think, therefore, that the demurrer to the answer should have been carried back to the petition, and sustained.

The brief time between the consultation and the delivery of the opinion renders it impossible for me to discuss any of the questions involved in this case except the question of jurisdiction of the contest board, and that but briefly. There are many questions of grave interest which I should be glad to discuss if time permitted, notably the question whether the procedure described at length in the answer in this case afforded the contestee the due process of law guaranteed by the Federal Constitution, and the question whether the action of the contest board was the exercise of arbitrary power.

SEASONGOOD, STIX, KROUSE, & COMPANY, *Appt.*,

v.
TENNESSEE & OHIO RIVER TRANSPORTATION COMPANY.

(.....Ky.....)

1. That freight is destined to a point beyond its line will not authorize a carrier to refuse to accept it when tendered to it for transportation.
2. An agreement between rival carriers that each will accept only freight destined to points within certain specified limits will not absolve one from liability to shippers for refusal to accept freight destined for points within another's territory.
3. A carrier refusing to accept freight tendered may be held liable for its loss by theft before the owner has opportunity, after notice of refusal, to make some safer disposition of it than to leave it in the warehouse at the wharf.
4. A carrier which knowingly permits one to act as its agent in such manner and for such length of time as to induce a person of ordinary prudence to believe that such assumed agent is in fact a general agent will be bound by his acts within the apparent scope of his authority.

(*Du Relle, J., dissents.*)

(December 8, 1890.)

APPEAL by plaintiff from a judgment of the Circuit Court for Crittenden County in favor of defendant in an action brought to recover for the loss of goods tendered to,

NOTE.—As to the duty of a carrier to transport goods when offered, see *note* to *Rushville v. Rushville Natural Gas Co. (Ind.)* 15 L. R. A. 321.

On the question when the liability of a railway carrier of goods ceases to be that of a carrier, see *East Tennessee. V. & G. R. Co. v. Kelly (Tenn.)* 17 L. R. A. 691, and *note*; *Missouri P. R. Co. v. Nevils (Ark.)* 28 L. R. A. 80; *Hardman v. Montana Union R. Co. (C. C. A. 9th C.)* 39 L. R. A. 300.

As to the authority of a carrier's agent to make contracts, see *Rudell v. Ogdensburg Transit Co. (Mich.)* 44 L. R. A. 415.

but refused by, defendant for transportation, and stolen from a warehouse in which they were then deposited. *Reversed.*

The facts are stated in the opinion.

Mr. C. S. Nunn, for appellant:

A shipper is justified in assuming that a person in charge of the carrier's usual place of receiving goods has authority to accept such goods and contract for the carrier.

Hale, Bailm. 316, 317; 2 Am. & Eng. Enc. Law, p. 805; *Pacific Exp. Co. v. Black*, 8 Tex. Civ. App. 363, 27 S. W. 830.

Any combination or agreement, the object of which is to destroy or interfere with free competition in any line of business, is void.

Anderson v. Jett, 89 Ky. 375, 6 L. R. A. 390, 12 S. W. 670; Ray, *Negligence of Imposed Duties, Freight Carriers*, p. 692.

The courts refuse to make the acceptance of goods marked for shipment beyond a carrier's line a basis for a contract for through carriage.

Louisville & N. R. Co. v. Tarter, 19 Ky. L. Rep. 229, 39 S. W. 698; Ray, *Negligence of Imposed Duties, Freight Carriers*, 365; 2 Am. & Eng. Enc. Law, p. 806; *Snow v. Indiana, B. & W. R. Co.* 109 Ind. 422, 9 N. E. 702; Hutchinson, Carr. §§ 102a, 103b.

But appellee was not asked to "accept goods for carriage farther than his own line." It was its duty to accept and carry the goods to Evansville and deliver to the next carrier to forward.

Hale, Bailm. p. 463.

The law makes no distinction between local or way freight and freight consigned to points beyond the carrier's line; the duty of the carrier to accept it in both cases is the same, and there is no reason for the distinction, for the liabilities assumed in each case are the same.

Ray, *Negligence of Imposed Duties, Freight Carriers*, p. 383; Hale, Bailm. p. 467.

McCafer's, Campbell & Campbell for appellee.

Guffy, J., delivered the opinion of the court:

It is alleged in the petition that the appellant delivered to the agent of appellee at the steamboat landing on the Ohio river at the mouth of Hurricane creek, or Tolou, in Crittenden county, Kentucky, a box of goods consigned to plaintiff, at Cincinnati, Ohio, to be carried by the defendant on its boat, for hire, for plaintiff. It is further alleged that the agent of defendant received said box, and placed same in the warehouse in which defendant kept its goods for shipment, and while in said warehouse, in possession of defendant, thieves broke in, and stole and carried away the goods. It is further alleged that one of appellee's boats upon which it carried freight stopped at said landing on said date after said goods had been received for shipment, and the same was tendered said boat or said officers for shipment by its said agent, when the defendant wrongfully refused to carry said goods, and by reason thereof said goods were lost. The answer of appellee denies the delivery 49 L. R. A.

of the goods to the agent; denies that it was its duty to carry the same, or that it was in any wise responsible for the damage or loss to appellant, if it had sustained any. After the issues were fully made up, a jury trial resulted in a verdict and judgment in favor of appellee; and, appellant's motion for a new trial having been overruled, it prosecutes this appeal.

The principal grounds relied on by appellant for a reversal are as to the instructions given and refused. It will be seen from the pleadings (and the testimony conduces to prove the same) that one McGrew was the owner of a warehouse at the mouth of Hurricane creek, which was the only point at which the goods were delivered to and from steamboats in that immediate vicinity, and that it was the custom of appellee, as well as other boats, to receive freight from said warehouse, and that McGrew was furnished with blank bills of lading, and collected freight bills. The collection, however, was done at the cost of the debtors. He was also employed by appellee to carry the United States mail from the steamboat landing to the postoffice at Tolou. It appears from the testimony that on a certain evening appellee's boat landed at the landing aforesaid, and that the clerk of the boat asked McGrew what he had, and McGrew replied that he had "some chickens and eggs for Evansville, and a box for Cincinnati, and do you want them?" The clerk replied, in substance, that he would take the chickens and eggs, but would not take the box; that appellee had an arrangement with another company that carried freight between New Orleans and Cincinnati not to take freight to any point beyond Evansville, and that the other company would not take freight within the boundary between Evansville and Cairo or Paducah; and it further appears that the goods were stolen the same night that appellee refused to take them. It is the contention of appellee that it was not required by law to accept the box tendered, for the reason, as now relied on, that it could not be required to receive freight destined to a point beyond the end of its own line, which it appears in this case was Evansville, Indiana. It is true that the appellee was not bound to undertake to deliver the box to the consignee at Cincinnati, but it was its duty to accept the box, if tendered to it as a common carrier; for it was then its duty to carry the same to the end of its line, and there deliver, or offer to deliver, the box to some common carrier engaged in such business, to be by it forwarded or carried to Cincinnati. It is clear that the agreement between appellee and the other company did not furnish any excuse for its failure to receive the goods. Such an agreement is illegal and not enforceable even between parties thereto. Much less can it excuse a party for refusing to discharge its duty as a common carrier as to the third party. *Anderson v. Jett*, 89 Ky. 375, 6 L. R. A. 390, 12 S. W. 670.

Instruction "A." asked by appellant, correctly presented the law in the case, and should have been substantially given.

It can hardly be doubted but that the loss of the goods was the direct result of appellee's refusal to accept same, or, at any rate, appellee should be held to account therefore if appellant's theory is true, that it had no reasonable opportunity after notice of such refusal to make some other safe disposition of the goods; and the evidence conduces to show that it was impracticable, if not impossible, to make any safer disposition of the goods than to leave them in the warehouse. It is said in *Ray, Negligence of Imposed Duties, Freight Carriers*, p. 383, that, "in the absence of any contract by an initial carrier to deliver perishable goods at their destination, the carrier's common-law liability is to deliver the goods in good order to the connecting carrier within a reasonable time." The instructions given by the court do not conform to this view of the law. They are also erroneous as to the agency of McGrew.

The third instruction is objectionable for the further reason that it calls special attention to certain evidence, and also requires the jury to believe that appellee had authorized or directed McGrew to receive freight for shipment on its boat, before they could hold appellee liable for his acts as to the

box in question. It is said in 2 *Am. & Eng. Enc. Law*, p. 805, that "since most of the carrier's business, both as to the receipt of goods and the making of contracts for their transportation, must be conducted by agents, there is necessarily a large delegation of authority to them; and it is reasonable that the consignor should have the right to presume that they have the necessary authority to act for the carrier." It seems to be the settled rule of law that if a party knowingly permits a person to apparently act as his agent in such manner and for such a length of time as to induce a person of ordinary prudence to believe that such an assumed agent is in fact a general agent, then in such case the principal must be held to be bound by the acts of such agent.

For the errors indicated, *the judgment is reversed*, and the cause remanded, with directions to award the appellant a new trial, and for proceedings consistent with this opinion.

Du Relle, J., dissents from so much of the opinion as holds the carrier obliged by law to contract to forward freight beyond its line.

LOUISIANA SUPREME COURT.

E. A. CASSARD

v.

William R. TRACY, Plff. in Certiorari.

E. A. CASSARD

v.

F. C. ZACHARIE, Plff. in Certiorari.

(52 La. Ann. 835.)

(*Nichols, Ch. J., and Monroe, J., dissent.*)

- *1. **The moment the Constitution of 1898 went into effect**, appeals then pending in the court of appeals became entitled to consideration, not from the point of view of the jurisdiction conferred upon the court by the Constitution of 1879, but from the point of view of the jurisdiction conferred upon the court by the Constitution of 1898.
2. **Under the Constitution of 1879 appeals to the court of appeals** for the parish of Orleans in cases involving less than \$500 were upon questions of law alone. Under the Constitution of 1898 the court has jurisdiction in all cases, both of the law and the facts.
3. **Where an appeal in a case for less**

*Headnotes by BLANCHARD, J.

NOTE.—For change of law as affecting pending appeals, see also *McClain v. Williams* (S. D.) 43 L. R. A. 287.

For change of remedies as affecting pending actions, see also *Farley v. Gelsecker* (Iowa) 6 L. R. A. 533; and *Chicago, B. & Q. R. Co. v. Jones* (Ill.) 24 L. R. A. 141.

As to vested right in statute of limitations, see *McEldowney v. Wyatt* (W. Va.) 45 L. R. A. 809, and *note*.
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than \$500 was pending in the court of appeals for the parish of Orleans when the Constitution of 1898 went into effect, but the evidence upon which it was tried in the district court had not been taken down in writing, and no statement of facts could be agreed upon, it became the duty of the court of appeals to remand the case, in order that on a second trial the testimony might be reduced to writing, and thus, in case of a second appeal, the court would be in a position to discharge its constitutional duty of adjudging the facts as well as the law of the case.

(November 20, 1899.)

WRITS of certiorari to review judgments of the Civil District Court for the Parish of Orleans, division D, requiring defendants to pay the amounts assessed against them for street paving. *Dismissed*.

The facts are stated in the opinion.

Mr. Francis C. Zacharie for plaintiffs in certiorari.

Mr. Albert Voorhies for respondent.

Monroe, J., delivered the opinion of the court:

It appears from the record that E. A. Cassard brought suits against relators upon paving contracts for sums exceeding \$100, but not exceeding, in the aggregate, \$500; that the suits were consolidated, by consent, and tried together in division D of the civil district court, before the adoption of the present Constitution, and that there was judgment against Tracy for \$56, and against Zacharie for \$155. Under the Constitution

then in force the cases were appealable upon questions of law alone, which were required to be taken up by means of bills of exception or assignments of error, accompanied by statements of fact agreed on or prepared by the trial judge. The defendants, however (relators here), reserved no bills of exception, nor did they agree upon or obtain from the trial judge any statements of fact. When the judgment was rendered against them, they moved for a new trial, but alleged no other grounds than that the judgment was contrary to law and the evidence, and that they were aggrieved thereby, and the new trial was refused. A suspensive appeal was then taken, and, after lodging the record in the appellate court, an assignment of error was filed setting forth that the judge *quo* had given judgment on *quantum meruit*, when, as appellants alleged, he ought either to have given judgment on the contracts sued on, or else have rejected plaintiff's demands. The cases were fixed for trial May 30, 1898, eighteen days after the new Constitution went into effect; and upon that day appellants filed a motion to remand them to the trial court, for reasons the substance of which will appear from the following excerpts from the opinion of the court of appeal, to wit: "A motion to remand is made on two grounds: (1) That there is no evidence in the record, the testimony in the lower court not having been taken down in writing, and that there is no statement of facts in the record, for the reason that opposing counsel could not agree upon the same, and the trial judge declined to make the same, although applied to therefor, for the reason, assigned by his honor, that he could not recall to memory the facts testified to. It is sufficient answer to this to say that the record does not disclose that any application was ever made, to court or counsel, for a statement of facts, and that we may not, properly, look beyond the record. We may add, however, that the proper course would have been to invoke, at the time, supervision of the action of the district judge, by writ in aid of our appellate jurisdiction. (2) That, under the new Constitution, the right is vested in defendants and appellants to have a trial, hearing, and judgment on this appeal and in this cause, both on the merits of the law and the facts. We have repeatedly ruled adversely to that contention, and our ruling has been sustained by the supreme court on a writ of review in the case of *Rosetta Gravel Pav. & Improv. Co. v. Kennedy*, 51 La. Ann. 1535, 26 So. 468. . . . Motion denied." The court then proceeded to decide the cases upon their merits, and affirmed the judgment appealed from. An application for rehearing was made and refused, and the appellants then made, to this court, the application which we are now considering, for the review of the judgment of the court of appeal upon the motion to remand; and in support of said application they urge that the provisions of the present Constitution, conferring jurisdiction on said court, apply to their cases, and entitle them to a hearing,

etc., on the facts; and that, in order to obtain the same, it is necessary that said cases be remanded to, and retried in, the lower court.

The relator's proposition is, in effect, that the provisions of the present Constitution—which became operative May 12, 1898—shall be so construed as to deprive Cassard, and relieve them, of the judgment which had been rendered by the district court against them on March 22, 1898. The question which first suggests itself is whether the constitutional provisions invoked by relators are properly susceptible of the construction suggested. It is plain that the effect of this construction will be to give to those provisions a retroactive operation, and to undo something which had been lawfully done before they were brought into existence. The judgment obtained by Cassard in the district court had been so obtained agreeably to the then existing law, constitutional and statutory. At that time, and under that law, he might have been deprived of it by the action of the appellate court, exercising the legal discretion vested in it; by an adverse judgment in an action to annul, founded upon pre-existing causes, specified by law; or by allowing said judgment to become prescribed. These conditions were as though written into the title by which he acquired, but they were the only conditions by which it was affected. Otherwise, and by the textual provisions of our law, the judgment was his property by an indefeasible title. Our Code of Practice (art. 548) reads: "A judgment, when once rendered, becomes the property of him in whose favor it has been given, and the judge cannot alter the same except in the mode provided by law." After the judgment was signed, the judge by whom it was rendered was powerless to alter it, save through an action of nullity, and for pre-existing specified causes. When the appeal was perfected, he was ousted of jurisdiction except for certain limited purposes, and jurisdiction of the cases was vested in the appellate court. In the exercise of that jurisdiction it was competent for the appellate court to have amended or reversed it, or if, in the exercise of a sound legal discretion, that court had reached the conclusion that the interests of justice would be best subserved thereby, it might have set the judgment aside, and have remanded the case to be tried *de novo*. But no authority was vested in any other department of the government either to set the judgment aside or to control the discretion vested in the appellate court in the premises, or in any other manner, without due process of law, to deprive Cassard of his property. If the convention which, after his acquisition of said judgment, adopted the present Constitution, could, by conferring jurisdiction upon a court created by it, impose upon such court the obligation to annul or destroy said judgment, it would seem to follow that it might have annulled or destroyed it by direct action, or by a general provision couched in some such language as the following, to wit: "All judgments heretofore rendered

by any of the courts of this state, and which are pending on or subject to appeal, are hereby annulled and set aside, and the causes in which they were rendered shall be tried *de novo*." And if it was competent to have annulled such judgments in order that the causes should be tried again in another way, it is difficult to perceive why, as a question of principle, they might not have been thus annulled for any other reason, or for no reason at all, the answer to all objections being that such action would merely affect the remedy. Nor would the situation, so far as the present cases are concerned, be in any wise altered if the defendants had taken a devolutive appeal twelve months, less a day, after the rendition of the judgment, instead of a suspensive appeal; or had taken no appeal at all; for, if the argument relied on be sound, it would, in either event, be the duty of the trial or appellate court, as the case might be, to set aside the judgment in order to meet the new conditions.

It is evident that such retroactive operation is likely to work injustice and hardship. Those who had gained their causes before the enactments in question went into effect were subjected to the usual trouble, delay, and expense of one trial; and the setting aside of their judgments, in order to meet conditions subsequently created, will subject them to further trouble, further delay, and further expense, and will give their opponents, who have lost, an unfair advantage, since the latter may demand new trials when they find it to their interest, for purposes of delay or otherwise, to do so, while those who have already gained their cases can have nothing better to hope for, and may lose, upon a second trial, by reason of the failure of their witnesses, or other untoward circumstances, all that they had gained upon the first. In addition to which, if the cases are, like the present, on appeal, the unfortunate appellees may be made liable for the costs of appeal, though the judgments appealed from were correct when rendered. It is in view of consequences such as these that all writers upon the construction of law concur in the opinion that, whether constitutional or statutory, it should be construed to operate prospectively only, unless such construction is absolutely precluded by the language used. Judge Cooley says: "We shall venture also to express the opinion that a Constitution should operate prospectively only unless the words employed show a clear intention that it should have a retrospective effect. This is the rule in regard to statutes, and it is 'one of such obvious convenience and justice that it must always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment putting it beyond doubt that the legislature meant it to operate retrospectively.' Retrospective legislation, except when designed to cure formal defects, or otherwise operate remedially, is commonly objectionable in principle, and apt to result in injustice; and it is a sound rule of construction which refuses lightly to imply an intent to

enact it. And we are aware of no reasons applicable to ordinary legislation which do not, upon this point, apply equally well to Constitutions." Cooley, Const. Lim. 62 [6th ed. p. 77]. Mr. Sedgwick repeats, again and again, that "the judiciary will give all laws a prospective operation only, unless their language is so clear as not to be susceptible of any other construction." Sedgw. Stat. & Const. L. p. 173. Mr. Black, in a recent work, says: "A constitutional provision should not be construed with a retrospective operation unless that is the unmistakable intention of the words used, or the obvious design of the authors." Black, Interpretation of Laws, p. 20. From Mr. Sutherland we take the following: "Retrospective Laws. Such statutes, when not forbidden by the Constitution, may be valid, but there is always a strong leaning against giving them a retrospective operation, and this proceeds from the presumption that the legislature does not intend what is unjust. 'Those whose duty it is,' says Erle, Ch. J., 'to administer the law, very properly guard against giving to an act of Parliament a retrospective operation, unless the intention of the legislature that it should be so construed is expressed in clear, plain, and unambiguous language.' Such laws are looked upon with general disfavor. In *Dash v. Van Kleeck*, 7 Johns. 506, Kent, Ch. J., said: 'There has not been, perhaps, a distinguished jurist or elementary writer within the last two centuries, who has had occasion to take notice of retrospective laws, either civil or criminal, but has mentioned them with caution, distrust, or disapprobation.' Sutherland, Stat. Constr. § 406. 'If, before final decision, a new law as to procedure is enacted and goes into effect, it must, from that time, govern and regulate the proceedings. But the steps already taken, the status of the case, as to the court in which it was commenced, the pleadings put in, and all things done under the late law, will stand, unless an intention to the contrary is plainly manifested; and pending cases are only affected by general words as to future proceedings from the point reached when the new law intervened.' Id. § 482, citing authorities. It must be presumed that the members of the convention which adopted the Constitution of 1898 were familiar with these commonly accepted canons of construction, and that, when they intended any particular provision incorporated in that instrument to operate retrospectively, they formulated it in such language as to leave no room for doubt. Coming, then, to the provisions which are here invoked, it may be remarked that under the late Constitution there was a court of appeals for the parish of Orleans, which had appellate jurisdiction on questions of law alone in cases where the amount in dispute, or fund to be distributed, exceeded \$100, and was less than \$500; and upon both law and facts where the amount in dispute, or fund to be distributed, exceeded \$500, and was less than \$2,000; and that the change made by the present Constitution (in so far as concerns the

matter at issue) was to confer upon the court which was created as the successor of the one mentioned jurisdiction as to facts, as well as law, in cases where "the amount in dispute or fund," etc., exceeds \$100 and is less than \$500. Counsel for relators refers to the following as the provisions in the new Constitution upon which he relies:

"Art. 131. There shall be a court of appeal to be known and designated as the court of appeal for the parish of Orleans."

"Art. 325 . . . Seventh. The supreme court, court of appeal, and district courts provided for by this Constitution are declared to be, and shall be construed to be, the same courts as those of the same name created by the Constitution of 1879, and all writs, orders, and process issued from said courts, which shall be pending, or in course of execution at the date when this Constitution goes into effect, together with all the records and archives of said courts, shall at once, and by virtue of this article, be transferred to, and held to be cases pending in, and writs, orders, and process issued from, and in course of execution under the authority of, and records and archives of, said courts, respectively, as organized under this Constitution."

"Art. 98. The courts of appeal, except as otherwise provided for in this Constitution, shall have appellate jurisdiction only, which shall extend to all cases, civil and probate, when the matter in dispute, or funds to be distributed, shall exceed one hundred dollars exclusive of interest, and shall not exceed two thousand dollars exclusive of interest."

"Art. 103. All cases on appeal to the court of appeal shall be tried on the original record, pleadings, and evidence."

It cannot be said of the language of these articles that it so clearly expresses the intention that they shall operate retrospectively as to be susceptible of no other construction. Upon the contrary, there is not an affirmative expression, or a word having an affirmative signification, which even remotely indicates such intention. That meaning can be arrived at only by a process of ratiocination, the argument being somewhat as follows: "The cases now under consideration were pending in the court of appeals before the adoption of the present Constitution. That court had, however, jurisdiction only as to the law. By the operation of the new Constitution they became cases pending in the present court of appeal, upon which court the obligation is imposed to exercise jurisdiction as to the facts as well as the law, but the jurisdiction as to the facts cannot be exercised in the present condition of the cases, for the reason that the facts are not disclosed in the record; hence the judgment rendered in said cases by the district court before the adoption of the present Constitution must be set aside, and the cases must be remanded and tried *de novo*, and in such a manner as to enable the court of appeal to pass on the facts." This amounts to saying: "We must give to these provisions the prospective operation contemplated by their framers, and, in order to do so, we

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must give them the retrospective operation for which the relators contend." If the relators' cases were the only ones to which the provisions in question were intended or could be held to apply, there would be no answer to this argument, for, unless they were applied as suggested, they would be entirely without effect. But the relators' are not the only cases to be affected. Construing them to operate prospectively only, the enactments will affect all cases which, being within the limit as to amount, may hereafter be filed, as long as the Constitution remains unchanged; as also all cases filed before the adoption of the Constitution, but which were untied in the district courts at that time; and with respect to such cases the law will bear equally and equitably upon all litigants, and will work no hardship. The only other cases to which the new law, by giving it a retroactive effect, could be made to apply, are those which had been tried and decided, but which had not been appealed, before its adoption, and those which had been tried and decided, and which were pending on appeal. Of this latter class it would be doing no violence to probability to assume that the larger proportion had been taken up on statements of fact agreed on by the opposing counsel, so that we have left cases pending on appeal on statements of fact prepared by trial judges, cases pending on appeal where no statements of fact had been agreed on or obtained from the trial judges, and cases decided in the district courts, and not appealed when the Constitution was adopted; and to the last two classes, inconsiderable in number, by comparison, and exceptional as to status, the constitutional provision invoked can be applied only by giving them a retroactive operation, which will have the effect of undoing that which has been lawfully done, and of depriving citizens, by mere legislation, of that which our law declares to be property lawfully acquired.

It will be conceded, however, that the intention of the lawmaker can be properly arrived at only by construing the different provisions of the law together, so that no one provision shall be entirely sacrificed in order to give an extreme, or supposed full, effect to another. Observing this rule, we find in article 325 (the "Schedule"), to which relators' counsel has referred us, a paragraph not mentioned in the reference, which reads as follows: "Second. All writs, actions, causes of action, proceedings, prosecutions, and rights of individuals or bodies corporate and of the state, when not inconsistent with this Constitution, shall continue as valid and in full force and effect." This seems to be a distinct manifestation of solicitude for the preservation of existing conditions and existing rights, and a declaration that the Constitution is to operate as little disturbance of those conditions and rights as may be consistent with the enforcement of the instrument as a whole. The "right of individuals, . . . when not inconsistent" with the law, would have remained "valid and in full force and effect"

without any affirmative declaration on the subject. The declaration is, therefore, made *ex industria*, as a rule of construction, applicable to the entire instrument, and, read in connection with the provisions which we have been considering, expresses the intention of the framers of the Constitution in language just the reverse of that required to entitle those provisions to the retroactive operation claimed for them. But the case is made still stronger by one of the articles to which we are especially referred by relators' counsel, to wit: "Art. 103. All cases on appeal to the court of appeal shall be tried on the original record, pleadings, and evidence." How can this article be applied in the cases now before us, or in any case which had been tried and decided before its adoption, and the "original . . . evidence" in which had not been preserved? The original record or pleadings in such cases may be obtained and used, but the original evidence, delivered orally, and not taken down, belongs to the past, and is beyond recall. The judge *a quo*, we are told by the relators' counsel, is unable to remember it, and the opposing counsel were unable to agree upon it. We have no means of knowing that the witnesses who testified can now be found, and not even those witnesses themselves, if found, could, with the best intentions, assure us that they would be able, upon a second trial, to give the same testimony as was given by them on the first. The original evidence, applying those words prospectively (from the date of the adoption of the Constitution), no doubt has been and will be taken down and preserved in all cases subject to appeal on the law and the facts, and thereafter tried or to be tried; but with respect to cases tried before the adoption of the Constitution, appealable only on questions of law, the original evidence, delivered orally, and not taken down, is no longer within human reach, and, to construe the articles of the Constitution which confer jurisdiction on the court of appeal to mean that such cases shall be tried by that court upon such original evidence, would be to hold that the framers of the Constitution intended to require an impossibility, in order to work an injustice. There are many irreconcilable decisions upon the general subject of retrospective legislation. Upon one branch of it—*i. e.*, the proper application of the term "*ex post facto*"—even the convention which framed the Federal Constitution seems for a while to have labored under some misapprehension. Mr. Justice Miller, speaking as the organ of the Supreme Court of the United States, makes the following comment: "As the clause was first adopted, the words concerning contracts were not in it, because it was supposed that the phrase *ex post facto* included laws concerning contracts as well as others. But it was ascertained, before the completion of the instrument, that this was a phrase which, in English jurisprudence, had acquired a signification limited to the criminal law, and the words 'or any law impairing the obligation of contracts' were added, to give se-

curity to rights resting in contracts. 2 Bancroft, History of the Constitution, 213." *Kring v. Missouri*, 107 U. S. 221, 27 L. ed. 506, 2 Sup. Ct. Rep. 443. While, therefore, an *ex post facto* law is retroactive in the sense that it operates upon a subject not liable to it at the time the law was made, the term is uniformly and exclusively applied by the courts to penal and criminal legislation, and, so applied, is defined to be a law which, in relation to an offense or its consequences, alters the situation of the accused to his disadvantage. Generally speaking, the prohibition against *ex post facto* laws does not, therefore, apply where the effect of the enactment is to modify the rigor of the existing law. And where there is involved merely a question of penalty, in which the state alone is concerned, an enactment abolishing such penalty pending proceedings for its enforcement is competent, and leaves the court, upon which is imposed the obligation of rendering the final judgment, without legal authority to impose such penalty. But, having jurisdiction of the case,—*i. e.*, the right to declare the law,—the court must hold that the law does not authorize the penalty, although it may have authorized it when the proceedings were commenced, and when, by the judgment appealed from, it was imposed. Such a case presents simply a question of the power of the sovereign by whom the penalty was imposed to remit it, or to repeal the law imposing it, at discretion, and does not involve the impairment of any obligations of the contracts of individuals or the divestiture of individual rights of property. This is the view which has been taken of laws authorizing imprisonment for debt. *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648; *Van Hoffman v. Quincy*, 4 Wall. 552, *sub nom. United States ex rel. Van Hoffman v. Quincy*, 18 L. ed. 409; *Sutherland*, Stat. Constr. 478.

A different question arises when the law imposing the penalty also establishes a basis upon which individuals may be said to acquire rights with respect to its enforcement; as, for instance, where the law gives a proportion of the fine to be recovered to the informer, who brings a *qui tam* action for the recovery. It has been held, in such cases, in England, that the rights of the plaintiff become vested by the bringing of the action, and that they would not be considered as affected by subsequent legislation unless it was so declared in express terms. *Crouch v. Jeffries*, 4 Burr. 2460. And so, in New York, it has been held, where an action was brought against the sheriff for a penalty for permitting the escape of a prisoner, and, pending the action, a law was passed to the effect that a return or recaption before suit should be a good defense, and it was claimed that such law operated retrospectively, that it should not be so construed. *Thompson, J.*, as the organ of the court, said: "It may, in general, be truly observed of retrospective laws of every description that they neither accord with sound legislation nor the fundamental principles of the social compact. . . . How unjust, then, the imputation against

the legislature that they intend a law to be of that description, unless the most clear and unequivocal expressions are adopted." And these views were concurred in by Judge Kent. *Dash v. Van Kleeck*, 7 Johns. 477; Sedgw. Stat. & Const. L. 167. Mr. Sutherland states the general doctrine upon this point in the following language: "If a penal statute is repealed pending an appeal, and before the final action of the appellate court, it will prevent an affirmance of a conviction, and the prosecution must be dismissed, or the judgment reversed. A final judgment before repeal is not affected by it. The repeal operates as a pardon of all offenses against it, and a bar to any subsequent prosecution. . . . Where a statute imposes a penalty for an injurious act done to the rights of others, such penalty to be recovered by the party aggrieved, it is in the nature of a satisfaction to him, as well as a punishment of the offender. In such a case the plaintiff is said to have acquired a vested right to the penalty as soon as the offense is committed, and a general repeal of the statute after action accrued does not affect that right." Sutherland, Stat. Constr. § 166.

When the statute to be construed will impair the obligations of a contract by having a retrospective operation attributed to it, such construction is inadmissible, because it would bring the act in conflict with the prohibition of the Constitution of the United States. More than this, it has been held, and may be considered settled, that "the remedy, for the enforcement of a contract, to which a party is entitled under state statutes in force when the contract was made, cannot be subsequently taken away by decisions of the state courts giving those statutes an erroneous construction, any more than by subsequent legislation. *Butz v. Muscatine*, 8 Wall. 575, *sub nom. United States ex rel. Butz v. Muscatine*, 19 L. ed. 490." Sutherland, Stat. Constr. § 478. Whether a judgment is to be regarded as a contract is a question which has been differently determined in different jurisdictions. In so far as concerns the Constitution of the United States, it may be considered as having been definitely answered in the negative, since the Supreme Court of the United States has so decided. *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 38 L. ed. 925, 13 Sup. Ct. Rep. 54. In this state it has been more than intimated that a judgment is to be regarded as a contract, though not where it is the outcome of an action in damages for a tort. In *Scott v. Duke*, 3 La. Ann. 253, Mr. Justice Rost, as the organ of the court, said: "The distinction between laws impairing the obligation of contracts or of judgments which the law holds to be contracts, and laws modifying the remedy given by the legislature to enforce the obligation, was fully recognized by Judge Marshall in the case of *Sturges v. Crowninshield* [4 Wheat. 200, 4 L. ed. 549]." But in *State v. New Orleans*, 32 La. Ann. 709, where the question was distinctly presented, it was held that a judgment for dam-

ages for a tort could not, in any manner, be considered a contract; and this doctrine was approved by the Supreme Court of the United States in the same case on writ of error. *Louisiana ex rel. Folsom v. New Orleans*, 109 U. S. 285, 27 L. ed. 936, 3 Sup. Ct. Rep. 211. There seems to be no reason to doubt, however, that a judgment is to be considered as "property," within the meaning of the 14th Amendment. In the case last above cited, Mr. Justice Bradley, in a concurring opinion, said: "But an ordinary judgment of damages for a tort, rendered against the person committing it in favor of the person injured, stands upon a very different footing. Such a judgment is founded upon an absolute right, and is as much an article of property as anything else that a party owns, and the legislature can no more violate it without due process of law than it can any other property. To abrogate the remedy for enforcing it, and to give no other adequate remedy in its stead, is to deprive the owner of his property, within the meaning of the 14th Amendment." *Louisiana ex rel. Folsom v. New Orleans*, 109 U. S. 285, 27 L. ed. 936, 3 Sup. Ct. Rep. 211. In *Gilman v. Tucker*, 128 N. Y. 190, 13 L. R. A. 304, 28 N. E. 1040, it was said: "We must bear in mind that a judgment has been rendered, and the rights flowing from it have passed beyond the legislative power, either directly or indirectly, to reach or destroy." In *Greenwood v. Butler*, 52 Kan. 424, 22 L. R. A. 465, 34 Pac. 967, it was said: "Speaking generally, it is the province of the legislature to establish, within constitutional limits, the rules, not only of procedure, but for the determination of rights by which the courts shall be governed. These rules must, in the very nature of things, precede the action of the courts in the orderly determination of the rights of parties. Those interested in any controversy are given their day in court. At the appointed time the court hears their proofs, the presentation of their views as to the law fixing their rights, and thereupon proceeds to determine all questions, both of fact and of law, presented. This determination is entered of record, and becomes a final settlement and determination of the controversy. It hardly seems necessary to cite authorities to support the proposition that a final judgment so entered is not to be changed or set aside by the lawmaking power. Our form of government does not contemplate an appeal from the judgment of the courts to the legislature, nor does it contemplate nor authorize, by a sweeping act of the legislature, a change in the force and effect of a great class of judgments already entered." See also *Weaver v. Lapsley*, 43 Ala. 224; *Merchants' Bank v. Ballou*, 1 Va. S. C. Rep. 102, 44 L. R. A. 306, 32 S. E. 481. In *McCabe v. Emerson*, 18 Pa. 111, it was claimed that a right of appeal had been granted by statute in a case in which judgment had been rendered under a law which allowed no appeal. Mr. Justice Rogers, as the organ of the court, said: "My respect for the legislature is too great to allow me for a single instant to

suppose that they designed so great a wrong as, by a retrospective act, to make that right which was clearly wrong. But, granting the intention to be clearly expressed, I have no hesitation in saying that the act is unconstitutional and void." See also, to the same effect, *People v. Carnal*, 6 N. Y. 463; *Lawrence v. Miller*, 2 N. Y. 245. Mr. Sedgwick, in summing up his presentation of this particular question,—i. e., how far remedial legislation, or legislation regulating procedure, may be permitted to affect acquired rights,—says that no general rule can be laid down, and that "at present all that can be done is to bring each case to the test of previous decisions and of principle, and, as far as possible, to endeavor to restrict the operation of laws to future cases." [P. 661.] Mr. Sutherland says: "No attempt has been made to fix definitely the line between alterations of the remedy which are to be deemed legitimate and those which, under the form of modifying the remedy, impair substantial rights; every case must be determined on its own circumstances. . . . Vested rights cannot be destroyed, devested, or impaired by direct legislation. Their protection is one of the primary purposes of government. They are secured by the Bill of Rights and the constitutional limitations upon the exercise of the sovereign powers. There is a vested right in property which one owns, and it cannot be legislated away. A vested right is property as tangible things are when they spring from contract or the principles of the common law. There is a vested right in an accrued cause of action; in a defense to a cause of action; even in the statute of limitations when the bar has attached, by which an action for a debt is barred. . . . When a right has been perfected by judgment, the fruits of recovery cannot be diverted by new legislation, nor subjected to new hazard by reviving a new right to appeal, or some other mode of review." Sutherland, Stat. Constr. §§ 478, 480. Mr. Black says: "But, as has been already stated, statutes which would impair or destroy vested rights will not be allowed to operate retrospectively, if that result can be avoided by any reasonable construction. And this rule is applicable to laws relating to remedies and the course of procedure and practice in the courts in respect to their applicability to pending suits." Black, Interpretation of Laws, p. 267.

It is suggested that, as the judgment obtained by Cassard in the district court was subject to appeal, and had, in fact, been appealed, when the new Constitution was adopted, it cannot be regarded as a final judgment, and hence that Cassard had no such vested or property right therein as to bring this case within any rule which can be found applicable to the case of a final judgment from which no appeal could be taken. The judgment in question decided all the points in controversy between the parties, and had been duly signed by the trial judge, and was, therefore, "final," according to the text of the law. Code Prac. arts. 539 *et seq.* It is true that it was not

final in the sense of having passed beyond the reach of judicial scrutiny, since it was awaiting review in the appellate court. But, as has been already stated, the plaintiff acquired said judgment as property, subject to certain conditions specified in the law under and by virtue of which he obtained it; and that it might be reviewed and reversed on appeal was one of those conditions. Except in so far as it might be affected by those specified conditions, however, the judgment was declared to be his property, and it was so by an indefeasible title. It is unnecessary to inquire what difference, if any, it would make if there existed no specific declaration of our law that "a judgment, when once rendered, becomes the property of him in whose favor it is given," or if that declaration applied only to judgments rendered by courts of last resort, or which are unappealable. If we should suppose that, in either of these other cases, the judgment in question would be regarded as merely one stage in the plaintiff's progress in the prosecution of a remedy which the state was as free to withdraw as it had been free to provide, and that the plaintiff would have no right to complain of a modification of that remedy which required him to begin over again, this would be merely to suppose a case, the conditions of which are different from those of the case which we are called on to decide. It is one thing to provide, or withhold, or modify, a remedy, and quite another thing to declare what is and what is not property, and to establish the conditions under which it may be acquired and held. A remedy may be provided to-day, and modified or abolished to-morrow. But a right of property, once vested in an individual, is not to be dealt with in that way. The fundamental reason for the establishment of any and all government is to prevent just such action, and to secure to the individual citizen the enjoyment of his property and his life free from molestation and arbitrary interference. The law provides how property may be acquired, and that, when acquired, it cannot be taken from the owner save by due process of law; and bald legislation is not due process of law. If, then, the judgment in question is property, it falls within the protecting rule. And the law declares, in terms, that it is property, for the text and the jurisprudence are conclusive that article 548 of the Code of Practice applies to judgments rendered by the trial judge, whether the cases decided are appealable or not. It may be that in other jurisdictions such judgments are not declared to be property, and that they are regarded as mere incidents pertaining to a remedy, the whole of which is at all times under the control of the state; but that has nothing to do with the question before us. The state of Louisiana, acting in her sovereign capacity, has made her declaration upon the subject, and the rights of the citizens of Louisiana who are parties to the present controversy are to be determined upon the basis of that declaration. She has said that the judgment of the trial judge, when it becomes final so far as he can make it so, and whether appealable

or not, is the property of him in whose favor it is given; and there is no more reason, as far as we can see, for denying full effect to this declaration than there would be for denying that real estate purchased at sheriff's sale is the property of the purchaser. The case of *Dunning v. West*, 51 La. Ann. 618, 25 So. 307, was appealed directly to this court, and the conclusion was reached that the interests of justice would be best subserved by remanding it in order to obtain additional testimony. It was a fact, of which the court took notice, that, after the judgment in the lower court, the plaintiff's wife, upon whose account the action had been brought (being an action in damages for personal injuries alleged to have been sustained by her), had been made, by law, a competent witness, whereas she had been unable to testify upon the original trial. Whether the case should or should not be remanded for that or for any other reason was, however, a matter within the legal discretion of the court, and it was so dealt with. And so it was a matter within the legal discretion of the court of appeal to have remanded the case which we are now considering, if, in the opinion of that tribunal, the interests of justice would thereby have been best subserved. But the discretion thus vested in this court, and exercised in remanding the *Dunning Case*, and vested in the court of appeal, and exercised by it in refusing to remand the instant case, is not subject to legislative control; and it is that sort of control which is invoked when we are asked to order the court of appeal to remand this case, which, exercising the judicial discretion vested in it, it has refused to remand. As a matter of course, the judgment rendered by the trial judge in the *Dunning Case* having been set aside, the case, when tried again, will be tried according to the law regulating the competency of witnesses which may be in force at the time of such trial, and the act of the legislature by which married women became competent witnesses in certain cases to which their husbands are parties, is given a retroactive effect, *quoad* that case; but it will be observed that the case was not re-opened in recognition of the supposed obligatory force of that statute, and, in so far as the reasoning might be construed as pointing in that direction, it must be considered as controlled by the views herein expressed.

A review of the other authorities to which we have been referred by the learned counsel for relators fails to disclose their applicability. There are many instances in which statutes regulating procedure may properly affect pending cases,—indeed, it may be said that this is so generally; but the line must be drawn in any specific case where, “under the form of modifying the remedy” or regulating the procedure, substantial rights, legally acquired, are impaired or divested. The authorities cited belong to the former class, the instant case to the latter.

The counsel concludes his brief with an argument upon the subject of the action of the court of appeal (in deciding the case upon its merits) upon his assignment of error. 49 L. R. A.

We think the question presented is not properly before us. The alleged error complained of in the pleadings was the refusal of the court of appeal to remand, and the prayer of the petition is that said court be ordered to remand, the case. We have concluded that there was no error in the refusal to remand, and the subsequent action of the court, affirming the judgment appealed from, formed no part of the issue there presented and decided. It is therefore ordered, adjudged, and decreed that the demand of the relators herein be rejected, and this proceeding dismissed at their cost.

Breaux, J., concurs in the decree. **Watkins, J.**, dissents, adhering to the views expressed in *Dunning v. West*, 51 La. Ann. 618, 25 So. 307.

Watkins, J., dissenting:

In my opinion the doctrine announced by the court in *Dunning v. West*, 51 La. Ann. 618, 25 So. 306, is the correct one, and strictly applicable to the instant case.

A rehearing having been had, **Blanchard, J.**, on February 19, 1900, delivered the following additional opinion:

A reconsideration of these cases has led to a conclusion at variance with that announced in the former opinion of the court. When trial was had in the district court, and when a suspensive appeal from the judgment there rendered in favor of the plaintiff was taken in each of the causes to the court of appeals, and lodged in the latter tribunal, the Constitution of 1879 was in force. That Constitution (art. 128) provided that “said appeals [meaning from the district court of the parish of Orleans to the court of appeals] shall be upon questions of law alone in all cases involving less than five hundred dollars, exclusive of interest, and upon the law and facts in other cases.” (Italics ours.) The amount involved in each of these cases was less than \$500. As, in case of appeal, the court of appeals would not have jurisdiction to sit in judgment upon the facts, the evidence adduced on the trial in the district court was not taken down in writing. Consequently, when appeal by defendants to the court of appeals followed the adverse judgment of the district court, it went up on the law alone. Shortly after the causes were lodged in the court of appeals, and before their trial there, the Constitution of 1898 went into effect, superseding the Constitution of 1879. The superseding Constitution changed the court of appeals for the parish of Orleans in some respects,—among others, increased the number of its judges from two to three, and enlarged its jurisdiction. Under the new Constitution its jurisdiction extends to all cases, civil or probate, when the matter in dispute or the fund to be distributed exceeds \$100, exclusive of interest, and does not exceed \$2,000, exclusive of interest. Article 98. And it is provided that all cases on appeal to the courts of appeal shall be tried on the original record, pleadings, and evidence. Article 103. A further provision

is to the effect that all causes pending in the court of appeals as constituted under the Constitution of 1879 were to be transferred to, and held to be causes pending in, the court of appeals as organized under the Constitution of 1898; and this was to be the case at once upon the going into effect of the latter Constitution. § 7, art. 325. By the terms of its own declaration, the Constitution of 1898 went into full force and effect from and after May 12, 1898, except as therein otherwise provided. § 8, art. 325. It thus appears that by operation of the new Constitution the appellants in the cases at bar became entitled to the judgment of the court of appeals on the facts as well as on the law of their cases. But the testimony had not been reduced to writing in the trial court, nor had any statement of facts been agreed upon. It was therefore impossible, in the then state of the record, for the court of appeals to discharge its constitutional duty of pronouncing judgment upon the facts of the cases, and appellants were not willing to submit the same upon the law alone.

This being the situation, appellants filed in the court of appeals a motion to remand the cases; suggesting their right, under the Constitution of 1898, to have a trial, hearing, and judgment on their appeals both on the law and facts, and praying that the causes be sent back to the district court, with instructions to be there tried anew, to the end that the evidence might be reduced to writing, in order that, in case of a second appeal, the appellate court might perform its constitutional duty of passing judgment on both the facts and the law. This motion was denied, and the court of appeals, proceeding to adjudge only the law of the case, affirmed the judgments appealed from. This was error. The motion to remand should have been granted. The moment the Constitution of 1898 went into effect, these appeals, then pending in the court of appeals, became entitled to consideration, not from the point of view of the restricted jurisdiction conferred upon the court of appeals by the Constitution of 1879, but from the point of view of the enlarged jurisdiction conferred upon that court by the Constitution of 1898. And inasmuch as there could be no judgment pronounced upon the facts, because of the lack of evidence or of an agreed statement of facts in the record, the court should have proceeded to put itself in a position where it could discharge its whole constitutional duty to the litigants. Obviously, the only way it could do this was to set aside the judgments appealed from and remand the cases, with instructions for trial *de novo*, and the taking down of the evidence offered. Then, if a second appeal followed, it would be in a position to judge both the law and the facts. To hold otherwise is to decree that these appeals were determinable under the jurisdiction vesting in the court of appeals under the Constitution of 1879, which Constitution, as the organic law of the state, had been entirely superseded, in all particulars having any bearing upon these cases,

by the later Constitution, and was no longer in force. The language of the Constitution of 1898 is plain and emphatic, to the effect that all cases on appeal to the court of appeals shall be tried on the original record, pleadings, and evidence. On appeal when? Obviously, at the time of and subsequent to the date when the new Constitution became operative. In these cases there were the original records and pleadings, but no original evidence. It cannot be said the evidence was lacking through laches or neglect of the appellants. No, it was lacking because of the fact that when trial was had in the court of the first instance no appeal was allowable on the facts, and hence no necessity to reduce the testimony of witnesses to writing. But before trial was had in the appellate court the remedy on appeal was enlarged. The appellants became entitled to the judgment of the higher court on the facts as well as the law. It was competent for the new Constitution to so ordain. The judgments which plaintiffs had recovered in the trial court were not final judgments. No vested rights had yet accrued. No indefeasible title in anything had passed. A suspensive appeal was pending, when, through the adoption of a new organic law, the state declared a change of public policy,—that appeals in causes under \$500, then pending or thereafter to be pending, should be determined by the court of appeals upon the facts as well as the law, just as was the case with appeals in cases over \$500. For the court of appeals to try these cases “on the original evidence,” in the language of the Constitution, it must have the evidence before it, and the only way possible to bring this about was to remand.

That the articles of the Constitution of 1898, providing an enlarged remedy on appeal in the cases under consideration, are not violative of any guaranty of the Federal Constitution, we think clear. The rule that the terms of a statute or Constitution are not to be interpreted as having a retrospective or retroactive operation, unless the language used plainly conveys that intention and is susceptible of no other interpretation, finds no application to remedial statutes or to the remedial provisions of organic laws. Remedial laws are an exception to the general rule, and may have retroactive or retrospective force. The text writers so declare. Cooley, Const. Lim. 4th ed. 469 (*376); Id. 476 (*381); Black, Interpretation of Laws, 265 *et seq.*; Sutherland, Stat. Constr. p. 221, §§ 164, 165, 482; Wade, Retroactive Laws, § 198; 23 Am. & Eng. Enc. Law, p. 451; Id. p. 506; 1 Marcade, No. 55, p. 43. And the doctrine finds confirmation in the jurisprudence of this state. *Scott v. Duke*, 3 La. Ann. 253; *Kilgore v. Planters' Bank*, 3 La. Ann. 693; *Commercial Bank v. Markham*, 3 La. Ann. 698; *Featherstonh v. Compton*, 8 La. Ann. 285; *Todd v. Landry*, 5 Mart. (La.) 463, 12 Am. Dec. 479; *Ashbridge's Succession*, 1 La. Ann. 206; *State v. Kling*, 12 La. Ann. 593; *Frey v. Hebenstreit*, 1 Rob. (La.) 565; *Baldwin v. Bennett*, 6 Rob. (La.) 309; *Cooper v. Hodge*, 17 La. 476; *Borgsted v.*

Nolan, 17 La. 593; *Hoa v. Lefranc*, 18 La. Ann. 397; *Walmsley v. Nicholls*, 36 La. Ann. 790; *State ex rel. Bonnet v. Mathews*, 33 La. Ann. 103; *Goodwill v. Elkins*, 51 La. Ann. 522, 25 So. 317; *Dunning v. West*, 51 La. Ann. 618, 25 So. 306. In the last case cited (very recently decided) the court used this language: "The only question, really, is whether the law enacted after the ruling in the court below should be considered as now applying. We think it does apply. The law is entirely remedial, and affects none of the vested rights of anyone." And in denying the application for rehearing it was said: "But the accepted canon of construction of retroactive laws, or those to which a retrospective effect is given, is that 'whatever relates to the manner of conducting and trying a suit is always within the control of the legislature, who can at any time make any change or modification they may think conducive to the public good, and a proper administration of justice in our courts.'"

The court of appeals cites, in support of its ruling denying the motion to remand, the opinion of this court in *Rosetta Gravel Pav. & Improv. Co. v. Kennedy*, 51 La. Ann. 1535, 26 So. 468. The main question there did not arise on a motion to remand in order that the evidence might be taken down in writing so that the court of appeals may on a subsequent appeal pass on the facts as well as the law of the case, but did arise in relation to certain testimony offered in the trial court and excluded, to which exclusion no sufficient bill of exceptions was taken, so as to reserve the point and bring it properly before the appellate court for its ruling. There are, however, in the opinion handed down in that case on the application for rehearing, statements of the law in conflict with the rule announced in this opinion, and in the opinion of the court in *Dunning v. West*, 51 La. Ann. 618, 25 So. 306; and, in so far as this is so, the *Rosetta Gravel Co. Case* must be considered overruled.

For the reasons assigned, it is ordered that the former decree of this court herein be set aside, and it is now ordered, adjudged, and decreed that the judgment of the court of appeals be annulled and vacated, and that this cause be remanded to the court of the first instance for further proceedings according to law, and with instructions to take down in writing the testimony offered on the second trial of the case there, to the end that, should an appeal be prosecuted to the court of appeals from the judgment rendered, that tribunal may be in a position to pass upon both the law and the facts of the case. It is further ordered, etc., that the costs herein incurred in the court of appeals and in this court be borne by plaintiff; those of the district court to abide the final determination of the cause.

Watkins, J., concurring:

The application for certiorari and writ of review having been vacated by the decree of this court, a rehearing was subsequently granted; and it becomes necessary for us to again examine the grounds on which that

opinion rests, and to decide whether same should be reinstated and maintained, or a different decree entered.

The case presented is as follows: The plaintiff, Cassard, instituted two suits—one against Tracy and another against Zacharie—upon paving contracts, and same were consolidated in the district court for trial and judgment; the amounts involved in said suits being in excess of \$100, but less than \$500. Same were tried together in the civil district court prior to the adoption of the Constitution of 1898, and there was a judgment rendered against Tracy for \$56, and against Zacharie for \$155. Under the terms of the Constitution of 1879, which was in force when said suits were instituted and judgment rendered, an appeal could be prosecuted in such cases on questions of law alone, to be taken to the court of appeals on bills of exception or assignments of error, accompanied by a statement of facts applicable to such questions of law. The defendants in said cases (relators here) reserved no bills of exceptions in the course of the trial in the district court, nor was there any agreed statement of facts prepared and filed therein conformably to law; but when the judgment was rendered against them they moved for a new trial upon the sole ground that the judgment rendered was contrary to law and evidence, and that they were aggrieved thereby. The applications for new trial were refused by the trial judge, and thereupon the defendants obtained an order for a suspensive appeal to the respondents' court; and after lodging the record therein they filed an assignment of errors, setting forth "that the judge *a quo* had given judgment on a *quantum meruit*, when, as appellants alleged, he ought either to have given judgment on the contract sued on, or else have rejected plaintiff's demands," altogether. The consolidated cases were fixed for trial in the respondents' court on May 30, 1898, eighteen days after the Constitution of 1898 had gone into effect; and upon that day appellants filed a motion to have the cause remanded to the district court for a retrial, for the reasons (1) that there is no evidence in the record (the testimony in the lower court not having been reduced to writing), and that there is no statement of facts in the record; (2) that under the Constitution of 1898 the appellants have the right to a trial and judgment on their appeal in the respondents' court, based on both the law and the facts. The respondents heard and considered said motion to remand, and declined to grant the same: (1) Because there is no evidence in the record, or statement of facts, and that "he could not recall to memory the facts testified to," same having been tried in their court *de novo*; (2) because the provisions of the Constitution of 1898 conferring jurisdiction on their court to pass upon the law and the facts had no application to a case situated as the one under consideration was,—citing *Rosetta Gravel Pav. & Improv. Co. v. Kennedy*, 51 La. Ann. 1535, 26 So. 468. Thereupon the respondents proceeded to decide the case upon

its merits, and affirmed the judgment appealed from, and an application for rehearing was made and refused, whereupon the appellants made the application to this court for certiorari or a writ of review.

The contention of relators is that the provision of the Constitution of 1898, conferring jurisdiction on courts of appeal to try and decide appeals from the civil district court of the parish of Orleans on the law and facts, is applicable to cases which are now under consideration, and that the respondents erred in declining to take jurisdiction thereof and so decide, and that it was further in error in declining to vacate the decree appealed from, and to remand the case to the civil district court for retrial, in order to obtain the evidence upon which they relied, or an appropriate statement of facts.

In the opinion of this court originally rendered, the decision of the respondents was affirmed, upon the theory (1) that the judgment appealed from was property of the plaintiff, Cassard, in the sense of the law, the title to which could not be taken away from him otherwise than by due process of law; and (2) that the provision of the Constitution of 1898 relied upon could operate prospectively only, and was not intended by the framers of the Constitution to have any retroactive effect; and, (3) if said provision be applied to the instant controversy, it would be giving to same a retrospective operation and effect, contrary to the intention of the framers of the organic law, and in violation of plaintiff's right of property in the judgment rendered. It will be sufficient to say that in support of each of said propositions numerous decisions were cited and quoted from; and it is readily admitted that same affirm the principles announced, with perfect unanimity, and, further, that we do not feel disposed to question their correctness. In our view, a judgment which is suspensively appealed from, and pending trial and disposition in the appellate court, is not property by an indefeasible title, in the sense of the law, and that applying to the cause in the respondents' court the provisions of the Constitution of 1898 is not to give to same a retroactive effect. We think that the question under consideration must be determined on the principle announced in *Dunning v. West*, 51 La. Ann. 618, 25 So. 306, which is to the effect that remedial laws have effect in any pending litigation, or, in other words, a law, either constitutional or statutory, which is remedial in character, must be construed to have application to all controversies pending and undetermined at the date of its promulgation.

The first question is as to the effect of a suspensive appeal upon the judgment appealed from. The Code of Practice declares that a judgment from which a suspensive appeal has been taken cannot be executed. Code Prac. art. 575. That same is not a final and definitive judgment. The very object of the appeal is to keep the controversy open, obtain a review of the law and evidence upon which same is predicated, and, if possible, to obtain a different decree in 49 L. R. A.

the appellate court. The effect of an appeal was very thoroughly considered in the case of *Beaird v. Russ*, 34 La. Ann. 315. A judgment which cannot be executed, and which may be reversed on appeal, cannot, certainly, possess any value as a piece of property, inasmuch as the title is defeasible and conditional. The very object of taking a suspensive appeal is to prevent the decree having any effect, and to prevent its execution. This being the case it is not readily perceivable upon what ground the argument is predicated that a law enacted during the interim of the suspensive appeal would have the effect of impairing the right of the judgment creditor, the right being defeasible and conditional. The argument on the other side is that a law, enacted during the pendency of a suspensive appeal, which only enlarges or alters the remedy of the parties to the suit, whether appellant or appellee, is applicable to pending suits, whether in courts of the first instance or on appeal, but that laws affecting the rights of parties, and not remedial in character, cannot have such an effect. As appertaining to the situation of the relators' case on appeal, we make the following extract from the opinion of the court in the instant case: "It is suggested that as the judgment obtained by Cassard in the district court was subject to appeal, and had in fact been appealed, when the new Constitution was adopted it cannot be regarded as a final judgment, and, hence, that Cassard had no such vested or property right therein as to bring this case within any rule which can be found applicable to the case of a final judgment; from which no appeal could be taken. The judgment in question decided all the points in controversy between the parties, and had been duly signed by the trial judge, and was therefore 'final' according to the text of the law. Code Prac. arts. 539 *et seq.* It is true that it was not final in the sense of having passed beyond the reach of judicial scrutiny, since it was awaiting review in the appellate court. But, as has been already stated, the plaintiff acquired said judgment as property, subject to certain conditions specified in the law, under and by virtue of which he obtained it, and that it might be reviewed and reversed on appeal was one of those conditions. Except in so far as it might be affected by those specified conditions, however, the judgment was declared to be his property, and it was so by an indefeasible title." We are not prepared to assent to the proposition stated in respect to the indefeasibility of the plaintiff's title to the judgment. On the contrary, we think the statement justifies a contrary opinion; that is to say, that his title thereto was not indefeasible. The plaintiff's right to the judgment necessarily depended upon its affirmance in the appellate court; for, if same should be reversed in the court of appeals, or by this court in reviewing the same, there would be no property in it at all. The right of property in a judgment of the district court, suspensively appealed from, would be necessarily extinguished by its reversal. We make a

further extract from the opinion, which relates to the case of *Dunning v. West*, to wit: "The case of *Dunning v. West*, 51 La. Ann. 418, 25 So. 306, was appealed directly to this court, and the conclusion was reached that the interests of justice would be best subserved by remanding it in order to obtain additional testimony. It was a fact of which the court took notice that after the judgment in the lower court the plaintiff's wife, upon whose account the action had been brought (being an action in damages for personal injuries alleged to have been sustained by her), had been made by law a competent witness, whereas she had been unable to testify upon the original trial. Whether the case should or should not be remanded for that or any other reason was, however, a matter within the legal discretion of the court, and it was so dealt with. And so it was a matter within the legal discretion of the court of appeal to have remanded the case which we are now considering, if, in the opinion of that tribunal, the interests of justice would thereby have been best subserved. But the discretion thus vested in this court, and exercised in remanding the *Dunning Case*, and vested in the court of appeal and exercised by it in refusing to remand the instant case, is not subject to legislative control, and it is that sort of control which is invoked when we are asked to order the court of appeal to remand this case, which, exercising the judicial discretion vested in it, has refused to remand. As a matter of course, the judgment rendered by the trial judge in the *Dunning Case* having been set aside, the case, when tried again, will be tried according to the law regulating the competency of witnesses which may be in force at the time of such trial; and the act of the legislature by which married women became competent witnesses in certain cases to which their husbands are parties is given a retroactive effect *quoad* that case; but it will be observed that the case was not reopened in recognition of the supposed obligatory force of that statute, and, in so far as the reasoning might be construed as pointing in that direction, it must be considered as controlled by the views herein expressed."

From the foregoing extract it clearly appears that the burden of the same was to overthrow the opinion in *Dunning v. West*. This much is plainly inferable from the language used, if it be not so declared in terms. And it further appears that, if the *Dunning Case* be not considered as reversed thereby, the ruling of the court therein is distinctly rested upon the ground that the court exercised a judicial discretion, only, in deciding as it did in that particular case, and therefore same is not to be considered applicable to like cases in the future, or to be consulted as a precedent in the instant case. Consequently we have two propositions to consider: (1) Whether the provision extracted from the Constitution of 1898 is to be viewed as a retroactive law; (2) whether this court, in deciding the case of *Dunning v. West*, merely exercised a legal discretion,

and so dealt with that case. It seems to me that the two positions are somewhat inconsistent and irreconcilable with each other. I find upon an examination of the opinion in *Dunning v. West* this statement: "There is no question here of a new fact or of newly-discovered evidences. The only question really is whether the law enacted after the ruling in the court below should be considered as now applying. We think it does apply. The law is entirely remedial, and affects none of the vested rights of anyone,"—citing *Baldwin v. Bennett*, 6 Rob. (La.) 309. From the opinion upon the application for rehearing it appears that our decision related to the effect to be given to § 1 of act 190 of 1898, amending the provisions of Rev. Civ. Code, art. 2281, relative to the competency of the wife to testify for or against her husband in civil suits for damages on account of personal injuries sustained by her. We find the following statement therein, to wit: "Our opinion held that that 'law is entirely remedial, and affects none of the vested rights of anyone;' citing *Baldwin v. Bennett*, 6 Rob. (La.) 309. This conclusion was not hastily reached, but after the most mature deliberation. The present contention of defendant's counsel is that, as the statute was enacted subsequent to the rendition of judgment in his favor in the district court, the interpretation now given it has the effect of divesting a vested right of property he acquired therein. But the accepted canon of construction of retroactive laws, or those to which a retrospective effect is given, is that 'whatever relates to the manner of conducting and trying a suit is always within the control of the legislature, who can at any time make any change or modification they may think conducive to the public good and a proper administration of justice in our courts,' etc. In our opinion, this statute furnishes an apt illustration of that rule, and that our decree was a proper one." The foregoing extracts from *Dunning v. West* disclose the fact to be that the court acted with perfect deliberation in holding that the effect to be given to the statute under consideration was that of a purely remedial statute, and not of a retroactive law. Consequently, in my view, our opinion therein answers, at one and the same time, both the propositions which were entertained in the original opinion of the court in the instant case. The foregoing views therein are entirely inconsistent with the uniform current of decision in this court from a very early date, and it may be crystallized in the following statement, to wit: "Whatever relates to the manner of conducting and trying a suit is always within the control of the legislature, who can at any time make any change or modification they may think conducive to the public good and a proper administration of justice in our courts." *Baldwin v. Bennett*, 6 Rob. (La.) 309; *Cooper v. Hodge*, 17 La. 476; *Borgsted v. Nolan*, 17 La. 594; *Frey v. Hebenstreit*, 1 Rob. (La.) 565; *Scott v. Duke*, 3 La. Ann. 253; *Kilgore v. Planters' Bank*, 3 La. Ann. 693; *Featherstonh v. Compton*, 8 La. Ann.

285; *State v. King*, 12 La. Ann. 594; *Hoa v. Lefranc*, 18 La. Ann. 397. The question here raised was substantially considered and decided in *Goldman v. Goldman*, 51 La. Ann. 761, 25 So. 555.

Monroe, J., dissents; adhering to the views expressed in the original opinion of the court.

Nicholls, Ch. J., dissenting:

I dissent from the opinion rendered in this case, but I am of the opinion that to a certain extent, and under proper limitations and conditions, the constitutional convention could have adopted an article of the Constitution affecting judgments then on appeal before the court of appeals. A judgment rendered by a district court, appealable to the court of appeals, is not a finality, though signed. An appeal from the judgment opens the issues in the cause, which remain open until finally disposed of by the appellate court. *Lacroix v. Menard*, 7 Mart. N. S. 347; *Rose's Succession*, 48 La. Ann. 422, 19 So. 450. It has been held that a statute which creates a new court, or extends the jurisdiction of an existing court, is not unconstitutional. *Com. v. Phillips*, 11 Pick. 28; *State v. Sullivan*, 14 Rich. L. 281; McClain, Crim. L. § 78. Our opinion in *Goldman v. Goldman*, 51 La. Ann. 778, 25 So. 555, was based upon the correctness of that proposition as applied to the facts of that case. My reasons for dissenting are that the question of the power of the convention in respect to this subject is not, in my opinion, involved in this litigation; for, whatever might have been the convention's power, it was not exercised. I do not think the enlarging of the jurisdiction of the court was intended to take effect retroactively on appeals then before the court of appeals, at least to the extent which is asserted and declared in the opinion of the majority of the court. I do not think it was intended to operate at once upon appellants situated as this appellant was, and to confer upon them the right to demand from the court, as a matter of absolute right, which had vested in them by the Constitution, that their causes be remanded. While I think the court, in the exercise of its already existing discretion to remand causes, could, if, in its opinion, the ends of justice would have been, by so doing, subserved, have, in view of the enlarged jurisdiction granted to it, reopened this cause and sent it back for a new trial, I do not think it was compelled to do so by force of any constitutional requirements upon it. I think it had the legal right to refuse the application to remand, and I think, in the condition in which this particular case stood, it acted properly in refusing it. It is intimated that so holding would be in direct opposition to what we have recently announced in the case of *Dunning v. West*, 51 La. Ann. 618, 25 So. 306. I see no parallelism in the two cases, and no inconsistency whatever in refusing to accede to the demand presently made upon this court 49 L. R. A.

to remand this case as a matter of right, and in its having in the *Dunning Case*, of its own motion, thought proper to remand that cause, in the interest of justice. We did not act in the *Dunning Case* under the pressure of any law making it our duty to remand, but because we thought the condition of the evidence was unsatisfactory, and we desired to be further informed as to the matters in controversy. Our action in remanding was strictly within our legal, discretionary powers, independently of the fact that, pending the appeal before us, Mrs. Dunning had become a competent witness, when she was not such when the case was tried. That fact was a mere circumstance which we took into consideration in deciding what course it would be best to take. There was no necessity for the court, in remanding, to have made mention of or allusion to the new statute. We could well have left the question as to whether Mrs. Dunning would on the new trial be a competent witness to be raised and decided at that time. If we did not pursue that course, it was simply to speed the litigation, and our action was merely advisory in character. We had a fixed opinion that she would on that trial be a competent witness, and we so declared. Had we not done this, but left the case to come to us a second time, with this particular question as one of the questions to be passed upon by us, we would have unquestionably decided rightly that Mrs. Dunning was a competent witness, and the discussion now before us would probably have never arisen. I entertain the same opinion now as to the competency of Mrs. Dunning as a witness on the second trial of the *Dunning Case* which I entertained when the case was remanded. See *West v. His Creditors*, 1 La. Ann. 365. I have said that, in dealing with the question of the propriety of (not the power or duty of) remanding this case, the action of this court in the *Dunning Case* afforded no precedent. The situation of the two cases was essentially different. In the *Dunning Case* the testimony taken on the first trial had been perpetuated in writing. In this case the testimony was not taken in writing, the witnesses have scattered, and the appellee would be placed in *duriori casu*. The original testimony could not be availed of, and whether the same testimony would be obtainable was certainly problematical, to say the least. This court, in speaking through Mr. Justice Porter in *Cow v. Williams*, 5 Mart. N. S. 142, said: "We cannot see the difference between depriving a man of his property, and depriving him of the evidence which establishes his right to it;" and McClain, in his work on Criminal Law (§ 78), citing numerous authorities, defines an *ex post facto* law as one which, with reference to a crime already committed, makes it harder for a defendant to defend himself.

I think the action of the court of appeals was within its discretionary powers, and that its action was in this case correct, and that we should sustain it.

NORTH DAKOTA SUPREME COURT

SWEDISH AMERICAN NATIONAL
BANK, *Appt.*,

v.

DICKINSON COMPANY *et al.*, *Respts.*

(6 N. D. 222.)

*1. The facts embodied in a supplemental complaint under the Code must relate to the cause of action set forth in the original complaint, and must be in aid thereof.

2. It is not proper to bring into a case, by supplemental complaint, new facts which have arisen since the action was commenced, and which by themselves constitute a new and independent cause of action, without reference to the facts alleged in the original pleading.

*Headnotes by CORLISS, J.

NOTE.—Right to set up judgment in other court by amendment or supplemental complaint in a pending action.

Since methods are usually provided for making a judgment recovered in any court in a state effective throughout the state, the only cases in which the right to amend a complaint so as to set up a judgment recovered since it was filed would become a vital question are those in which the matter at issue has been determined in a collateral way between slightly different parties, or in a different form of action in the same state, and where a judgment has been obtained on the same cause of action between the same parties in another state.

Of the former class *Jenkins v. International Bank*, 127 U. S. 484, 32 L. ed. 189, 8 Sup. Ct. Rep. 1196, affirming 111 Ill. 470, is a good illustration. In that case a subsequent decree in another action establishing the amount of a bankrupt's indebtedness to a bank was permitted to be set up in a suit by the bank to foreclose collaterals to defeat the plea of usury in the original indebtedness, notwithstanding the statute would have barred a suit to enforce such subsequent decree, the court saying it was competent for complainant to bring the decree forward by supplemental bill as conclusive evidence of the amount due for which it was entitled to take a decree. It was strictly new matter arising after the filing of the bill in support of the relief originally prayed for. It can in no sense be considered as a new cause of action. It was not a bill to enforce the decree, nor was complainant obliged to rely upon it as the sole ground of recovery on the ground that the original cause of action had become merged in it.

Of the second class of cases, *SWEDISH AMERICAN NAT. BANK V. DICKINSON CO.* contains the best discussion of the principle which has yet appeared. In view of the interesting character of the question involved, the scarcity of cases upon the subject is somewhat remarkable.

It is well established that the recovery of a judgment in another state for the same cause of action may be pleaded in bar of a pending suit, and it then becomes a vital question whether the effect of this plea can be neutralized by amending the complaint in such a way as to sue upon the judgment rather than the original cause of action. The few cases which have been decided seem to agree that in the absence of express statutory permission this cannot be done.

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3. Accordingly, held, that when, pending an action upon notes, judgment thereon was recovered in another state, the plaintiff could not file a supplemental complaint alleging recovery of such judgment, but that the rendition thereof constituted a bar to the further prosecution of the action.

(November 19, 1896.)

APPEAL by plaintiff from a judgment of the District Court for Cass County refusing to permit the filing of a supplemental complaint, in an action to recover the amount alleged to be due on certain promissory notes. *Affirmed.*

The facts are stated in the opinion.

Messrs. Newman, Spaulding, & Phelps, for appellant:

The power of the court to allow amend-

In *Barnes v. Gibbs*, 31 N. J. L. 317, 80 Am. Dec. 210, the question was directly raised whether, in case a merger of the original cause of action has taken place by the entry of a judgment in another state, the writ and pleadings can be amended so as to transform the action from assumpsit to debt, and permit the judgment to become the foundation of the suit; and the court said, allowing the utmost amplitude to the powers of the court to alter forms and correct errors, "the present application seems to be much beyond the scope of such power. It is obvious the proposition is not to amend defects, but to substitute one cause of action for another. Besides, even if the court should permit the proposed commutation to be made, it would not avail the plaintiffs, because the ground of action sought to be substituted has arisen since the commencement of this suit. No record could be framed which would support a judgment, exhibiting a cause of action accruing to the plaintiff after the purchase of his writ. Such defect would be pleadable in abatement, or, at the trial, the plaintiffs could be nonsuited, or, if it was disclosed in the declaration, the defendants might demur, or move in arrest of judgment, or assign it for error."

In *Green v. Starr*, 52 Vt. 426, it was decided that, in an action upon the common counts for breach of contract, a special count could not be filed setting up a recovery of a judgment in another state for such breach subsequently to the bringing of the action. The court says: "The cause of action in the original declaration and the special count are not the same."

In *Watson v. Thibou*, 17 Abb. Pr. 184, the action was upon certain promissory notes, and the defense was that the notes had been paid by bonds, whereupon the plaintiff sought to file a supplemental complaint setting up the record of a judgment upon the bonds in a foreign country, but this was refused upon the ground, *inter alia*, that it would be setting up a cause of action arising since the pending suit, which could not be permitted. In view of the holding in *Eastern Townships Bank v. Beebe*, 53 Vt. 177, 38 Am. Rep. 665, that a foreign judgment is not a debt of higher degree than the original cause of action, and therefore does not merge it, the statements in *Watson v. Thibou*, refusing to permit the setting up of the judgment in the amended complaint, may need re-examination. However, since the defense was payment of the notes by the bonds, the decision was doubtless correct.

H. P. F.

ments of the complaint and supplemental complaints before trial is the same.

Rev. Codes, §§ 5297, 5301.

The limitation in each case is that the allegations shall be material to the case.

At common law but few amendments were allowed.

Tidd, Pr. p. 651; *Haynes v. Morgan*, 3 Mass. 210.

In those states which have not adopted the Code of Procedure the ruling has been practically uniform that no amendment could be allowed which changed the nature of the action, as assumption to debt, case to debt or trespass, and so on, and amendments in actions at law have only been allowed when they did not change the form of the action.

Carpenter v. Gookin, 2 Vt. 495, 21 Am. Dec. 566; *Barnes v. Gibbs*, 31 N. J. L. 317, 86 Am. Dec. 210; *Haynes v. Morgan*, 3 Mass. 208.

Under the Code there is no such thing as changing the form of an action for the enforcement or protection of private rights and the redress of private wrongs.

Rev. Codes, § 5181.

There is but one form of action, and the object of that form of action is the redress of private wrongs.

Beardsley v. Stover, 7 How. Pr. 295; *Troy & B. R. Co. v. Tibbits*, 11 How. Pr. 170; *Union Nat. Bank v. Bassett*, 3 Abb. Pr. N. S. 360; *McQueen v. Babcock*, 3 Keyes, 428; *Brown v. Leigh*, 49 N. Y. 78; *Ford v. Ford*, 35 How. Pr. 321; *Mason v. Whitely*, 1 Abb. Pr. 85; *Watson v. Rushmore*, 15 Abb. Pr. 51; *Wyman v. Remond*, 18 How. Pr. 273.

In the case at bar the proposed supplemental complaint did not change the cause of action, and was material to the plaintiff's case.

The supplemental complaint did not even change the cause of action. It simply changed the manner of stating the cause of action.

Latham v. Richards, 15 Hun, 129; *Third Ave. R. Co. v. New York Elev. R. Co.* 19 Abb. N. C. 261; *Baker v. Bartol*, 6 Cal. 483; *Kimball v. Bryan*, 56 Iowa, 632, 10 N. W. 218; *Sibley v. Young*, 26 S. C. 415, 2 S. E. 314; *Bogle v. Gordon*, 39 Kan. 31, 17 Pac. 857; *School Dist. No. 2 v. Boyer*, 46 Kan. 54, 26 Pac. 484; *Wilson v. Smith*, 20 N. Y. Civ. Proc. Rep. 235, 14 N. Y. Supp. 628; *Jenkins v. International Bank*, 127 U. S. 484, 32 L. ed. 189, 8 Sup. Ct. Rep. 1196.

The allowance of an amendment or supplemental complaint is usually within the discretion of the court, but should always be allowed when it tends to the furtherance of justice.

Fleischmann v. Bennett, 79 N. Y. 579; *Harding v. Minear*, 54 Cal. 502; *Schouweiler v. Hough*, 7 S. D. 163, 63 N. W. 776.

Messrs. Ball, Watson, & Maclay, for respondents:

The supplemental complaint sets up a new cause of action.

The cause of action given by the note is based upon the contract of the parties alone, and the evidence which may be adduced in its favor, or against it, is almost unrestricted in scope. That given by the judgment 40 L. R. A.

risers, not at all by contract of the parties, but is the final pronouncement of the judicial department of the state upon matters contained in the record. Although it has sometimes been called a contract, or quasi contract, it is only so by legal fiction.

Freeman, Judgm. § 4.

The notes are merged in the judgment.

The judgment is to be regarded as a new debt.

Freeman, Judgm. 215-217, 221; *McGillvray v. Avery*, 30 Vt. 537; *Child v. Eureka Powder Works*, 45 N. H. 547; *Boston India Rubber Factory v. Hoit*, 14 Vt. 92; *Andrews v. Varrell*, 46 N. H. 17; *Bank of North America v. Wheeler*, 28 Conn. 433, 73 Am. Dec. 683; *Cissna v. Haines*, 18 Ind. 496.

One of the proofs that the cause of action is new lies in the fact that evidence of a totally different kind is necessary to sustain it.

1 Enc. Pl. & Pr. 556, note 2; *Foste v. Standard Ins. Co.* 26 Or. 449, 38 Pac. 617.

An amendment or supplemental complaint setting up a new cause of action is not allowable.

Dexter v. Ivins, 133 N. Y. 551, 30 N. E. 594; *Freeman v. Grant*, 132 N. Y. 22, 30 N. E. 247; *Shafarman v. Jacobs*, 15 Misc. 10, 36 N. Y. Supp. 428; *Zboynski v. Brooklyn City R. Co.* 10 Misc. 7, 30 N. Y. Supp. 540; *Sanford v. American Dist. Teleg. Co.* 13 Misc. 88, 34 N. Y. Supp. 144; *Burns v. Walsh*, 10 Misc. 699, 31 N. Y. Supp. 788; *Zoller v. Kellogg*, 66 Hun, 194, 21 N. Y. Supp. 226; *Lau v. Pemberton*, 9 Misc. 219, 29 N. Y. Supp. 605; *Rowell v. Janorin*, 69 Hun, 305, 23 N. Y. Supp. 481; *Shaw v. Bryant*, 65 Hun, 57, 19 N. Y. Supp. 618.

In the great majority of the states, including those having the Code provisions, the common-law rule against the introduction of a new cause of action is adhered to.

1 Enc. Pl. & Pr. 547, 548, and notes.

In addition to the fact that the supplemental complaint set up a new cause of action, it was also objectionable on the ground that it was a cause of action which accrued subsequent to the commencement of the action. The only matters which can be set up in the supplemental complaint are such as are consistent with, and in aid of, the cause of action contained in the original complaint.

Barnes v. Gibbs, 31 N. J. L. 317, 86 Am. Dec. 210; *Watson v. Thibou*, 17 Abb. Pr. 184; *Gleason v. Gleason*, 54 Cal. 135; *Buchanan v. Comstock*, 57 Barb. 582; *Tiffany v. Bowerman*, 2 Hun, 643; *Pinch v. Anthony*, 10 Allen, 470; *Lowry v. Harris*, 12 Minn. 255, Gil. 166; *Meyer v. Berlandi*, 39 Minn. 438, 1 L. R. A. 777, 40 N. W. 513; *Noonan v. Orton*, 21 Wis. 283; *Shinners v. Brill*, 38 Wis. 648; *Milner v. Milner*, 2 Edw. Ch. 114; *Farmers' Loan & T. Co. v. United Lines Teleg. Co.* 47 Hun, 315; *Fickett v. Cohu*, 14 Daly, 550, 1 N. Y. Supp. 436; *Randall v. Christianson*, 84 Iowa, 501, 51 N. W. 253.

The argument of hardship to the appellant should not be considered.

1 Chitty, Pl. 197; *McGillvray v. Avery*, 30 Vt. 538; *Barnes v. Gibbs*, 31 N. J. L. 317.

86 Am. Dec. 210; *Child v. Eureka Powder Works*, 45 N. H. 547; *C. H. Fargo & Co. v. Cutshaw*, 12 Ind. App. 392, 39 N. E. 532; *Fairfield v. Baldwin*, 12 Pick. 388; *Freeman v. Creech*, 112 Mass. 180.

Corliss, J., delivered the opinion of the court:

The sole question of law at issue on this appeal relates to the extent of the power of the district court to allow a plaintiff to file a supplemental complaint. The causes of action set forth in that pleading in this case were promissory notes. While this suit was pending the plaintiff recovered in the state of Minnesota, against the same defendants, a judgment upon the identical causes of action embraced in the complaint. Thereafter its counsel applied in this action to the district court for permission to file a supplemental complaint, averring the recovery of this judgment. The court refused to grant this motion, on the sole ground of a want of power. The correctness of this ruling is the only question before us. Should we reach the conclusion that the power exists, it would be our duty to reverse the judgment and order appealed from, and direct the district court to bring to bear upon the application its judicial discretion. But, in our judgment, the court did not err in its decision. A few fundamental principles of law control this case. It has long been the doctrine that a final judgment merges, within the jurisdiction in which it is rendered, the original cause of action on which it is founded. 1 Freeman, Judgm. §§ 215-217; 15 Am. & Eng. Enc. Law, p. 336. This rule applies in this country to judgments rendered in the different states, on the ground that, under the provisions of the Federal Constitution, they are practically assimilated to domestic judgments. 1 Freeman, Judgm. § 221; 15 Am. & Eng. Enc. Law, p. 341; *Barnes v. Gibbs*, 31 N. J. L. 317, 86 Am. Dec. 210; *Bank of United States v. Merchants' Bank*, 7 Gill, 415; *Bank of North America v. Wheeler*, 28 Conn. 433, 73 Am. Dec. 683; *Rogers v. Odell*, 39 N. H. 452; *McGilvray v. Avery*, 30 Vt. 538; *Child v. Eureka Powder Works*, 45 N. H. 547; 2 Black, Judgm. § 864. A different rule applies in the case of a foreign judgment. 2 Black, Judgm. § 847. The origin of this rule was the technical basis of the doctrine of merger. It was supposed to rest upon the principle that a higher security or evidence of liability swallowed up that of inferior character. A foreign judgment not being regarded in England as technically a matter of record the foreign judgment was not there looked upon as an evidence of indebtedness superior to the claim on which it was founded. See cases cited in 2 Black, Judgm. § 847; 2 Freeman, Judgm. § 220; 15 Am. & Eng. Enc. Law, p. 341, note 7. In this country, there has been a disposition to follow the English decisions in all cases not falling within the class of judgments specified in the Federal Constitution. See 2 Black, Judgm. § 847. But if a foreign judgment is, on sound principles of private international law, conclusive be-

tween the parties, there is no reason, save an extremely technical one,—a reason unsuited to jurisprudence in its present stage of development,—why such a judgment should not in every civilized country be treated as merging the original cause of action upon which it rests. As Chief Justice Beasley said in *Barnes v. Gibbs*, 31 N. J. L. 317, 86 Am. Dec. 210: "The doctrine of merger arises out of the quality of a judgment which renders it conclusive upon the parties as to the questions which it involves." See also Freeman, Judgm. § 220; *Jones v. Jamison*, 15 La. Ann. 35.

From these elementary principles to which we have referred, we are forced to deduce the conclusion that, the moment the judgment was recovered in Minnesota, the plaintiff's causes of action on the notes sued upon were utterly extinguished. This judgment would, if pleaded by the defendants, constitute a complete bar to the further prosecution of the action. 15 Am. & Eng. Enc. Law, p. 341, note 5; *Rogers v. Odell*, 39 N. H. 452; *McGilvray v. Avery*, 30 Vt. 538; *Bank of North America v. Wheeler*, 28 Conn. 433, 73 Am. Dec. 683; *Child v. Eureka Powder Works*, 45 N. H. 547; *Bank of United States v. Merchants' Bank*, 7 Gill, 415.

How the plaintiff can gain any advantage by setting forth in its own pleading facts which, if averred in the answer, would constitute a perfect defense to the further prosecution of the suit, is beyond our comprehension. The office of a supplemental bill in equity was to bring into a case, by a new pleading, facts which had occurred or become for the first time known to the plaintiff subsequently to the commencement of the action, and which related to the case set forth in the original bill. Just how far the courts of chancery would go in permitting new facts to be brought by supplemental bill into a pending suit in equity has never been stated with the utmost precision. But there are two general classes of cases with respect to which the law on this subject has been for many decades very clearly settled. If the original bill is not defective in substance, new facts may, by supplemental bill, be incorporated into the cause of action, although they necessitate an enlargement or change in the character of the relief originally sought. But in every decision on this point the qualification is stated or plainly to be inferred from the opinion that a new cause of action cannot be substituted for the one set forth in the original pleading. *Jacob v. Lorenz*, 98 Cal. 332, 33 Pac. 119-121; *Candler v. Pettit*, 1 Paige, 168, 19 Am. Dec. 399; *Jacques v. Hall*, 3 Gray, 194; *Winn v. Albert*, 2 Md. Ch. 42; *Edgar v. Clevenger*, 3 N. J. Eq. 258. But in the case at bar the plaintiff does not seek to enlarge its relief, or to alter the character thereof. It merely asks that it be allowed to obviate a perfect defense to its causes of action on the notes, and recover the same money judgment upon an entirely distinct cause of action, not in existence when he brought the suit, but arising subsequently to its commencement. No adjudication, no statute, no principle of law or

equity, can be found to sustain its contention in this behalf. In interpreting our statute permitting the filing of supplemental complaints, we must fall back upon the settled practice in chancery before the adoption of the Code. The statute embodies the rule of procedure in equity. It has merely made applicable to actions at law, as well as suits in equity, the rules prevailing in chancery with respect to supplemental pleading. Counsel for plaintiff does not claim that our statute has any wider scope; and he could not successfully make such contention in view of the language of the statute that the new facts must be material to the case, and the fact that in other states similar provisions have been uniformly treated as merely voicing the existing rule of practice in equity. *Prouty v. Lake Shore & M. S. R. Co.* 85 N. Y. 272-275; *Buchanan v. Comstock*, 57 Barb. 583; *Watson v. Thibou*, 17 Abb. Pr. 184; *Bowery Nat. Bank v. Duryee*, 74 N. Y. 491-495; *Gleason v. Gleason*, 54 Cal. 135, 136; *Jacob v. Lorenz*, 93 Cal. 332, 33 Pac. 119-121; *Eastman v. St. Anthony Falls Water Power Co.* 17 Minn. 48, Gil. 31; *Bull v. Rothschild*, 16 N. Y. Civ. Proc. Rep. 356, 4 N. Y. Supp. 826; *Tiffany v. Bowerman*, 2 Hun, 643-646; *Cohn v. Husson*, 67 How. Pr. 461. In this connection it is well to state the other general rule on the subject of supplemental bills in equity. It is a rule of limitation of power. The plaintiff cannot, by supplemental pleading, bring into the action a distinct cause of action arising since the beginning of the suit. Every one of the decisions last above cited recognizes this rule. And in most of these cases it is enforced under a statute identical in its language with ours. If the original bill is defective in substance, the plaintiff cannot, by supplemental bill, bring into the case new facts constituting a distinct cause of action, which has arisen since the suit was instituted. *Milner v. Milner*, 2 Edw. Ch. 114; *Putney v. Whitmire*, 66 Fed. Rep. 338; *Bernard v. Toplitz*, 160 Mass. 162, 35 N. E. 673; *Fahs v. Roberts*, 54 Ill. 195; *Patten v. Stewart*, 24 Ind. 332-343; *Orton v. Noonan*, 29 Wis. 547; *Story*, Eq. Pl. § 339.

The groundwork of this doctrine is that the plaintiff cannot recover on a cause of action which does not exist when he sues. He must dismiss his action, and plead anew. It follows from this that the rule that a new cause of action, which had not accrued when the writ was served, cannot be brought into the case by supplemental complaint, applies not only to cases where no cause of action existed at all when the suit was brought, but also to cases where a cause of action was in existence, and was set forth in the original complaint, and the plaintiff seeks to abandon that cause of action, and inject into the suit an entirely different cause of action; and the authorities cited below fully sustain this proposition. Indeed, this practice of changing the cause of action has never been sustained, even in a case where the new cause of action was in existence when the suit was commenced. Much less should this be allowed when the cause of action sought to be

made the basis of the suit by supplemental complaint arose during the pendency of the case. *Milner v. Milner*, 2 Edw. Ch. 114; *Eastman v. St. Anthony Falls Water Power Co.* 17 Minn. 48, Gil. 31; *Prouty v. Lake Shore & M. S. R. Co.* 85 N. Y. 272-275; *Buchanan v. Comstock*, 57 Barb. 583; *Watson v. Thibou*, 17 Abb. Pr. 184; *Cohn v. Husson*, 67 How. Pr. 461, 462; *Gleason v. Gleason*, 54 Cal. 135; *Bull v. Rothschild*, 16 N. Y. Civ. Proc. Rep. 356, 4 N. Y. Supp. 826; *Tiffany v. Bowerman*, 2 Hun, 643-646. In this last case the court said: "It seems only necessary to state the facts, in order to show that the motion for leave to file this supplemental complaint for such a purpose should have been at once denied. A supplemental complaint must be consistent with, and in aid of, the case made by the original complaint. A new and substantive cause of action cannot be set up, by way of supplemental complaint, as a ground of recovery; more especially a cause of action to which the plaintiff was not entitled when he commenced the action." In *Prouty v. Lake Shore & M. S. R. Co.* 85 N. Y. 272, the court said: "The principle invoked by the appellant to sustain this theory is the well-established doctrine that the plaintiff cannot file a supplemental bill to introduce new facts which have occurred since the filing of the original bill, and upon which a decree can be had without reference to the original bill; and in such case the original bill should be dismissed and a new one filed." In *Gleason v. Gleason*, 54 Cal. 135, the court said: "This is, therefore, a new controversy between them,—a new and independent cause of action about the title to property acquired since the judgment; and it is not allowable to substitute a new and distinct cause of action by way of supplemental complaint." In *Eastman v. St. Anthony Falls Water Power Co.* 17 Minn. 48, Gil. 31, the court states the rule to be that "a supplemental complaint must be for the same substantive cause of action as that set out in the original complaint." The doctrine as it was enunciated by the vice chancellor in *Milner v. Milner*, 2 Edw. Ch. 114, has never been questioned, and is undoubtedly sound. The vice chancellor said: "The question in my mind is whether the complainant, upon her intending to rely upon the new facts, must not file an entirely new bill. I consider it not a case for amendment or a supplemental bill. The latter is generally filed to continue the original suit, or is, in its matter, directly connected with it, and because of the original bill being somewhat defective. But here there is new substantive cause of action, upon which a decree can be had without connecting it with the original bill. The complainant is here wanting to go entirely upon new ground; in fact, to make a new case. If this is to be done, it must be by a dismissal of the present bill, and the filing of a new one. I must refuse this motion." The decision of the court in *Barnes v. Gibbs*, 31 N. J. L. 317, 86 Am. Dec. 210, is directly in point. The court was called upon to decide whether a supplemental com-

plaint could be filed setting up the recovery of a judgment upon the claim sued upon, and the ruling of that tribunal was that this could not be done. Chief Justice Beasley, speaking for the full bench, said: "The case certified calls for the opinion of this court on a second point, *viz.*, whether, upon the assumption of a merger having taken place, the writ and pleadings in this case can be so amended as to transform the action from assumpsit to debt, and to permit the judgment obtained in New York to become the foundation of the suit? Allowing the utmost amplitude to the power of this court to alter forms and correct errors, the present application seems to be much beyond the scope of such power. It is obvious the proposition is not to amend defects, but to substitute one cause of action for another. Besides, even if the court should permit the proposed commutation to be made, it would not avail the plaintiffs, because the ground of action sought to be substituted has arisen since the commencement of this suit."

But it is urged that there is authority for the proposition that a supplemental complaint may embrace such matters as are sought to be incorporated in the complaint in the case at bar, and that such authority should be followed. To sustain this claim, the case of *Jenkins v. International Bank*, 127 U. S. 484, 32 L. ed. 189, 8 Sup. Ct. Rep. 1196, is cited. But, in our opinion, that case is plainly distinguishable from the case now before us. That action was instituted to foreclose a lien upon certain property pledged as collateral to a debt. Pending this action, a decree was rendered in another case which so adjudicated the amount due upon the claim to secure which the collateral security had been given as to preclude the relitigation of that question in the pending suit. The supreme court of Illinois and the Supreme Court of the United States both held that it was proper to incorporate in a supplemental bill the fact of the rendition of this decree. But it is obvious that there is no parallel between that case and the action which is before us. The cause of action in that case was not indebtedness, but the lien. The object of the action was to foreclose that lien. The plaintiff did not seek to change the object of the action, nor did he attempt to incorporate in his supplemental bill a new cause of action. The lien constituted his sole cause of action before the supplemental bill was filed, and it still remained his sole cause of action after the decree had been rendered, and after the fact that it had been rendered was brought into the case by the supplemental bill. The action was not originally brought upon the indebtedness, but it was founded upon the lien; and this continued to be the cause of action after the supplemental bill had been filed. The lien was not divested by the decree which conclusively established the amount due. 2 Freeman, Judgm. §§ 229, 230, and cases cited. In both of these courts the distinction was made which we here outline. Had the action been, not to foreclose a lien, but to recover a money judgment on

the indebtedness, it is apparent from the language of both these tribunals that their decisions would have been different. The Illinois supreme court said on this point at pages 470 and 471, 111 Ill. (*Jenkins v. International Bank*): "We do not consider the supplemental bill as introducing a new cause of action. The indebtedness is the same. The evidence of it at the time of filing the original bill in this case consisted in notes from Walker to the bank. The notes have since, as said, become merged in the Wilshire decree. There has been, then, a change in the evidence of the indebtedness,—from notes to a decree upon them. That is all. The collaterals sought to be foreclosed by sale of them were pledged for the payment of the indebtedness. A decree upon the notes, and the running of the statute of limitations against the decree, is not any payment of the indebtedness. The simple effect is that the statute is a bar to a suit upon the decree. The collaterals may be held until the indebtedness is paid according to the terms of the pledge. We do not consider that there has been any new suit brought upon the decree, but that there is, under the supplemental bill, the assertion of the right to claim the benefit of the Wilshire decree as *res adjudicata*, and that the statute of limitations set up is not a bar to that right." And in the Federal Supreme Court the same distinction is stated in the following language: "In support of this proposition, it is argued, on behalf of the plaintiff in error, that the supplemental bill set out and sought a recovery upon a cause of action distinct from that stated in the original bill. The original bill prayed for a decree against Walker upon his notes held by the bank, and, for the satisfaction thereof, a sale of the property held as security therefor. During the pendency of that bill, precisely the same matters were put in issue in the Wilshire suit between Walker and the bank, and in that suit a decree was rendered finding the amount due. That decree in the Wilshire suit stands unreversed, and operates as an estoppel by way of *res adjudicata* between the parties. By way of proof or in pleading, it would be good as a bar in any subsequent suit between the same parties upon the same issues. Having been rendered after the institution of the present suit, it was competent for the complainant to bring it forward, by a supplemental bill, as conclusive evidence of the amount due, for which it was entitled to take a decree, and as a complete answer to the defense set up by the plaintiff in error, as the assignee of the bankrupt, to the relief prayed for in the original bill, and to the relief sought by the cross bill. It was strictly new matter arising after the filing of the bill, properly set up by way of supplemental bill, in support of the relief originally prayed for. It can in no sense be considered as a new cause of action. It was not a bill to enforce the decree, nor was the complainant obliged to rely upon it as the sole ground of recovery, on the ground that the original cause of action had become merged in it. If the notes were

merged in the decree, it was simply a change in the nature of the evidence to support the complainant's title to relief. The indebtedness remained the same, and the equity of the complainant to a foreclosure and sale of the securities remained unchanged." In fact, the courts in that case were but applying the familiar rule that the holder of collateral security may, in the absence of a statute to the contrary, recover a personal judgment upon his claim, and thereafter foreclose his lien notwithstanding such judgment. See 1 Freeman, Judgm. §§ 229, 230; *Bank v. Brown*, 112 Ind. 474, 481, 482, 14 N. E. 358. The cause of action in such a foreclosure suit being the lien, the recovery of a judgment on the debt before or after the commencement of the foreclosure action does not create a new cause of action; does not extinguish the old. The original lien continues in existence, securing the new evidence of the debt the same as it did the old. By the recovery of a judgment, the cause of action is not wiped out. The only effect is to conclusively establish the amount which the lien secures. It is a significant fact that in New York the legislature has, in express terms, incorporated into the statute regulating the filing of a supplemental complaint a provision that the plaintiff may in this way bring into the case "the judgment or decree of a competent court, rendered after the commencement of the action determining the matters in controversy or a part thereof." N. Y. Code Civ. Proc. § 544. It is evident that in New York the law was considered to be settled the other way, in the absence of an explicit statute on the point. Our Code merely permits the plaintiff to set up in his supplemental bill "facts material to the case." Rev. Codes, § 5301. What in this action is "the case" of the plaintiff as his suit was originally brought? The answer is obvious. It is the cause of action set up in his complaint. That constitutes his case. Another and entirely distinct cause of action does not constitute his case, as it appears in his original pleading. As we have already seen, the decisions are unanimous to the effect that, under just such a statute as ours, the plaintiff cannot, by supplemental complaint, introduce a new and distinct cause of action.

The argument of hardship does not appeal to us with any force. It is true that in this case—and it will likewise be true in many other cases—a refusal to allow the subsequent recovery of the judgment to be set up in a supplemental complaint will result in the loss of priority of lien upon property secured by an attachment in the action, because the plaintiff will be compelled to dismiss his action upon the claim, and bring a new suit upon the judgment itself. This same argument was advanced in *Bank of North America v. Wheeler*, 28 Conn. 433, 73 Am. Dec. 683, against the proposition that the effect of the recovery of a judgment in one state was to extinguish the original cause of action in every other state. It will be observed that the precise question here presented was there involved, for if the judgment

extinguishes the original cause of action, and creates a new cause of action, there is no logical escape from the conclusion that the suit cannot be kept alive by supplemental complaint. On this point of hardship the court says: "The plaintiffs urge the inconvenience arising from holding the judgment in New York to be a defense in the present suit, in consequence of the loss of the security obtained by attachment in the latter. We are not, however, at liberty to impair the effect which the Constitution and laws of the United States give to judgments rendered in the several states, although it may be attended with inconvenience, or even apparently unjust consequences. The remedy is elsewhere. When suits are pending in different states upon the same cause of action, the plaintiff must elect in which he will proceed to final judgment." And in two other cases, in which it was held that the recovery of a judgment upon the claim sued for was fatal to the further prosecution of the action, it appears that the attachments had been issued and levied, and that, of course, the liens secured thereby would be lost. *Bank of United States v. Merchants' Bank*, 7 Gill, 415; *Child v. Eureka Powder Works*, 45 N. H. 547 (see 549, 550).

The recovery of the judgment in Minnesota was the result of the voluntary act of the plaintiff. It could have kept alive this action by refraining from entering judgment in the Minnesota suit, and in this way it could have preserved its lien. But it did not see fit to do so. It frequently happens that the judgment rendered is not a personal judgment in more than one state, jurisdiction being acquired in other states solely over property by attachment or garnishment. A judgment purely in *rem* would not merge the cause of action on the original claim, and therefore would not constitute a bar to an action thereon in another jurisdiction. *Whittier v. Wendell*, 7 N. H. 257; *Fitzsimmons v. Marks*, 66 Barb. 333; *Rangely v. Webster*, 11 N. H. 209; 1 Freeman, Judgm. §§ 218, 219. In many cases there will therefore be no hardship to the creditor. In many others he will hold in his own hands the power to prevent a merger. And, over against the loss of priority of lien which may in a few cases result from this doctrine, it is proper to set the moral right of the debtor not to be harassed by numerous suits upon the same demand at the same time. The rule being settled that the pendency of an action in a foreign state or country does not constitute a good plea in abatement, the debtor has no legal protection against the institution of any number of actions against him in different jurisdictions upon the same claim. It would therefore seem to us not a matter for regret that his moral right to be exempt from undue harassment should receive some slight legal sanction. If, however, it be thought that a different rule should prevail, the arguments in that behalf should be addressed to that body whose province it is to make, and not to the department whose duty it is to declare, the law.

The order and judgment of the District Court are in all things affirmed.

All concur.

A petition for rehearing was subsequently filed, in response to which the following opinion was handed down on December 28, 1896:

Counsel for plaintiff very earnestly press upon us the reconsideration of the point which seemed to us so clear that we did not discuss it at length. They concede the doctrine of merger, and the rule that the supplemental bill must not embody facts creating an independent cause of action. Their whole contention ranges around the question, What is the real cause of action in this case? They insist that the debt is the primary right, and that this right, in connection with defendant's failure to respect it, constitutes the cause of action. Hence it follows, they urge, that that cause of action was not extinguished by the judgment, but exists to-day as much as ever it did, despite the fact that it has assumed a new form. There is much ambiguity on this subject. Jurists have found it difficult to define with precision the meaning of the phrase "cause of action." While it may be that this is a difficulty which inheres in the subject itself, and is therefore unsurmountable, yet we do not consider that there should be, notwithstanding this fact, much controversy in a case like this as to the cause of action set up in the original complaint. If counsel's claim that the debt is the cause of action be sound, then there is no distinction between an action for services, for goods sold, and for money loaned. In each case there is a debt. But in no two of these suppositive cases did the debt grow out of the same facts. In each of these cases the peculiar distinctive facts out of which the obligation arises are what constituted the cause of action, when coupled with the omission of the defendant to respect the plaintiff's rights thereby established. It is not the mere existence of a debt—an element common to them all—which constitutes the cause of action in either of these cases. If the debt were the cause of action, it would be unnecessary for the plaintiff to do more than aver in his complaint that the defendant was indebted to him in a specified sum. On this theory the same complaint would do for all actions belonging to these three classes. All that it is necessary for the pleader to do in any case is to set forth the facts constituting his cause of action. No one would think of stopping with a bare allegation of indebtedness; and yet this is all that is required if that indebtedness alone constitutes the cause of action. There is an element common to all causes of action; but it does not of itself constitute a cause of action. In every case there is present the fact that the defendant has neglected to observe his legal duty to the plaintiff. In an action at law to recover money, the cause of action is not simply the withholding of the money from the plaintiff by the defendant. In a sense, that may be said to be the legal wrong for which the law furnishes a remedy.

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But why is it a wrong of which the law takes cognizance? Because, and only because, by reason of certain antecedent facts, the plaintiff has become vested under the law with a right to demand the money. In seeking for one element of the cause of action, we must go back of the mere right to demand that the money claimed shall not be withheld, and ascertain what are the particular facts out of which that right springs. When we have discovered these facts, we have found out that which differentiates the particular cause of action from another, which, while showing, perhaps, an indebtedness of like amount, arises out of different circumstances. The cause of action is always disclosed by the answer to the inquiry: "How did the defendant become liable to be prosecuted by the plaintiff in this particular action?" It is true that a cause of action is not in cases of contracts complete until the defendant has failed to pay in accordance with his legal obligation. But the foundation for it is, in all such cases, laid before the default occurs; and in many instances this element of default is not a constituent part of the cause of action, as in tort cases, where the cause of action accrues the moment the wrong is committed. No one would speak of the failure of a slanderer of character to indemnify the person vilified as constituting the latter's cause of action. It is the slander which forms the plaintiff's cause of complaint in such a case. A plaintiff may have three different causes of action against the same defendant,—one for money loaned, one for goods sold, and one for services rendered. If in each case the withholding of the money alone is the cause of action, then all of the causes of action are identical in character. Would this be seriously claimed by anyone?

We have used these few observations for the reason that the plaintiff's counsel seem to take the position that in this case the withholding of the money constitutes the cause of action. We will now turn to the plaintiff's contention that the debt, coupled with defendant's default, is the cause of action. If the mere fact that there is a debt, independently of the circumstances out of which such debt arose, constitutes the cause of action in any case, then all legal distinctions are in this regard obliterated. The real essence of this contention is that, in all cases to recover money, it is the original obligation to pay, in connection with defendant's default, which constitutes the plaintiff's cause of action. If this be so, then a cause of action for libel is not affected by the fact that the defendant has, in full settlement of the claim, given his note for a certain sum of money. A note is not actual payment. The original obligation to pay damages lies at the basis of such note. It is, in substance, the same claim as the original claim for damages. So, it is after judgment upon the note. But the cause of action is not the same in each case. The statute of limitations as to each is different. The action for libel would have to be brought within two years after that cause of action

accrued. The action upon the note would have to be commenced within six years after that new cause of action, resting upon different facts, accrued. And the action upon the judgment could be instituted within ten years after that cause of action, based upon still different facts, had accrued. Rev. Codes, §§ 5200, 5201, 5203. Sections 5199 to 5201, Rev. Codes, differentiate a cause of action upon a judgment from the cause of action upon the claim upon which it was rendered. Under these provisions, an action upon contract must be brought within six years after that cause of action accrues; and an action upon a judgment rendered upon the same contract may be brought within ten years after that cause of action—that new and distinct cause of action—accrues. How can it be said that a cause of action upon a judgment accrues if no cause of action upon it does in fact accrue, but the old cause of action, for the original claim, still continues unaffected, and the judgment is only the same cause of action in another form? No judgment for money ever has been, or ever can be, rendered of which it cannot be as truthfully said as of this judgment in the case at bar that it is only the original claim in another form. Is it a fact that lawyers, judges, and codifiers have so long been mistaken in supposing that a distinct cause of action upon a judgment accrues when the judgment is rendered. The fact that the same debt lies at the foundation of distinct causes of action does not render them identical. If one who has borrowed money fails to pay it, a cause of action against him for money loaned exists. If his creditor thereafter takes the debtor's note in full payment, the old cause of action is extinguished, and a new one is created. The fact that there was an original debt is important only for the purpose of showing a consideration for the note. But an action upon such a note, under such circumstances, cannot be regarded as an action for money loaned. The original cause of action in the case supposed has been wiped out. If, in turn, a bond should be executed in payment of the note, the cause of action on the note would, in turn, be destroyed. If judgment should finally be recovered upon such bond, the cause of action upon the bond would likewise be extinguished. In the case supposed, there would exist, in succession, four distinct causes of action, all founded upon the same debt, which had at no time been paid, despite all the various changes which had taken place in the form of the evidences of such indebtedness. Would counsel for plaintiff seriously contend that in such a case there existed at all times only one cause of action,—the original cause of action, for money loaned? Pushed to its logical consequences, the doctrine contended for would make it necessary for a court to apply to an action upon the judgment here involved the statute of limitations applicable to the original cause of action, the six-years statute of limitation. All must agree that no action upon the notes can be maintained after judgment. This is conceded. All will 49 L. R. A.

assent to the proposition that the action must be maintained upon the judgment. And yet if it is the same cause of action as that upon the notes, or for the original debt, the six-years' statute of limitation governs. This will be true in all cases. The consequence will be that in every instance the statute of limitations applicable to the cause of action upon which the judgment is founded will govern in actions upon such judgment. Would counsel for plaintiff concede that their cause of action upon this judgment would be barred in six years? Here is a decisive test.

It is urged that the facts set up in the supplemental complaint do not of themselves constitute a cause of action, independently of the facts alleged in the original complaint; that the execution of the notes or the existence of the original debt is an essential element of the cause of action upon the judgment. We can see no force in this claim. The judgment is the cause of action irrespective of the character of the claim on which it rests. No averment as to the nature of such anterior cause of action is necessary or even proper. Such an allegation would be stricken out as surplusage. In an action upon a judgment, the only inquiry which a court will make is whether there is a valid judgment, unsatisfied and unpaid. The test as to the necessity of an allegation in a complaint is whether that specific fact need be proved to make out a case. When a judgment is sued upon, it is a matter of no moment what lies behind the judgment, if it is valid; or, indeed, whether there was any claim behind it at all. That question is forever foreclosed by the judgment itself. If an allegation as to the existence of the notes set forth in the original complaint is vital to the cause of action upon the judgment, then issue upon that fact might be taken by the defendant. Will it be urged that the defendant would be allowed to go into that question in a suit upon the judgment which had forever set that question at rest? Section 5201, Rev. Codes, provides that the plaintiff cannot unite in the same complaint a cause of action for slander and another cause of action based upon a contract. If the same defendant should thrice slander the same plaintiff, and judgment for one of such slanders should be recovered by the plaintiff, and the defendant should give him his note in settlement of the damages sustained by him by reason of another thereof, would it be contended that thereafter the plaintiff might, in the same complaint, join the cause of action upon the judgment and the cause of action upon the note with the cause of action for the third slander, on the ground that the note and the judgment had not changed the essential nature of the original causes of action for the two slanders, but had merely given the original obligations to pay damages for such slanders another form? In all causes of action there exist, as we have before observed, two fundamental elements. There are the facts which create the obligation. There is the other fact that that obligation has not been respected. In this action, as originally instituted, upon

the notes, the fact which constituted the obligation was the execution and delivery of notes for a consideration. The default of the defendant was in failing to pay them when due. But neither of these particular elements enters into the cause of action upon the judgment. The obligation in the latter case is created by the judgment, and not by the notes. The default is the failure to pay such judgment, and not an omission to pay the notes, which can no longer be paid, because the judgment has as completely extinguished any cause of action upon them as payment would have done. How can a cause of action based upon one kind of obligation arising out of a certain fact, coupled with a failure to discharge that obligation, be the same cause of action as that which rests upon another and different obligation, springing out of a new fact, coupled with a failure to comply with such new obligation. Every cause of action is the invasion of the plaintiff's rights by the defendant, or the latter's failure to discharge some legal duty to the plaintiff. If a defendant assaults a plaintiff, he invades his rights. If he omits to pay when due his note held by the plaintiff, he fails to discharge a legal duty to the plaintiff. In each case, these respective elements constitute the plaintiff's cause of action. A court, in determining whether the defendant has invaded plaintiff's rights, or neglected to discharge a legal duty which he owes the plaintiff, must make the preliminary inquiry as to the facts out of which plaintiff's alleged right arises. If that right rests upon the defendant's obligation to pay a note, it is that particular right, in connection with defendant's failure to respect it, that constitutes the plaintiff's cause of action. If it rests upon the defendant's obligation to pay a judgment rendered against him upon such note, it is that particular right, in connection with the defendant's disregard of it, which constitutes that particular cause of action. This is the utmost scope of Prof. Pomeroy's language in his work on Remedies and Remedial Rights (§ 453). The primary right therein referred to is the plaintiff's right in the particular case. If it rests upon contract, it must stand upon the particular contract sued upon. A plaintiff's primary right in an action upon a note is the defendant's duty to him which the note creates. When a judgment is rendered upon such note, the primary right is the defendant's duty to the plaintiff created by such judgment, and not by the note, which has ceased to be the source of any duty of the defendant to the plaintiff.

Counsel essay to distinguish the case of *Watson v. Thibou*, 17 Abb. Pr. 184, from the case at bar. We are unable so to distinguish it. It is true that the notes in that case were not extinguished by a judgment, but by bonds received in payment thereof. But wherein does this difference affect the principle? The original debt had not been paid by the bonds, any more than the original debt in this case has been paid by the judgment. Accepting such bonds in satisfaction of the notes is strictly analogous to

recovering judgment upon notes in the case at bar, and thus extinguishing them as subsisting obligations. Each act is the voluntary act of the creditor. Whether he, in terms, extinguishes the original cause of action, or invokes the powers of a court of justice to do that which has the same effect,—i. e., render a judgment upon such original cause of action,—is immaterial. Nor does it make any difference that the act of extinguishing the original cause of action by accepting a new obligation is called "novation," whereas the act of destroying such cause of action by the recovery of judgment is not called "novation," but "merger." The vital question is: Has the original cause of action been destroyed, and a new one substituted for it? The very argument made by counsel for plaintiff in this case could have been employed by the court in the *Watson Case* to justify the allowance of plaintiff's motion that he be permitted to file a supplemental complaint. The court could have said with as much truth as can be here asserted that the original debt had not been affected, but only a new evidence of indebtedness substituted for the old. But this was not regarded by the court in that case as at all important. The court saw and held that a cause of action upon bonds was not the same as a cause of action upon notes previously given, although the same debt furnished the consideration for each of these classes of obligations.

It is urged that we did not speak with precision when, in distinguishing the case of *Jenkins v. International Bank*, 127 U. S. 484, 32 L. ed. 189, 8 Sup. Ct. Rep. 1196, we asserted that the cause of action in that case was the lien sought to be foreclosed. We fail to discover our error in this respect except that we should have spoken of the lien as constituting the cause of action when coupled with defendant's failure to perform his legal duty to satisfy the lien. It is said that if the lien constituted one element of the cause of action in that case, in contradistinction from the debt, the indebtedness need not have been set up in the complaint therein; that it would have been necessary to refer to nothing but the lien in the bill. But a lien presupposes a debt. It cannot exist without one. A lien is the legal grip of a debt upon property. When it is said that a lien constitutes an element in a cause of action in a particular case, the assertion is made that this grip of a debt upon property is the cause of action which the plaintiff is seeking to enforce by a foreclosure suit. In an action to foreclose a lien, the lien is the main thing. It is illogical to speak of the lien being a mere incident of the debt in such a case. The debt is a component part of the lien, and not something separate from it, of which the lien is a mere incident. One who has secured a lien upon property is vested with an equitable cause of action, distinct from his mere legal cause of action to recover a personal judgment against the debtor. It is the lien, and not the mere debt, which gives him that equitable cause of action. If the indebtedness co-

stitutes the cause of action in such a case, then an action to foreclose a lien is an action at law, the same as an action against the debtor to recover a mere money judgment, for the cause of action in each case is the same,—i. e., the debt. A plaintiff brings an action on a note, and also an action to foreclose a lien which secures such note. Are the two actions the same? All know that they are not. What distinguishes them is the lien. When the suit is to foreclose the lien, the cause of action is the lien to be foreclosed, coupled with defendant's default. When the object of the action is to obtain a money judgment merely, the note, coupled with defendant's default, constitutes the cause of action. If, in a foreclosure action, the lien is not one of the elements in the cause of action, in contradistinction from the debt, we are at a loss to know what, in such a case, does, in fact, constitute one of the elements of the cause of action. If a complaint in a foreclosure action should fail to allege the existence of the lien, it would be demurrable. When it does properly set forth the fact of a lien, it necessarily contains an averment as to the debt, for this is an essential ingredient in every lien. A lien is not alleged unless a debt of some character is set up. But the debt is not stated in the pleading as the substantive cause of action, but merely to make complete the allegations of the complaint as to the existence of a lien, the lien being the real cause of action sought to be enforced by the suit, when coupled with defendant's failure to satisfy it. A cause of action is that which enables the plaintiff to maintain the particular action he seeks to prosecute. What is it that gives the plaintiff a right to institute and carry on a suit to foreclose a lien if it is not the lien itself, in connection with the debtor's default?

It is insisted that the change proposed to be made by the supplemental complaint is one which relates to the form of the action only. We are unable to assent to this view. If the plaintiff had brought debt upon the judgment in question after the same had been rendered, and if forms of action had not been abolished by the Code, and if it were the doctrine in this country, as in England, that a foreign judgment is not a record, and hence

that an action of debt would not lie thereon, then in case the plaintiff should seek to change his action from debt to assumpsit, we would have the mere question of a change in the form of the action, the cause of action remaining the same. But it is not a change of this character which is attempted in this case. The plaintiff is not essaying to alter the mere form of his action (a thing never done by supplemental complaint,) but to bring into the case an entirely new cause of action. He seeks to eliminate from the complaint a cause of action which, since the commencement of this action, has been extinguished, and substitute in its place a new cause of action, which accrued after this action was instituted.

It is urged that the New Jersey case is not in point, for the reason that no radical changes had been made by statute in that state in the rules of procedure. But we have seen—and counsel for plaintiff assent to this conclusion—that the statute of this state regulating the filing of supplemental complaints has not altered the old rule that a new cause of action cannot by such means be substituted for the old. Nor is there anything in the language or spirit of our Code which in any manner affects the significance of the phrase "cause of action." On the contrary, several provisions of the Code, to which we have referred, conclusively show that the old meaning of that phrase has not been disturbed. That which before the Code system was adopted was not the cause of action is not now the cause of action. It is, therefore, apparent that the statutory regulations of practice in this state have in no respect affected the two inquiries which lay at the foundation of the decision in the New Jersey case, and which also lie at the basis of our judgment in this cause,—i. e.: Can a new cause of action be substituted for the original by supplemental complaint? Does a new cause of action arise in this country when a judgment is recovered upon a claim in any of the courts thereof? The importance of this question to the profession is our apology for the length of this additional opinion. The petition for a rehearing is denied.

Wallin, Ch. J., concurs.

MAINE SUPREME JUDICIAL COURT.

MAINE WATER COMPANY

v.

City of WATERVILLE.

(93 Me. 586.)

1. A municipal corporation having authority to contract for a water

NOTE.—For power of municipalities to exempt property from taxation, see *Whiting v. West Point* (Va.) 15 L. R. A. 860, and *note*; *McTwiggan v. Hunter* (R. I.) 29 L. R. A. 526; *State ex rel. Realty Co. v. Cooley* (Minn.) 29 L. R. A. 777; also *Frederick Electric Light & P. Co. v. Frederick City* (Md.) 36 L. R. A. 130. 49 L. R. A.

supply may agree to pay a portion of the taxes assessed for any year against a water company in addition to a specified amount for water to be supplied by the company, if the consideration for the agreement is reasonably adequate, and the contract is reasonable and fair and for a reasonable length of time.

2. An unconstitutional exemption from taxation is not effected by an agreement by a municipal corporation to pay the taxes assessed against a water company in return for a supply of water which constitutes an adequate consideration for the agreement.
3. Public policy will not avoid a con-

tract by a municipality to pay for a reasonable length of time a portion of the taxes assessed against a water company as part consideration for a water supply, merely because the gross and annual amounts to be paid are uncertain and the return to be received is also uncertain, where the contract is limited to the taxes assessed on the property owned by the company at the time of its execution and on pipe lines, hydrants, and fixtures thereafter laid.

(February 9, 1900.)

REPORT by the Superior Court for Kennebec County for the opinion of the Supreme Judicial Court of an action brought to recover the amount of taxes upon plaintiff's property which defendant had agreed to pay as part consideration for a water supply. *Judgment for plaintiff.*

As a special defense to the action defendant alleged that the contract under which plaintiff claimed was not made upon the consideration therein expressed, but that the expression of consideration therein was fraudulently inserted for the purpose of concealing the true character of said contract, and making it appear to be legal and proper, when in truth and in fact the real agreement and understanding between the parties who subscribed and executed the contract was illegal and improper. That the real purpose of the contract was to exempt plaintiff's property from taxation in contravention of the principles of the Constitution pertaining to such subjects, and to illegally limit and control the action of the assessors of the city in the performance of the duties imposed upon them by law; that the pretended contract is utterly illegal and void for want of power or authority on the part of defendants' agent who pretended to execute the same.

Further facts appear in the opinion.

Messrs. Heath & Andrews, for plaintiff:

There was no exemption from taxation, direct or indirect. There was no evasion, direct or indirect, of the rule against exemption.

There can be no taint of illegality in a contract that never has worked, and never can work, an actual exemption from taxation, either direct or indirect.

Cartersville Improvement Gas & Water Co. v. Cartersville, 89 Ga. 683, 16 S. E. 25; *Grant v. Davenport*, 36 Iowa, 396; *Utica Waterworks Co. v. Utica*, 31 Hun, 431; *People ex rel. Mills Waterworks Co. v. Forrest*, 97 N. Y. 97; *Portland v. Portland Water Co.* 67 Me. 135; *New Orleans v. New Orleans Waterworks Co.* 36 La. Ann. 432; *Ludington Water-Supply Co. v. Ludington*, 119 Mich. 480, 78 N. W. 558.

The discretion of municipal corporations within the sphere of their powers is as wide as that possessed by the government of the state.

St. Louis v. Boffinger, 19 Mo. 13; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505, 24 Am. Rep. 756.

It was for the city to adjudge of the necessity.

Kelley v. Mihoaukees, 18 Wis. 83.
49 L. R. A.

The general assembly is a co-ordinate branch of the state government, and so is the law-making power of municipal corporations within the prescribed limits. It is no more competent for the judiciary to interfere with the legislative acts of the one than the other.

Brush v. Carbondale, 78 Ill. 74; *Cape May & S. L. R. Co. v. Cape May*, 35 N. J. Eq. 419; *Moses v. Risdon*, 46 Iowa, 251; *Bridgeport v. Housatonic R. Co.* 15 Conn. 475; *Spaulding v. Lowell*, 23 Pick. 71; *Baker v. Boston*, 12 Pick. 184, 22 Am. Dec. 421; *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *Methodist Protestant Church v. Baltimore*, 6 Gill, 391, 48 Am. Dec. 540; *Sheidley v. Lynch*, 95 Mo. 497, 8 S. W. 434; *Horton v. Nashville*, 4 Lea, 39, 40 Am. Rep. 1.

In contracting to supply itself with water a city is not exercising its governmental or legislative powers, but its business powers.

1 Dill. Mun. Corp. § 27; *Cincinnati v. Cameron*, 33 Ohio St. 336; *Safety Insulated Wire & Cable Co. v. Baltimore*, 25 U. S. App. 166, 66 Fed. Rep. 140, 13 C. C. A. 375; *Illinois Trust & Sav. Bank v. Arkansas City*, 40 U. S. App. 257, 34 L. R. A. 518, 76 Fed. Rep. 271, 22 C. C. A. 171; *Vincennes v. Citizens' Gaslight Co.* 132 Ind. 114, 16 L. R. A. 485, 31 N. E. 573.

Such contracts, even in the absence of legislative authority, for a reasonable term of years, are sustained and held to be only within the discretion of the city council, and, in the absence of fraud, not reviewable by the court.

Vincennes v. Citizens' Gaslight Co. 132 Ind. 114, 16 L. R. A. 485, 31 N. E. 573; *New Orleans Gaslight Co. v. New Orleans*, 42 La. Ann. 188, 7 So. 559; *East St. Louis v. East St. Louis Gaslight & Coke Co.* 98 Ill. 415, 38 Am. Rep. 97; *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 419; *Atlantic City Waterworks Co. v. Atlantic City*, 48 N. J. L. 378, 6 Atl. 24.

While such a contract might appear unreasonable to the court, yet, if debatable and one on which prudent men might differ, the court, in the absence of fraud, cannot annul the bargain.

Terre Haute v. Terre Haute Waterworks Co. 94 Ind. 305; *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80.

The municipal officers have a large and wholesome discretion in determining the necessity and price to be paid for public service, with which the courts have no right to interfere, except where it is clearly about to be abused.

Memphis v. Memphis Water Co. 5 Heisk. 528; *Warren v. Chicago*, 118 Ill. 329, 9 N. E. 883.

Mr. Harvey D. Eaton, for defendant:
The plain meaning and intention of the parties executing this contract was not what is stated in the final draft as executed, but rather an illegal purpose to exempt plaintiff's property from taxation, and limit and restrain the assessors in the performance of their statutory duties.

Such contracts are void.

Brewer Brick Co. v. Brewer, 62 Me. 62,

16 Am. Rep. 395; *Dill v. Wareham*, 7 Met. 477; *Thorndike v. Camden*, 82 Me. 39, 7 L. R. A. 463, 19 Atl. 95; *People ex rel. Eckerson v. Zundel*, 157 N. Y. 513, 52 N. E. 570; *Lorillard v. Monroe*, 11 N. Y. 392, 52 Am. Dec. 120.

It is contrary to public policy, and therefore void, for a city to contract to pay annually for many years a sum of money the gross and annual amounts of which are both uncertain, and more especially so when the return to be received is also uncertain.

Garrison v. Chicago, 7 Biss. 480, Fed. Cas. No. 5,255; *Dill. Mun. Corp.* 4th ed. § 97; *Richmond County Gaslight Co. v. Middletown*, 59 N. Y. 228; *Milbau v. Sharp*, 27 N. Y. 628, 34 Am. Dec. 314; *Davis v. New York*, 14 N. Y. 533, 67 Am. Dec. 186; *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80; *Brick Presby. Church v. New York*, 5 Cow. 538; *Gosler v. Georgetown*, 6 Wheat. 597, 5 L. ed. 339.

Wiswell, J., delivered the opinion of the court:

On May 5, 1887, the Waterville Water Company, the predecessor of the plaintiff corporation, entered into a written contract with the inhabitants of the then town of Waterville, by the terms of which the water company contracted, among other things, to construct a safe and suitable reservoir in the town, with a capacity of at least 2,000,000 gallons of water, the bottom of which reservoir should be at least 175 feet above the level of the street at the postoffice; to force water to such reservoir from either the Mesalonskee stream or the Kennebec river, and keep therein at all times water sufficient to supply the hydrants to be established in the town of Waterville for extinguishing fires, and also sufficient to supply the inhabitants of the town with water for domestic and other uses; to convey the water from the reservoir through cast-iron pipes of adequate size and strength, to be laid by it in certain named streets of the town; and to connect such pipes with fifty hydrants of the most improved pattern, to be furnished and placed in position by the company wherever located by the town, and to furnish water for such hydrants.

The water company therein further contracted to furnish, free of charge, except for the consideration hereinafter referred to, water for three watering troughs, and a limited supply of water for the seven schoolhouses in the village, the town hall, selectmen's office, engine houses, a fountain, and to supply one street sprinkler. The town, upon its part, in consideration of the agreements made by the water company, agreed to pay \$40 per annum for each of the fifty hydrants referred to, and \$30 per annum for each additional hydrant that the town might need and require to be set. It was further provided that the contract should continue in force for a period of twenty years from the time said works are completed, and said hydrants are supplied with water sufficient to render a reasonably efficient fire service.

49 L. R. A.

At a meeting of the board of aldermen of the city of Waterville held April 2, 1889, the town having in the intervening time become a city by act of the legislature, this communication from the water company was presented and read:

"To the City Council of Waterville: The Waterville Water Company respectfully represents that the valuation put upon its property and plant for the purposes of taxation for the year 1888 was excessive, and pray that a reasonable abatement of its tax for that year may be ordered. Said company also pray that a reasonable fixed valuation may be decided upon by the city council for a definite term, upon which said company's tax shall be based."

This communication was signed in the name of the Waterville Water Company, by its treasurer.

Thereupon, at the same meeting, the following order was presented in the board of aldermen, and upon the same day passed in concurrence by both branches of the city council:

"Ordered: That the mayor be and hereby is authorized and instructed to propose to the Waterville Water Company, that if said company will furnish to the city water for flushing the public sewers whenever necessary, the city will fix a valuation of not exceeding \$25,000, upon which to tax said company's property. Said valuation to continue so long as the water company shall furnish water for flushing the sewers, not exceeding the remainder of the term of the contract now subsisting between the city and said water company, and if said proposition is agreed to by said company, to contract in writing in behalf of the city with said company in accordance with this order."

On April 12, 1889, a supplemental contract was entered into between the city and the water company, substantially in accordance with the order above quoted, except that the terms of the contract in relation to the supply of water to be furnished for schoolhouses and public buildings were considerably more liberal for the city than the terms of the original contract. It contained a provision in relation to the furnishing of water for flushing sewers, as stipulated in the order passed by the city council, and a further agreement to supply water for a proposed new city building.

The language of the contract relative to the obligation of the city was as follows: "The city of Waterville, the party of the second part, for and in consideration of the use of water furnished (free of charge) by the party of the first part as hereinbefore mentioned, hereby contracts and agrees with said party of the first part, through Nathaniel Meader, mayor of said city, its agent hereunto duly appointed and authorized, that the annual valuation of said company's works and the property now owned by said company in said Waterville, for the purpose of taxation, shall not exceed the sum of twenty-five thousand dollars, for and during the continuance of the original contract for

a supply of water made between said company and the town of Waterville, and dated May 5, 1887." This contract was subsequently ratified by a resolution passed in concurrence by both branches of the city council.

At a meeting of the board of aldermen held November 5, 1889, the following order was presented, and laid upon the table:

"Whereas, the Waterville Water Company on the twelfth day of April, A. D. 1889, made a contract with the city of Waterville to furnish certain water service for said city, as expressed therein, and whereas, doubt has been expressed as to the validity of said contract on account of the terms in which the same is expressed, therefore, be it ordered:

"That in consideration that said Waterville Water Company has furnished said water service to the present time and shall furnish the same for the term expressed in said contract, said city will pay therefor a sum of money annually which shall be equal to the tax annually assessed against said company by said city on such a portion of said company's valuation as shall be in excess of twenty-five thousand dollars. This agreement shall take effect and become operative when said company shall express its assent thereto and shall include the present year, and the mayor is hereby authorized to make a formal contract with said water company in accordance with the spirit and terms of this order."

This order received a passage by both branches of the city council on November 11, 1889.

Upon January 21, 1890, a new contract was entered into between the city and the water company as authorized by the foregoing order, wherein the agreements of the water company were substantially identical with those contained in the contract of April 12, 1889. The contract, upon the part of the city, was as follows: "The city of Waterville, the party of the second part, for and in consideration of the use of water furnished by the party of the first part, as hereinbefore mentioned, hereby contracts and agrees with said party of the first part, through Nathaniel Meader, mayor of said city, its agent hereunto duly appointed and authorized, to pay said water company each year a sum of money equal to all taxes assessed for that year upon the property now owned by said company in said city, and all pipe lines with hydrants and fixtures hereafter laid by said water company in said city, in excess of the tax assessed upon a valuation of twenty-five thousand dollars (\$25,000) for and during the remainder of the term of the original contract for a supply of water made between said company and the town of Waterville, and dated May 5, 1887." It was further provided therein "that this contract is substituted for the contract entered into by and between said city and said water company April 12, 1889."

The Waterville Water Company was incorporated by an act of the legislature approved March 16, 1881. By act of the legislature

approved February 8, 1887, its charter was amended by the addition of the following section: "Said towns of Waterville, Winslow, and Fairfield village corporation, or either of them, are hereby authorized to contract with said Waterville Water Company for such supply of water as is contemplated by said act of incorporation, and as herein amended, and to pay to such company such compensation therefor as may be agreed upon by said company and said town or towns."

For a number of years succeeding the execution of the contract last referred to, the city yearly paid to the company an amount equal to all taxes assessed upon the company's property in excess of the tax assessed upon a valuation of \$25,000, and exclusive of the tax upon new property acquired by the company subsequent to the time of the execution of this contract. But in the year 1897, the tax upon the company's property having been paid by the company, the city refused to pay the company the amount provided by the contract, and this suit was brought to recover the same.

It is urged upon the part of the defense that the contract of January 21, 1890,—the one upon which this suit is based,—was illegal and void, because its purpose and effect were to exempt from taxation a considerable portion of the water company's property, or to limit and restrain the assessors of taxes from placing a true valuation upon its property.

If this were true (that is, if the terms of the last contract were merely intended as a cover, and if the real intent and purpose of the contracting parties was to grant an exemption from taxation, in whole or in part), we should have no question of the correctness of the defendant's position.

By the Constitution of this state, "all taxes upon real and personal estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just value thereof." [Art. 9, § 8.] Although this section applies specially to real estate, yet the very idea of taxation implies an equal apportionment and assessment upon all property, real and personal, according to the just value thereof. *Brewer Brick Co. v. Brewer*, 62 Me. 62, 16 Am. Rep. 395. All property which is the subject of taxation under the authority of the state must bear its just and due proportion of the burden thereof.

Nor, perhaps, is there any doubt that the contract of April 12, 1889, was invalid, whatever may have been its purpose or the consideration therefor, because therein the city of Waterville attempted to limit the official action of the assessors of that city,—an entirely independent tribunal created by authority of law, and over which the city council of Waterville had no control whatever.

But the question here is whether or not a municipality may make a valid contract with a water company, wherein, in consideration of the contract of the company to furnish a supply of water for municipal purposes, it

agrees to pay therefor, in addition to a specified sum of money, another sum each year equal to the amount of tax for that year assessed against the company provided that the consideration for this agreement upon the part of the municipality is reasonably adequate. We think that such a contract, if reasonable and fair, and for a reasonable length of time, may be made.

It was decided by this court in *Portland v. Portland Water Co.* 67 Me. 135, that, in pursuance of legislative authority, the city of Portland might exempt from taxation for a term of years the property of the water company, in consideration of an undertaking and agreement by the company to furnish free of cost to the city a supply of water for its public and municipal purposes. The court pointed out that the legislative action, followed by the vote of the city council in pursuance of it, partook of the nature of a contract with the defendant corporation and distinguished the case from that of *Brewer Brick Co. v. Brewer*, 62 Me. 62, 16 Am. Rep. 395, which was much relied upon by the plaintiff.

The great distinction between these two cases (*Brewer Brick Co. v. Brewer*, and *Portland v. Portland Water Co.*) is obvious. In the former case the municipality attempted, undoubtedly because it was believed that thereby benefits would ultimately, but indirectly, accrue to the people of the town, to exempt the defendant from its just share of the burden of taxation, while in the latter case the city only paid for benefits received by the municipality, as such, by the so-called exemption.

But in the case under consideration the contract neither provides for nor means exemption from taxation, if the consideration for the agreement upon the part of the city is reasonably adequate. The term "exemption" implies a release from some burden, duty, or obligation. "It is a grace, a favor, an immunity; taken out from under the general rule, not to be like others who are not exempt; to receive, and not make a return." *Bartholomew v. Austin*, 52 U. S. App. 512, 85 Fed. Rep. 359, 29 C. C. A. 568. But it cannot be said that a corporation that, for a valuable and adequate consideration, obtains the agreement of another to reimburse it for the amount of taxes that it is obliged to pay, is thereby exempted or released from the burden of paying its just proportion of taxes.

A lessor provides in his lease that, as a partial payment for the use of the demised premises, the lessee shall reimburse him for the amount that he shall be obliged to pay as a tax upon such premises. Is the lessor or his property exempted or released from any burden of taxation? Certainly not. The payment of a tax by the lessee is only the payment of a partial consideration for the use of the premises. No more, we think, can it be said that this contract under consideration has the effect of exempting the property of the plaintiff corporation from

taxation, provided that there was an adequate consideration for the contract.

If, as was decided in *Portland v. Portland Water Co.* 67 Me. 135, a city may make full compensation for a water supply needed and received by it, by offsetting the tax against the service rendered, why may not a valid contract be made to pay in part for such service by the payment of a sum equal to the tax assessed upon the company's property, in addition to the payment of a definite sum, when, by reason of the extent of the water service rendered, a sum equal to the tax assessed would not be a fair equivalent therefor?

We can see no distinction in principle. True, in *Portland v. Portland Water Co.* the legislature specifically authorized such a contract; but no objection is made to this contract because of a lack of authority given by the legislature, as, we have already seen, the town of Waterville was authorized by an amendment to the charter of the original company to contract with that company for a supply of water.

Our conclusion that such a contract is valid, when made for an adequate consideration, is abundantly sustained by numerous decided cases.

In *Cartersville Improvement, Gas, & Water Co. v. Cartersville*, 89 Ga. 683, 16 S. E. 25, the city agreed that it would exempt or cause to be exempted from municipal taxation all the property of the gas and water company for a term of years, and that "if the city should at any time during the five years find itself obliged, by a decree of any court or by operation of law, to assess and collect a tax against the property mentioned, then the city agreed that, in consideration of the reduced prices at which the gaslight was to be furnished it and its citizens, it would pay or return to the illuminating company, its successors or assigns, all sums of money which it or they might have been obliged to pay, and which might have been levied or assessed against the property by the city in violation of the spirit of this contract." In an action brought by the company to recover from the city the amount which it had been obliged to pay as taxes assessed upon its property, it was held by the court as follows: "While a city cannot exempt a gas company from municipal taxation, it can contract to pay for gas a stipulated sum per lamp, and in addition thereto a sum for all the lamps supplied, equivalent to the amount of taxes imposed upon the company, provided this additional sum is a fair and just allowance to compensate for the actual value of the light service, and the stipulation is bona fide and not in the nature of an evasion of the law prohibiting exemption from taxes." The court further held: "The present action is not brought to recover money voluntarily paid as taxes, but for a balance due under the contract for lighting the city: this balance being measured in part by the amount of taxes assessed and collected by the municipal government from the gas company."

In *Grant v. Davenport*, 36 Iowa, 396, an

ordinance of the city of Davenport provided that the water company should, during the life of the grant, furnish water free of charge to all public schools and to all city buildings, and for certain fountains and watering troughs: "And in consideration of the foregoing provisions the said company, during the term of twenty-five years, shall be exempt from all municipal taxation on the franchise hereby granted, and all property owned by said company and actually required for the economical management of the works aforesaid."

The court held that this ordinance was a valid one, saying in its opinion: "But it seems to us that, when the whole ordinance is construed together, it does not amount to an exemption from taxation. It, in effect, applies the taxes as they would otherwise become due in part payment of, or in part consideration for, the water rent. The city pays the amount of money specified, and the taxes upon the franchise and the property required for the management of the works as water rent. It might have required the payment of the taxes, and then returned the amount as part pay for water rent. The manner of doing it cannot defeat the power to do it."

In *Bartholomew v. Austin*, 52 U. S. App. 512, 85 Fed. Rep. 359, 29 C. C. A. 568 (a case decided by the circuit court of appeals for the fifth circuit), the contract between the water company and the city provided that the city should have the right to use water, free of charge, from the hydrants, for the purpose of flushing sewers, for the fire department buildings, city hall, and all public schools, and for watering places and fountains, "in consideration for all of which the property of the City Water Company shall be, and the same is hereby, exempted from municipal taxation during the full term for which the contract is executed." The courts sustained the contract, and held that the meaning of the provision above referred to was not to grant an exemption from taxation. *Grant v. Davenport*, 36 Iowa, 396, and *Portland v. Portland Water Co.* 67 Me. 135, were both cited by the court in its opinion with approval.

In *Utica Waterworks Co. v. Utica*, 31 Hun, 431, the contract between the water company and the city provided that, for the water service furnished by the company for municipal services, the company was to receive a definite sum each year, and in addition thereto a sum equal to one half of its taxes paid in excess of \$1,000. The court sustained the contract. In the opinion of the court it is said: "The contract furnished a mode of computation by which the sum to be paid annually by the city could be ascertained. . . . The effect of the contract is not to relieve the company from the payment of taxes in whole or in part, at the expense of other taxpayers, but it is to adopt the amount of taxes paid by the company as a partial measure of compensation for the water supplied by it. . . . It is not a remission of taxes, but simply a resort to the

amount of taxes as a measure of compensation."

In *New Orleans v. New Orleans Waterworks Co.* 36 La. Ann. 432, the act of the legislature incorporating the waterworks company provided that the city should be allowed water free of charge for fires and other public purposes, "and in consideration thereof the franchises and property of said New Orleans Waterworks Company used in accordance with this act shall be exempt from taxation—state, municipal, and parochial." A contract was made between the company and the city in accordance with the legislative enactment, but the city subsequently assessed, and brought suit against the company for, the taxes. The court held that the city was entitled to judgment, since, by express provision of the Constitution, property could not be exempted from taxation unless it was "actually used for church, school, or charitable purposes," but that the water company could compel the city to pay for water used a sum equal to the amount of the taxes thus recovered, as the latter amount was made by the act of the legislature and by the parties the exact consideration for the free supply of water.

In *Ludington Water-Supply Co. v. Ludington*, reported in 119 Mich. 480, 78 N. W. 558, the question considered was identical in principle with the one here presented. The court decided that a contract whereby a city, as part consideration for a water supply, agrees to pay all taxes levied against the property of the water company in excess of a certain amount, during the continuance of the contract, is not invalid, as an attempt to exempt a company's property from taxation, in excess of the amount named. The court says in its opinion: "It is contended that the provisions relating to taxes are invalid, for the reason that the city has no power, under its charter, to exempt property from taxation, and that this contract is an attempt to exempt the property of the plaintiff, in excess of a certain amount, from its share of the public burden. The contract does not purport to provide that the property of plaintiff shall not be assessed. Its terms indicate that it was intended by both parties that it would be assessed, and that the plaintiff would pay the taxes on the property up to a certain amount, and the defendant all in excess, as a part of the consideration for the supply of water. The city no more exempts the property of the plaintiff from taxation, by such an agreement, than does the mortgagor, who agrees to pay the taxes levied against the mortgaged property, exempt the mortgaged property from taxation."

It is true that the courts of some states where the question has arisen have come to a different conclusion, and have regarded a contract similar to this, in substance, as an attempt to exempt the property of the corporation contracting with the city from taxation. That such may be true in any given case, and that such a contract may be merely intended to cover with the semblance of legality an illegal attempt to exempt prop-

erty from taxation without a fair return therefor, we do not question.

But what we hold is that a municipality may, for a reasonably adequate consideration, in the way of service rendered to it for municipal purposes, agree to make compensation therefor, for a term of years not unreasonably long, either in whole or in part, by reimbursing the company, in whole or in part, the amount that the company performing the service may be obliged to pay as taxes assessed upon its property. We think that this conclusion is sustained both by reason and the weight of authority.

This view leads us to an examination of the question of fact as to the adequacy of the consideration for the city's agreement in this case, but about this there is apparently no controversy. It is sufficient to say, upon this branch of the case, that the undisputed testimony of witnesses produced by the plaintiff shows that a fair compensation, according to the prevailing rates, for the water supplied by the company during the year 1897 under the contract of January 21, 1890, in addition to that which was provided for in the original contract of May 5, 1887, would be far in excess of the amount that the company can recover in this action under the terms of the latter contract. According to this testimony, this compensation would amount to over \$3,000, while the amount that can be recovered in this action is less than \$1,000.

As to the years preceding 1897, it is admitted that the value of the water service rendered by the company was equal each year to the amount that the city under the last contract reimbursed the company for taxes paid. In view of this evidence and admission, and the further fact that the counsel for the city raises no question of adequacy of consideration, either by evidence or argument, we may safely assume that during the remaining years of the contract the city will receive at least an equal equivalent for the amount that it will be obliged to pay.

We are therefore forced to the conclusion, from the value of the water service that has been actually furnished,—than which no better evidence could be produced,—that the contract when made was fair and reasonable; that the city thereby received an amply adequate consideration for its agreement, and has since received a fair equivalent for its payments; and that the contract was not intended as the cover of an illegal attempt to exempt the company's property from taxation.

It is further urged that this contract was void because "it is contrary to public policy for a city to contract to pay annually for many years a sum of money, the gross and annual amounts of which are both uncertain, and more especially so when the return to be received is also uncertain."

We do not think that the contract involved in this case is contrary to public policy. It is not for an unreasonably long period of time. In many cases it is absolutely necessary for a city or town to make a water con-

tract for a term of years, in order to obtain the great benefits of a sufficient water supply for the protection of the property of its inhabitants against fire, to provide for the health of its citizens by a proper sewer system, and for other municipal purposes. Without a contract extending over a period of years, it would, we believe, frequently be the case that no individuals or corporation could be found who would go to the expense of constructing a suitable and sufficient water plant that would answer the requirements for public purposes as well as for domestic uses.

Such a contract must contain some elements of uncertainty as to compensation, because of the uncertainty of the extent of water service that may be required in the future by reason of the growth of the municipality in population and the increase of its needs. There is no very great uncertainty under this contract as to the amount that will have to be paid each year by the city according to its terms. The provision of the contract relative to the repayment of a portion of this company's taxes only applied to "the property now owned by said company in said city, and all pipe lines with hydrants and fixtures hereafter laid by said water company in said city." It does not affect the considerable amount of property that has been acquired by the company since the execution of the contract; and while the pipe lines and hydrants of the company may have increased, and very likely will increase, in length and number, it is reasonable to believe that there will be a corresponding increase of service rendered to the city. There is undoubtedly some uncertainty in the contract, both as to the extent of service that may be required and rendered and the amount of compensation that will have to be paid therefor; but this uncertainty is inevitable in such a contract, and is certainly not of such a character as to make the contract contrary to public policy. As was said in several of the cited cases, the amount of taxes is only adopted as a measure by which to determine the amount of compensation.

It is unnecessary in this case to inquire whether a city council, in making such a contract as this, is exercising its governmental powers or its business powers, or whether a city council may, without legislative authority, enter into a contract with a water company for a term of years, because in this case, as we have already seen, legislative authority was given for the then town of Waterville to make a contract with the water company for a supply of water. Two contracts were made,—one providing for the payment of a specified sum for each hydrant, the other for the payment of a sum to be measured each year by the amount of taxes for such year in excess of a certain amount. Both contracts were fair and reasonable, and entered into without fraud.

There is no controversy as to the amount to be recovered in this action if the action is maintainable. That amount is \$924, and interest thereon from September 23, 1897, up-

on which day, it is admitted, demand was made.

Judgment for plaintiff for \$924 and interest, as above.

Peters, Ch. J., concurring:

I have concurred in the opinion in this case, but not without some hesitation.

I think the principle is so likely to be abused in practice, that it would be wise in the legislature to interfere, to prevent such contracts in the future. To my mind, there is much in the argument that such contracts are not in accordance with good public policy.

As many of our cities and towns have already incurred an indebtedness up to the constitutional limit, they are tempted to purchase the privileges of light and water at extravagant rates in this way. I appreciate a difference between a lessee paying a part of his agreed rent by assuming taxes assessed on the rented property by a third party, and taxes assessed by the lessee himself or by agents and officers in his behalf. Here the taxes to be paid are not merely such as pertain to the property leased, but are the taxes assessed on all the property of the lessors.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Leonard HOWARTH, Receiver of the Traders' Bank of Tacoma, Appt.,

v.

Benjamin LOMBARD, Jr.

(.....Mass.....)

1. The construction of a statute imposing liability upon stockholders for debts of a corporation, made by the highest court of the state in which it was enacted, is binding upon the courts of another state in which it is sought to be enforced.
2. The liability imposed by statute upon stockholders for debts of the corporation is contractual as well as statutory, and may be enforced in foreign jurisdictions, if the statute requires no preliminary local proceedings to adjust equities.
3. Collection may be made from stockholders wherever they may be found, after the preliminary proceedings required by statute, and the adjustment of the rights and liabilities of the corporation, creditors, and stockholders under a statute imposing liability for corporate debts upon stockholders after proceedings showing the insolvency of the corporation and the need of payment by stockholders to satisfy the claims of creditors.
4. A nonresident holder of stock in a corporation is bound by the action of the court in appointing a receiver for it and determining the amount necessary to satisfy the statutory liability of stockholders for its debts.
5. A receiver appointed to enforce the statutory liability of stockholders of an insolvent corporation, who, under the statute, has legal title to the fund as trustee for creditors, and who is the only person who can legally demand and collect the money, may bring actions against stockholders in his own name in courts of other states.

(March 28, 1900.)

APPPEAL by plaintiff from an order of the Superior Court for Suffolk county sustaining a demurrer to the complaint in an

action to enforce defendant's liability as stockholder in an insolvent corporation. *Reversed.*

The facts appear in the opinion.

Messrs. John Walter Saxe and Hollis R. Bailey, for appellant:

The decree fixing the assessment is binding upon the defendant, even though he was not personally served with process in the state of Washington. Service was made upon the corporation of which he was a member, and also by publication in the state of Washington.

Howarth v. Ellwanger, 86 Fed. Rep. 54; *Howarth v. Angle*, 25 Misc. 551, 55 N. Y. Supp. 1108; *Glenn v. Williams*, 60 Md. 93; *Vanderwerken v. Glenn*, 85 Va. 9, 6 S. E. 806; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; *Howard v. Glenn*, 85 Ga. 238, 11 S. E. 610; *Priest v. Glenn*, 4 U. S. App. 478, 51 Fed. Rep. 400, 2 C. C. A. 305; *Bennett v. Glenn*, 8 U. S. App. 419, 55 Fed. Rep. 956, 5 C. C. A. 353; *Mutual F. Ins. Co. v. Phœnix Furniture Co.* 108 Mich. 170, 34 L. R. A. 694, 66 N. W. 1095; *Parker v. Stoughton Mill Co.* 91 Wis. 174, 64 N. W. 751; *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810; *Shcafe v. Larimer*, 79 Fed. Rep. 921; *Dexter v. Edmands*, 89 Fed. Rep. 467; *Brown v. Trail*, 89 Fed. Rep. 641; *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 44 N. E. 349.

The question as to what effect this decree of the court in the state of Washington is entitled to have in Massachusetts is a Federal question upon which the decisions of the United States Supreme Court are binding upon the courts of Massachusetts.

Mutual F. Ins. Co. v. Phœnix Furniture Co. 108 Mich. 170, 34 L. R. A. 694, note, 66 N. W. 1095.

In *Commonwealth Mut. F. Ins. Co. v. Wood*, 171 Mass. 484, 51 N. E. 19, it was de-

NOTE.—For right to enforce stockholder's liability outside of the state of incorporation, see note to *Cushing v. Perot* (Pa.) 34 L. R. A. 737; also footnote to *Howarth v. Angle* (N. Y.) 47 L. R. A. 725.

For receiver's right to enforce stockholder's liability, see *Howarth v. Angle* (N. Y.) 47 L. R. A. 725; *Hirschfeld v. Fitzgerald* (N. Y.) 40 49 L. R. A.

L. R. A. 839; *Wyman v. Eaton* (Iowa) 43 L. R. A. 695; *Minneapolis Baseball Co. v. City Bank* (Minn.) 38 L. R. A. 415; *Runner v. Dwiggs* (Ind.) 36 L. R. A. 645; also cases in note to *Cushing v. Perot* (Pa.) 34 L. R. A. 737; and *Republic L. Ins. Co. v. Swigert* (Ill.) 12 L. R. A. 328.

cided that an assessment made upon a policy holder, after notice by publication, was binding, although the policy holders failed to receive any actual notice.

Defendant is liable under the Constitution and statutes and law of Washington apart from the decree levying assessment.

The liability sought to be enforced is in no sense penal or in the nature of a penalty.

Flash v. Conn, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224.

Such a liability as this is customarily held to be contractual in its nature.

2 Morawetz, Priv. Corp. 2d ed. § 872.

That the statutory liability of a stockholder in a corporation can be enforced outside of the state where the corporation was organized,—

Cuykendall v. Miles, 10 Fed. Rep. 342; *Bank of North America v. Rindge*, 57 Fed. Rep. 279; *Rhodes v. United States Nat. Bank*, 24 U. S. App. 607, 34 L. R. A. 742, 66 Fed. Rep. 512, 13 C. C. A. 612; *McVickar v. Jones*, 70 Fed. Rep. 754; *National Bank v. Whitman*, 76 Fed. Rep. 697; *American Freehold Land-Mortg. Co. v. Woodworth*, 82 Fed. Rep. 269; *Rhode Island Mortg. & T. Co. v. Moulton*, 82 Fed. Rep. 979; *Ferguson v. Sherman*, 116 Cal. 169, 37 L. R. A. 622, 47 Pac. 1023; *Dexter v. Edmands*, 89 Fed. Rep. 467; *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 42 L. R. A. 396, 51 N. E. 207.

Under the national bank act the liability of a stockholder is several, and not joint; the liability is contractual or quasi contractual.

Casey v. Galli, 94 U. S. 673, 24 L. ed. 168; *United States v. Knox*, 102 U. S. 422, 26 L. ed. 216; *Richmond v. Irons*, 121 U. S. 55, 30 L. ed. 873, 7 Sup. Ct. Rep. 788; *Bailey v. Sawyer*, 4 Dill. 463, Fed. Cas. No. 744; *Brown v. Smith*, 88 Fed. Rep. 565.

The courts in Massachusetts, as a matter of comity, will enforce a contractual liability existing under the statutes of another state where no rule of public policy is violated.

Northern P. R. Co. v. Babcock, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978.

It is not against public policy in Massachusetts to enforce the statutory liability of the defendant in this case.

Post v. Toledo, C. & St. L. R. Co. 144 Mass. 341, 59 Am. Rep. 86, 11 N. E. 540; *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 44 N. E. 349, 172 Mass. 39, 42 L. R. A. 396, 51 N. E. 207.

The usual mode of procedure under the United States bank act has been by separate actions at law brought by the receiver against different stockholders.

Bailey v. Sawyer, 4 Dill. 463, Fed. Cas. No. 744; *Kennedy v. Gibson*, 8 Wall. 498, 19 L. ed. 476; *Casey v. Galli*, 94 U. S. 673, 24 L. ed. 168.

A decree in equity for a fixed sum of money is a good basis for an action at law to enforce payment of the same.

2 Black, Judgm. § 902.

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A foreign receiver, as a matter of comity, may sue.

Smith, Receiverships, 1897, p. 167; 20 Am. & Eng. Enc. Law, p. 242; *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37, 46 N. W. 310; *Dyer v. Power*, 39 N. Y. S. R. 136, 14 N. Y. Supp. 873; *Wilkinson v. Rutherford*, 49 N. J. L. 241, 8 Atl. 507; *Maibon v. Ongley Electric Co.* 156 N. Y. 196, 50 N. E. 806.

The United States courts have frequently allowed a foreign receiver to sue.

Cuykendall v. Miles, 10 Fed. Rep. 342; *Rogers v. Riley*, 80 Fed. Rep. 759; *Avery v. Boston Safe-Deposit & T. Co.* 72 Fed. Rep. 700; *Schultz v. Phenix Ins. Co.* 77 Fed. Rep. 375, 42 U. S. App. 483, 80 Fed. Rep. 337, 25 C. C. A. 453; *Sheafe v. Larimer*, 79 Fed. Rep. 921; *Hewarth v. Ellwanger*, 86 Fed. Rep. 521.

Plaintiff can sue in his own name as receiver, and need not sue in the name of the corporation.

Wilson v. Book, 13 Wash. 683, 43 Pac. 939; *Hardin v. Sweeney*, 14 Wash. 132, 44 Pac. 138.

Plaintiff can sue in Massachusetts as receiver.

Taylor v. Columbian Ins. Co. 14 Allen. 353; *Folger v. Columbian Ins. Co.* 99 Mass. 267, 96 Am. Dec. 747; *Wilson v. Welch*, 157 Mass. 77, 31 N. E. 712; *Bunsell v. Supreme Sitting O. of I. H.* 161 Mass. 229, 23 L. R. A. 846, 36 N. E. 1065; *Andrews v. Morn*, 162 Mass. 294, 38 N. E. 505; *Fort Payne Coal & I. Co. v. Webster*, 163 Mass. 134, 39 N. E. 786; *Ewing v. King*, 169 Mass. 97, 47 N. E. 597.

Messrs. Russell Bradford and Edwin G. Melnes, for appellee:

The Washington court never had jurisdiction over this defendant to make or authorize an assessment that would bind him in any way, or in any way to determine the amount of his liability.

The United States Supreme Court has drawn a sharp and logical distinction between suits to enforce liability for unpaid subscriptions to stock where the corporation without judicial proceedings had a right to levy the assessment, and suits to enforce an additional personal liability imposed by statute on stockholders, and not enforceable by the corporation. In the one case they have held that the stockholder was not a necessary party to proceedings to compel the corporation to lay the assessment needed. In the other case, if the stockholder was not before the court, the proceedings have been held to be void against him.

Hawkins v. Glenn, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; *Glenn v. Liggett*, 135 U. S. 533, 34 L. ed. 264, 10 Sup. Ct. Rep. 867; *Glenn v. Harbury*, 145 U. S. 499, 36 L. ed. 790, 12 Sup. Ct. Rep. 914; *Wilson v. Seligman*, 144 U. S. 41, 36 L. ed. 338, 12 Sup. Ct. Rep. 541; *Great Western Telcg. Co. v. Purdy*, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810; *Great Western Telcg. Co. v. Loewenthal*, 154 Ill. 261, 40 N. E. 318, 51 Ill. App. 447.

Whether a receiver can enforce the alleged statutory liability, whether he can sue in this jurisdiction, and, if so, whether he can maintain the action in his own name, are all questions of procedure and remedy, and are governed exclusively by the law of the forum.

Morawetz, Priv. Corp. 2d ed. § 876; *Story, Conf. L.* § 556; *Marshall v. Sherman*, 148 N. Y. 9, 34 L. R. A. 757, 42 N. E. 419; *Tuttle v. National Bank of the Republic*, 161 Ill. 497, 34 L. R. A. 750, 44 N. E. 984; *Hollings v. Brierfield Coal & I. Co.* 150 U. S. 371, 37 L. ed. 1113, 14 Sup. Ct. Rep. 127; *Parker v. Moore*, 3 Edw. Ch. 234; *High, Receivers*, § 406; 5 *Thomp. Corp.* §§ 6839, 6848; *Falmouth Nat. Bank v. Cape Cod Ship Canal Co.* 166 Mass. 550, 44 N. E. 617.

The statutory liability runs directly and immediately from shareholders to creditors. The receiver has no power to enforce the liability.

Beach, Receivers, Alderson's ed. 1897, § 459; *Cook, Stock & Stockholders*, § 218; *Morawetz, Priv. Corp.* § 869; *First Nat. Bank v. Hingham Mfg. Co.* 127 Mass. 563; *Chamberlin v. Huguenot Mfg. Co.* 118 Mass. 532; *Farnsworth v. Wood*, 91 N. Y. 308; *Arctz v. Weir*, 89 Ill. 25; *Jacobson v. Allen*, 20 Blatchf. 525, 12 Fed. Rep. 454; *Liberty Female College Assn. v. Watkins*, 70 Mo. 13; *Umsted v. Buskirk*, 17 Ohio St. 113; *Lane v. Morris*, 8 Ga. 468; *Bristol v. Sanford*, 12 Blatchf. 341, Fed. Cas. No. 1393; 3 *Thomp. Corp.* § 3,560; *Beach, Priv. Corp.* § 716; *Waite, Insolvent Corp.* § 233; *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 44 N. E. 349; *American Freehold Land-Mortg. Co. v. Woodworth*, 82 Fed. Rep. 269; *Nierne v. Atherton*, 7 Kan. App. 20, 51 Pac. 791.

A receiver cannot sue in a foreign jurisdiction.

High, Receivers, 3d ed. 1894, § 239; *Andrews v. Moen*, 162 Mass. 294, 38 N. E. 505; *Buswell v. Supreme Sitting O. of I. H.* 161 Mass. 229, 23 L. R. A. 846, 36 N. E. 1065; *Johnson v. Powers*, 139 U. S. 156, 35 L. ed. 112, 11 Sup. Ct. Rep. 525; *Harvey v. Varnacy*, 104 Mass. 436; *Ayres v. Siebel*, 82 Iowa, 347, 47 N. W. 989; *Commercial Nat. Bank v. Motherwell Iron & Steel Co.* 95 Tenn. 172, 29 L. R. A. 164, 31 S. W. 1002; *Stockbridge v. Beckwith*, 6 Del. Ch. 72, 33 Atl. 620; *Moreau v. DuBellet* (Tex. Civ. App.) 27 S. W. 503; *Parker v. C. Lamb & Sons*, 99 Iowa, 265, 34 L. R. A. 704, 68 N. W. 686; *Filkins v. Nunnemacher*, 81 Wis. 91, 57 N. W. 79; *Rogers v. Haines*, 103 Ala. 198, 15 So. 606.

In any event the receiver cannot maintain the action in his own name in this state.

Glenn v. Marbury, 145 U. S. 499, 36 L. ed. 790, 12 Sup. Ct. Rep. 914; *Wilson v. Welch*, 157 Mass. 77, 31 N. E. 712; *High, Receivers*, 3d ed. § 200; *Ewing v. King*, 169 Mass. 97, 47 N. E. 597.

This action cannot be maintained under the settled law of this commonwealth.

The alleged liability arises wholly by the statutes of Washington, it being "clear that 49 L. R. A.

at common law the corporation only would be liable."

Andrews v. Callender, 13 Pick. 490.

This suit involves the relation between the corporation, its creditors, and its stockholders, and complete justice only can be done by the courts of the jurisdiction where the corporation was created.

Post v. Toledo, C. & St. L. R. Co. 144 Mass. 341, 59 Am. Rep. 86, 11 N. E. 540.

In effect an assessment is attempted to be laid upon the stockholders according to the alleged law of Washington, and the "courts of that state alone can afford complete and effectual judicial relief."

Post v. Toledo, C. & St. L. R. Co. 144 Mass. 341, 59 Am. Rep. 86, 11 N. E. 540.

The suit concerns the relation between the corporation and its stockholders, and upon that the court will not undertake to pass.

Pierce v. Equitable Life Assur. Soc. 145 Mass. 56, 12 N. E. 858; *Coffing v. Dodge*, 167 Mass. 231, 45 N. E. 928; *Andrews v. Moen*, 162 Mass. 294, 38 N. E. 505.

The jurisdiction of the Washington court as against this defendant can go no further than to determine that certain claims presented to it are valid obligations of the corporation. It cannot determine the validity or invalidity of claims not presented to it for adjudication, nor, as against this defendant, the time when the claims arose, the amount of stock outstanding when they arose, or what amount of stock this defendant holds, or how long he has held it.

D'Arcy v. Ketchum, 11 How. 165, 13 L. ed. 648; *Gregory v. Stetson*, 133 U. S. 579, 33 L. ed. 792, 10 Sup. Ct. Rep. 422; *Pendleton v. Russell*, 144 U. S. 640, 36 L. ed. 574, 12 Sup. Ct. Rep. 743; *Sugg v. Thornton*, 132 U. S. 524, 33 L. ed. 447, 10 Sup. Ct. Rep. 163; *Noble v. Union River Logging R. Co.* 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; *Goldie v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; *Grover & B. Sewing Mach. Co. v. Radcliffe*, 137 U. S. 287, 34 L. ed. 670, 11 Sup. Ct. Rep. 92; *Hale v. Hardon*, 89 Fed. Rep. 283; *Wilson v. Seligman*, 144 U. S. 41, 36 L. ed. 338, 12 Sup. Ct. Rep. 541; *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810.

The equality that justice demands would surely be no more likely to be reached by suits at law against individual stockholders than by a bill in equity against all the stockholders within reach of process. And such suits have been repeatedly dismissed by this court.

Coffing v. Dodge, 167 Mass. 231, 45 N. E. 928; *Erickson v. NeSmith*, 15 Gray, 221, 4 Allen, 233; *Hutchins v. New England Coal Min. Co.* 4 Allen, 580; *Halsey v. McLean*, 12 Allen, 438, 90 Am. Dec. 157; *New Haven Horse-Nail Co. v. Linden Spring Co.* 142 Mass. 340, 7 N. E. 773; *Post v. Toledo, C. & St. L. R. Co.* 144 Mass. 341, 59 Am. Rep. 86, 11 N. E. 540; *Bank of North America v. Rindge*, 154 Mass. 203, 13 L. R. A. 56, 27 N. E. 1015; *State Nat. Bank v. Saycard*, 86 Fed. Rep. 45; *Elkhart Nat. Bank v. Con-*

verse, 58 U. S. App. 83, 87 Fed. Rep. 252, 30 C. C. A. 632.

Knowlton, J., delivered the opinion of the court:

This is an action brought by the plaintiff, as receiver of the Traders' Bank of Tacoma, in the state of Washington, to recover the amount of an assessment laid by the superior court of that state upon the defendant as a stockholder. A demurrer was filed, which was sustained by the superior court, and the case comes before us on an appeal from a judgment for the defendant.

The Constitution of Washington contains this provision: "Each stockholder of any banking or insurance corporation or joint stock association shall be individually and personally liable, equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporation or association accruing while they remain such stockholders, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares." Wash. Const. art. 12, § 11. A statute which is made a part of the plaintiff's declaration is in these words: "Each and every stockholder shall be personally liable to the creditors of the company to the amount of what remains unpaid upon his subscription to the capital stock, and not otherwise, provided that the stockholders of every bank incorporated under this act, or the territory of Washington, shall be held individually responsible, equally and ratably," etc. (then following the exact language of the Constitution). 1 Hill's Anno. Stat. & Codes (Wash.) § 1511. It is averred that this statute was in force at the time of the organization and incorporation of the Traders' Bank, and has been ever since. The statutes do not more particularly define the nature of this liability, and they contain nothing as to the means of enforcing it. The meaning of the language in reference to the particular nature of the obligation and the method of enforcing it was left to be determined by the courts. Several decisions of the supreme court of Washington have been made in regard to it. In one case the court uses this language: "It will be seen that there is no language which in express terms gives the creditors the immediate, or any, right of action. The liability is not on, but for, the contract, debt, or agreement. That the liability so provided is in addition to that flowing directly from the holding of stock which has not been fully paid for. The latter, in event of the insolvency of the corporation, is held to be a trust fund for creditors, and there is no good reason why the same should not be held as to the former. No satisfactory reason can be given for holding one to be a trust fund and the other not to be. There is no principle by which the two classes of liability can be distinguished other than that one is primary and the other secondary: for while it is true that one can be enforced by the corporation itself, and the other only by creditors, yet they were both

created for the benefit of the corporation in carrying on its business, and to secure to creditors the payment of its obligations. If the liability which is clearly primary must be treated as a trust fund for the benefit of all of the creditors of the corporation, greater reason exists why a liability which is secondary only, and created entirely for the benefit of the creditors, should likewise be treated as such trust fund. There is nothing in our Constitution which defines the method by which this liability shall be made available. Hence the method must be determined by the courts, and their aim should be to prescribe one which will accomplish the object of the provision with the least inconvenience to the creditors, without unnecessary annoyance to the stockholders." *Wilson v. Book*, 13 Wash. 676-679, 43 Pac. 939. See also *Watterson v. Masterson*, 15 Wash. 511, 46 Pac. 1041. It is decided that this liability cannot be enforced directly by individual creditors, but only by a receiver duly appointed, and by him only after the application of the available assets of the corporation to the payment of its debts. This construction of the statute, made by the highest court of the state in which it was enacted, is binding upon us.

The principal question in the case is whether such a liability can be enforced against stockholders in this commonwealth. It is familiar law that statutes do not extend, *ex proprio vigore*, beyond the boundaries of the state in which they are enacted. If they are merely penal, they cannot be enforced in another state. If they furnish merely a local remedy for the invasion of a recognized right which is protected elsewhere in other ways, they cannot be given effect in another jurisdiction. *Richardson v. New York C. R. Co.* 98 Mass. 85-89. The fundamental question is whether there is a substantive right originating in one state, and a corresponding liability which follows the person against whom it is sought to be enforced into another state. Such a right, arising under the common law, is enforceable everywhere. Such a right, arising under a local statute, will be enforced *ex comitate* in another state unless there is a good reason for refusing to enforce it. It will be enforced, not because of the existence of the statute, but because it is a right which the plaintiff legitimately acquired, and which still belongs to him. If the statute creating the right is against the policy of the law of the neighboring state, that is a sufficient reason for refusing to enforce the right there. In the neighboring state, in such a case, it will not be considered a right. If the enforcement of a statutory right in a neighboring state in the manner proposed will work injustice to its citizens, considerations of comity do not require the recognition of it by the courts of that state. If the right, by the terms of the statute creating it, is to be enforced by prescribed proceedings within the state, the right is limited by the statute, and can only be enforced in accordance with the statute. If it

is of such a kind that, with a due regard for the interests of the parties, a proper remedy can be given only in the jurisdiction where it is created, it will not be enforced elsewhere. But if there is a substantive right, of a kind which is generally recognized, courts, through comity, ought to regard it and enforce it as well when it arises under a statute of another state as when it arises at common law, unless there is some good reason for disregarding it. These seem to be the reasons and principles which govern the action of the courts in cases of this kind. See *Erickson v. Nesmith*, 15 Gray, 221, 4 Allen, 233; *Halsey v. McLean*, 12 Allen, 438, 90 Am. Dec. 157; *Higgins v. Central New England & W. R. Co.* 155 Mass. 170, 20 N. E. 534; *Walsh v. New York & N. E. R. Co.* 160 Mass. 571, 36 N. E. 584; *Smith v. Mutual L. Ins. Co.* 14 Allen, 336-342; *Post v. Toledo, C. & St. L. R. Co.* 144 Mass. 341, 59 Am. Rep. 86, 11 N. E. 540; *Bank of North America v. Rindge*, 154 Mass. 203, 13 L. R. A. 56, 27 N. E. 1015; *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 44 N. E. 349, 172 Mass. 39, 42 L. R. A. 396, 51 N. E. 207.

The question whether the liability in cases of this kind is contractual, or only statutory, has been answered differently in different jurisdictions. In *Burch v. Taylor*, 1 Wash. St. 245-248, 24 Pac. 438,—a case which has since been modified in other particulars,—it is said that the liability is contractual; and, although in the other decisions of that state we have seen no other direct statement upon the subject, we understand them virtually to hold the same thing. It is not the statute which directly and proximately creates the liability. It is the voluntary action of the stockholders under the statute, followed by action of creditors which is founded on the action of the stockholders. This statute was in existence before the Traders' Bank was organized. The stockholders subscribed for their stock with full knowledge of the statute, and they must be held impliedly to have agreed to be bound by it. The statute enters into and forms a part of their undertaking as stockholders, and their implied agreements in that relation conform to it. It is to be noticed, under this statute, that stockholders, merely by subscribing for stock, without an express promise to pay for it, are bound, in all corporations to pay the amount of their unpaid subscriptions, if needed, and in banking corporations to pay as much more, if it is called for, to satisfy creditors. In this respect their undertaking is like that of stockholders in many other states, but unlike that of stockholders in Massachusetts, who become such under statutes which provide for the collection of stock subscriptions by selling the stock to pay the assessment upon it. See *New Haven Horse-Nail Co. v. Linden Spring Co.* 142 Mass. 349-354, 7 N. E. 773. Although the liability is founded on a statute, there is a contractual element entering into it. The undertaking is as if one subscribing for stock expressly agreed to take and hold it under

a previously prepared contract in writing that all who should become holders of the stock should pay the amount of their subscriptions to the corporation when needed, and should pay the additional sum to create a fund for creditors if the corporation should become insolvent, and a receiver should be appointed to collect it. It was said by Mr. Justice Field in *Post v. Toledo, C. & St. L. R. Co.* 144 Mass. 341-344, 59 Am. Rep. 86, 11 N. E. 545, that such an obligation is *quasi ex contractu*. In *Concord First Nat. Bank v. Hawkins*, 174 U. S. 364-372, 43 L. ed. 1007-1011, 19 Sup. Ct. Rep. 742, Mr. Justice Shiras says: "Undoubtedly the obligation is declared by the statute to attach to the ownership of the stock, and in that sense may be said to be statutory. But, as the ownership of the stock in most cases arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation." In *Hawthorne v. Calef*, 2 Wall. 10, 17 L. ed. 776, it is decided to be contractual, in the sense that under the Constitution no subsequent statute can impair the obligation. See also *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 44 N. E. 349; *Flash v. Conn.* 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Casey v. Galli*, 94 U. S. 673, 24 L. ed. 168; *United States v. Knox*, 102 U. S. 422, 26 L. ed. 216; *Richmond v. Irons*, 121 U. S. 27-55, 30 L. ed. 864-873, 7 Sup. Ct. Rep. 788; *Deater v. Edmonds*, 89 Fed. Rep. 467; *Howell v. Manglesdorf*, 33 Kan. 194-199, 5 Pac. 759; *Ferguson v. Sherman*, 116 Cal. 169, 37 L. R. A. 622, 47 Pac. 1023. The weight of authority is in favor of holding this statutory liability to be also contractual. At all events, it is a liability which corresponds to a substantive right that grows out of voluntary action which is in the nature of an implied promise to the corporation that is being formed, and to those who may become creditors of the corporation. This action is followed by the completion of the organization of the corporation, and the giving of credit to the corporation by those who trust, in part, at least, to the implied promise of the stockholders. If the voluntary action is a purchase of stock, instead of an original subscription for it, the principle is the same. Such a right ought to be enforceable. Inasmuch as the nature of it and the methods of enforcing it depend upon the statute which enters into the implied contract, we must look to the statute to ascertain its extent and the manner of enforcing it. If it is of such a nature as to call for local proceedings in the state where the corporation is, in order to adjust equities, such proceedings must be had, and it cannot be made effectual without them. Most of the cases in which creditors of foreign corporations have been refused relief in this commonwealth have shown rights which, under the statutes creating them, could not properly be enforced without proceedings in the foreign state whereby equities could be adjusted. In the present case

as the statute has been construed, it is plain that no action can be maintained against a stockholder until after proceedings in a court of Washington, showing the insolvency of the corporation, and the need of payment to satisfy the claims of creditors. After such proceedings, and an adjustment of the rights and liabilities of the corporation, of creditors, and of stockholders, collection can be made from stockholders wherever they are found. In *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 44 N. E. 349, 172 Mass. 39, 42 L. R. A. 396, 51 N. E. 207, the plaintiff was allowed to recover because a substantive right had grown up, which had been held by the court of Kansas to be contractual, and because the preliminary proceedings in Kansas had been taken, which were necessary under the statute to the enforcement of the right in other jurisdictions. These proceedings, which were merely the recovery of a judgment against the corporation, with proof that it could not be collected in the ordinary way, removed the only limitation upon the right to proceed by action against any stockholder, wherever he might be found. All having been done that the statute required to be done, it was held that, as against one who had become a stockholder in a corporation governed by such a law, there was no injustice in allowing the plaintiff to proceed in our courts.

In the case at bar a receiver of the Traders' Bank has been appointed, the amount of its assets and liabilities has been judicially determined, the necessity for an assessment upon stockholders and the amount of the required assessment have been ascertained, an assessment upon all stockholders has been made, and the receiver, who is to hold this fund in trust for creditors, has been directed to collect it. We see no injustice to the defendant in holding him here to the performance of the obligation which he voluntarily assumed in another state. The question arises, how far these proceedings in the court of Washington are binding on the defendant. The stockholders must be assumed to have understood the statute from the first as it has been construed by the court. They must be presumed to have agreed that on the insolvency of the corporation a receiver might be appointed by the court, and the affairs of the corporation administered, and the amount of its assets and liabilities determined, and the deficiency ascertained under the order of the court, and an assessment to meet this deficiency made ratably upon all who were then stockholders. This is the only proper way of accomplishing the object of the statute, and the statute as construed by the local courts, means this as plainly as if every part were expressed. Under the statute the stockholders impliedly agreed that, if their subscriptions were in part unpaid when they were needed for creditors, they would pay the balance to the corporation or its legal representative, and that if more was needed they would also pay their proper share, up to the amount of their subscriptions, to the

trustee of this additional fund, for the benefit of creditors. The determination of the questions involved is a part of the proceedings of the court in the administration of the affairs of a local insolvent corporation. The court of Washington, acting under its general authority in such administration, is the only tribunal which has jurisdiction to determine the amounts due creditors, and to collect and apply the assets of the corporation. The undertaking of the stockholders relates directly to the payment of amounts so to be ascertained. The ascertainment is like a common case of a judgment against a corporation, which is binding on stockholders. The members of such corporations, as well as the corporations themselves, are within the jurisdiction of the local court, so far as is necessary for the determination of the rights and liabilities of the corporation and its members among themselves. In reference to this kind of liability such decisions and orders are binding on stockholders who are not before the court otherwise than by virtue of their membership in the corporation. *Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1089; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329-336, 40 L. ed. 986-990, 16 Sup. Ct. Rep. 810; *Glenn v. Liggett*, 133 U. S. 533, 34 L. ed. 264, 10 Sup. Ct. Rep. 867; *Sanger v. Upton*, 91 U. S. 56-58, 23 L. ed. 220, 221; *Marson v. Deither*, 49 Minn. 423-426, 52 N. W. 38; *Lewis v. Glenn*, 84 Va. 947, 979, 6 S. E. 806; *Hamilton v. Glenn*, 85 Va. 901, 9 S. E. 129; *Glenn v. Williams*, 60 Md. 93-116. That such adjudications are binding upon absent stockholders in reference to assessments for unpaid subscriptions has often been expressly decided. See cases last above cited. The rule is discussed at length in *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739. Under the statute now before us, we can see no difference in principle between the secondary liability and the primary liability referred to in the opinion of the supreme court of Washington. Each grows out of the same statute and the same undertaking. Each is founded on an implied promise made in pursuance of the requirements of the statute. In reference to each, the subscriber for stock contemplates the same kind of proceedings, and a collection by the same officer, who represents, not only such assets as the corporation has for all purposes, but the right to a special fund, which is an asset that can be collected and used for creditors only. In *Cole v. Satsop R. Co.* 9 Wash. 487, 37 Pac. 700, and *Hardin v. Sweeney*, 14 Wash. 129, 44 Pac. 138, it is held that the receiver is the only person who can collect this fund. This is equivalent to saying that it can be collected only of those who are stockholders at the commencement of the proceedings, and that while it is not, in the narrow sense, an asset of the corporation, it is an asset to be used by the receiver and the court for the benefit of the corporation and of the creditors, in administering the affairs of the

corporation. See *Wilson v. Book*, 13 Wash. 676-679, 43 Pac. 939; *Irons v. Manufacturers' Nat. Bank*, 21 Fed. Rep. 197. There is as much reason for holding the proceedings of the court binding upon absent stockholders in this part of the administration of the affairs of the corporation as in the collection of unpaid subscriptions. The primary fund and the secondary fund are both to be administered under the order of the court. The court, in making assessments for unpaid subscriptions, does not act merely as the representative of the directors, who might have made such an assessment, but by virtue of its general power to do all that is proper in settling the affairs of the corporation. These assessments are, in principle, like the assessments made by the court upon the members of insolvent mutual fire insurance companies under the laws of this commonwealth, which are binding upon the members to whom no actual notice is given. *Commonwealth Mut. F. Ins. Co. v. Wood*, 171 Mass. 484, 51 N. E. 19. The only difference is that our statutes in regard to mutual insurance companies prescribe the manner of making an assessment, while in the case at bar the court acts under the general provisions of the statutes. The general liability under the statute in Washington is like that under the national banking act of the United States, and the court has construed the statute in such a way as to make the practical application of it substantially the same. Under that act assessments made by the comptroller are binding upon stockholders, although made without notice to them. *United States Rev. Stat. § 5234; Casey v. Galli*, 94 U. S. 673, 24 L. ed. 168; *United States v. Know*, 102 U. S. 422, 26 L. ed. 216; *Richmond v. Irons*, 121 U. S. 27-55, 30 L. ed. 864-873, 7 Sup. Ct. Rep. 788; *Bailey v. Sawyer*, 4 Dill. 463, Fed. Cas. No. 744; *Brown v. Smith*, 88 Fed. Rep. 565. The reason for holding them binding is that the obligation is contractual, and that it contemplates the possibility of such an assessment. Of course, the defendant may show, if he can, that he is not a stockholder of this bank, or not a stockholder for so large an amount as alleged, or may make any other defense that is personal to himself. But we are of opinion that, as a member of the corporation, he is bound by the decision of the court of the state where the corporation was organized, made in administering its affairs in insolvency, and determining the amount of its assets and liabilities, and the amount of the assessment which should be made upon the stockholders.

The remaining question is whether an action upon the liability so determined can be maintained by the receiver in his own name. It has been held that an ordinary appointment as receiver, made in another state, will not enable the appointee to sue in this commonwealth in his own name. *Wilson v. Welch*, 157 Mass. 77, 31 N. E. 712. If he has a right of property as assignee, he may maintain an action. *Fort Payne Coal & Iron Co. v. Webster*, 163 Mass. 134, 39 N. E. 786; *Ewing v. King*, 169 Mass. 97, 47 N. 49 L. R. A.

E. 597. Under a recent statute, an assignee of an ordinary chose in action may sue in his own name. *Stat. 1897, chap. 402, § 1*. The tendency is towards greater liberality in this respect. *Buswell v. Supreme Sitting, O. of I. H.* 161 Mass. 224-229, 23 L. R. A. 846, 36 N. E. 1065. In the present case the receiver is called by the court in Washington a "quasi assignee for creditors." He is charged with the administration of a trust fund which does not take form nor come into actual existence until after his appointment, and he is the only person who can collect it. By virtue of his official relation to the corporation and its creditors, he is the owner of the legal title to this fund, as a trustee for the creditors. A suit could not have been brought in the name of the corporation, and he is the only person who can now, or who ever could, legally demand and collect the money. We are of opinion that the action is rightly brought in his name. In a case brought by this plaintiff to collect a part of this same assessment, the court of appeals in the state of New York, affirming a decision of the appellate division of the supreme court of that state (*Howarth v. Angle*, 39 App. Div. 151, 57 N. Y. Supp. 187), has recently held that the plaintiff may recover in an action at law against a stockholder in that state. *Howarth v. Angle*, 162 N. Y. 179, 56 N. E. 489. A similar decision has also been made in favor of this plaintiff against another stockholder by the United States circuit court for the northern district of New York. *Howarth v. Ellwanger*, 86 Fed. Rep. 54. On this last question the judge in the opinion says: "The defendant Woodworth was not a party. But, whether parties or not, the law seems clear that the stockholders are bound by the order making the assessment." See also, to the same effect, *Sheafe v. Larimer*, 79 Fed. Rep. 921. On the general question many similar decisions under various statutes have been made elsewhere. *Whitman v. National Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; *Hale v. Hardon*, 95 Fed. Rep. 747, 37 C. C. A. 240; *Bell v. Farwell*, 176 Ill. 489, 42 L. R. A. 804, 52 N. E. 346; *Western Nat. Bank v. Lawrence*, 117 Mich. 669, 76 N. W. 105; *Whitman v. National Bank*, 51 U. S. App. 536, 83 Fed. Rep. 288, 28 C. C. A. 404; *Guerney v. Moore*, 131 Mo. 650, 32 S. W. 1132; *Rhodes v. United States Nat. Bank*, 24 U. S. App. 607, 34 L. R. A. 742, 66 Fed. Rep. 512, 13 C. C. A. 612; *Bagley v. Tyler*, 43 Mo. App. 195; *McVickar v. Jones*, 70 Fed. Rep. 754; *National Bank v. Whitman*, 76 Fed. Rep. 697; *American Freehold Land Mortg. Co. v. Woodworth*, 79 Fed. Rep. 951; *Schiffer v. Columbia College*, 87 Fed. Rep. 166; *Mechanics' Sav. Bank v. Fidelity Ins., Trust & S. D. Co.* 87 Fed. Rep. 113, 91 Fed. Rep. 456; *Brown v. Trail*, 89 Fed. Rep. 641; *Platt v. Larter*, 94 Fed. Rep. 610; *Western Nat. Bank v. Reckless*, 96 Fed. Rep. 70; and cases above cited. Other somewhat similar

cases which have been decided in favor of the defendant either differ materially from the present case in their facts, or rest upon reasoning which does not seem to us convincing. See *Marshall v. Sherman*, 148 N. Y.

9, 34 L. R. A. 757, 42 N. E. 419; *Hancock Nat. Bank v. Farnum*, 20 R. I. 406, 40 Atl. 343; *Crippen v. Laighton* (N. H.) 46 L. R. A. 467, 44 Atl. 538.
Demurrer overruled.

MICHIGAN SUPREME COURT.

Mary Lovina SHAW, by Charles B. Lamb,
Her Next Friend,
v.

CHICAGO & GRAND TRUNK RAIL-
ROAD COMPANY, *Plff. in Err.*

(.....Mich.....)

1. Knowledge by a carrier of a dangerous practice by its employees is implied from an allegation in a complaint that it, by its servants, made a practice of permitting and allowing the act to be done in a manner and at a place which subjected the person or persons who might chance to be lawfully upon the premises to hazard.
2. An allegation in pleading which is not deemed sufficiently specific should be demurred to.
3. To render previous acts of a mail agent in ejecting mail from a moving train admissible in evidence in an action for injuries caused by the bag going through a window in the station building and injuring an intending passenger, it is not necessary that they show the prior occurrence of such an accident; it is sufficient if they indicate that in common prudence the carrier ought to have anticipated that such an accident was liable to happen.
4. A railroad company must not permit the continuance of dangerous habits of a mail agent in delivering heavy packages from the car in such manner as to endanger persons lawfully on its premises.
5. Continuance for a considerable length of time of a practice by mail agents to deliver mail bags from the car in such a manner as to endanger persons on the premises will charge the carrier with notice.
6. Evidence that other persons had been struck by mail thrown onto the platform is admissible in an action for injuries to an intending passenger by a mail bag going through the station window, and its admission cannot be made erroneous by merely showing on cross-examination that such accidents were at remote periods of time, but advantage of that fact must be taken by motion to strike out or to limit.
7. Misuse of a paper admitted in evidence by counsel in argument wrongfully construing it as an admission of defendant's liability is not reversible error if the judge cautioned the jury not to put that interpretation on it.
8. Seven thousand dollars is not so grossly excessive as to require interference by the appellate court, as damages for injuries to an intending railway passenger by a mail bag thrown through the station window, which were very painful and caused permanent disfigurement to, and loss of sight of, one eye.

(April 24, 1900.)

NOTE.—For injury by mail sack thrown from train, see also *Galloway v. Chicago, M. & St. P. R. Co.* (Minn.) 23 L. R. A. 442, 40 L. R. A.

ERROR to the Circuit Court for Eaton County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Geor & Williams, with *Mr. E. W. Meddaugh*, for plaintiff in error:

The declaration fails to state a cause of action. It fails to state defendant's duty. It states inferences, and not facts.

Schindler v. Milwaukee, L. S. & W. R. Co. 77 Mich. 136, 43 N. W. 911.

The court erred in permitting witnesses to testify as to what they had observed at the station about where the mail bags had been thrown off.

McKee v. Chicago, R. I. & P. R. Co. 83 Iowa, 616, 13 L. R. A. 817, 50 N. W. 209; *Koontz v. Chicago, R. I. & P. R. Co.* 65 Iowa, 226, 21 N. W. 577; *Loftus v. Union Ferry Co.* 84 N. Y. 459, 38 Am. Rep. 533; *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404, 14 N. E. 391; *Nelson v. Chicago, M. & St. P. R. Co.* 30 Minn. 74, 14 N. W. 360; *Schroeder v. Michigan Car Co.* 56 Mich. 132, 22 N. W. 220; *Sjogren v. Hall*, 53 Mich. 274, 18 N. W. 812; *Werbowski v. Port Wayne & E. R. Co.* 86 Mich. 236, 48 N. W. 1097; *Whalen v. Michigan C. R. Co.* 114 Mich. 512, 72 N. W. 323; *Redmond v. Delta Lumber Co.* 96 Mich. 545, 55 N. W. 1004.

In cases where injuries have been received when the passenger was standing upon the depot platform, and the mail bag was discharged upon the platform, recovery has been denied.

Muster v. Chicago, M. & St. P. R. Co. 61 Wis. 325, 21 N. W. 223; *McGrath v. Eastern R. Co.* 74 Minn. 363, 77 N. W. 136; *South-ern R. Co. v. Rhodes*, 58 U. S. App. 349, 56 Fed. Rep. 422, 30 C. C. A. 157.

When counsel misstates the evidence, and the attention of the circuit judge is called to it, and he fails to correct the statement or pay any attention to it, it is reversible error.

Rickabus v. Gott, 51 Mich. 227, 16 N. W. 384; *McDuff v. Detroit Evening Journal Co.* 84 Mich. 1, 47 N. W. 671; *Sullivan v. Deiter*, 86 Mich. 404, 49 N. W. 261; *Jones v. Portland*, 88 Mich. 598, 16 L. R. A. 437, 50 N. W. 731; *Thompson v. Toledo, A. A. & N. M. R. Co.* 91 Mich. 255, 51 N. W. 995; *Geist v. Detroit City R. Co.* 91 Mich. 446, 51 N. W. 1112; *Rutter v. Collins*, 96 Mich. 510, 56 N. W. 93; *Anderson v. Michigan C. R. Co.* 107 Mich. 591, 65 N. W. 585; *Britton v. Michigan C. R. Co.* 118 Mich. 491, 76 N. W. 1043; *Amperse v. Fleckenstein*, 67 Mich.

247, 34 N. W. 564; *Pringle v. Miller*, 111 Mich. 663, 70 N. W. 345; *Mott v. Detroit, G. H. & M. R. Co.* (Mich.) 6 Det. L. N. 87, 79 N. W. 3.

Messrs. Dean & Hooker for defendant in error.

Montgomery, Ch. J., delivered the opinion of the court:

Plaintiff went to defendant's station at Millett at about the hour of 7:30 A. M. on the morning of July 4, 1898, to take a local train for Lansing, due at Millett at 8:17 A. M. Defendant's train No. 1, west-bound, was due at Millett at 7:35 A. M. This train carried mail but was not scheduled to stop at Millett. Mail had been carried on this fast train since some time in 1893, during which time the mail sack had been thrown off and picked up at this station while the train was in motion. The plaintiff was in the station, sitting near the window at the northeast end of the building. The bottom of the window was 3 feet above the floor, and the window was near the center of the east wall of the building, which was 16 feet in width and 32 feet in length. The platform in front of the building was 12 feet in width, and the rail nearest the platform would be about 3 feet distant from the platform. The evidence shows that the mail bag was either kicked or thrown from the car door, and went about 18 feet to the east and 30 feet to the southeast. In other words, it was thrown from the car when the train was 30 feet distant from the station, and was thrown 18 feet away from the car. The mail pouch did not strike the ground, but went through the air sufficiently high to go through the window 3 feet above the ground, breaking the sash and panes out. The glass from the broken window struck the plaintiff in the eye, which has resulted in total loss of sight in that eye, and caused a disfigurement of the eye. In an action against the railroad company plaintiff recovered a verdict of \$7,000, and defendant brings error.

It is insisted that the declaration states no cause of action, and that error was committed in admitting any evidence under the declaration. The declaration contains the following averments: "That while the said plaintiff was lawfully upon the premises of said defendant upon said day and year aforesaid, and while seated within said depot of said defendant, next to the window at the northeast end of said depot, upon a seat placed in said depot for the convenience and use of prospective passengers of said railroad company aforesaid, a certain fast west-bound train, commonly known as a 'mail train,' and scheduled to arrive at the station of Millett aforesaid at 7:35 o'clock, or thereabout, in the morning of the day and year aforesaid, and each day of the week during which time it was so scheduled to arrive, passed through said station of Millett aforesaid at a high rate of speed, which said train was scheduled by said railroad company not to stop at said station of Millett aforesaid, but to pass through said place or

settlement without stopping, and which said train carried mails of the government of the United States of America, and from which train it was the practice of the agent or mailing clerk on said west-bound train to eject a mail pouch or bag at said station of Millett, from the mail car attached to and a part of said train, while said train was in motion and running at a high rate of speed; and said mailing clerk or agent, on the said 4th day of July, 1898, aforesaid, ejected said mail pouch or bag aforesaid from the door of said mail car aforesaid at said station of Millett aforesaid in manner aforesaid. That it was the custom and practice of said defendant, through its servants, to allow said mail pouch or bag aforesaid to be ejected from its said fast west-bound mail train so scheduled to arrive at and pass through said station of Millett as aforesaid, without stopping, while running at a high rate of speed. And thereupon, to wit, the 4th day of July, 1898, and upon all such days upon which said west-bound mail train was scheduled to arrive at and pass through said station of Millett aforesaid without stopping, and at the said station of Millett aforesaid, it became and was the duty of said defendant to manage and conduct its said west-bound mail train aforesaid, by its said servants or servant, with all due care, caution, and diligence, and in a manner which would afford safety to those persons or that person who might be lawfully upon the premises of said defendant aforesaid. Yet the said defendant did not regard its duty, and use due care, caution, and diligence, but, on the contrary thereof, by its said servants or servant, made a practice and custom of allowing and permitting said mail pouch or bag aforesaid to be ejected from said west-bound mail train in a manner and at a place which subjected the persons or person who might chance to be lawfully upon the premises of said defendant at the time and place aforesaid, or upon any day upon which said west-bound mail train aforesaid was scheduled to so arrive, to hazard and danger or injury; and upon the said 4th day of July, 1898, while the said plaintiff was so seated in said depot of said defendant as aforesaid, at said station of Millett, the plaintiff being then and there lawfully, and in and about her proper business, and in the exercise of due care, caution, and diligence, and without negligence or fault on her part, the said defendant, through its negligence and the negligence of its said servants or servant, allowed and permitted said mail pouch or bag to be so ejected from said west-bound mail train aforesaid, while in motion and while running at a high rate of speed and at such a place on said premises, that it struck the said window upon the northeast end of said depot aforesaid, and, breaking through said window aforesaid, caused said plaintiff to be struck in the left eye by said mail pouch or bag aforesaid." It is said that the declaration fails to state defendant's duty; that it states inferences, and not facts; that there is no averment that the defendant knew of the dangerous practice of discharging the

mail bag. It is alleged, however, that the defendant, by its servants, made a practice of permitting and allowing the mail pouch to be ejected in a manner and at a place which subjected the person or persons who might chance to be lawfully upon the premises to hazard. This averment implies knowledge, and, if not deemed sufficiently specific, should have been demurred to. See *Fox v. Spring Lake Iron Co.* 89 Mich. 387, 50 N. W. 872.

The plaintiff offered testimony tending to show that for a considerable period of time the mail agent had, in ejecting the bag, occasionally thrown it so that it struck upon the platform intended for passengers, at times struck the depot building, and once or twice it was known to go into the open door of the depot. It is contended that this evidence was incompetent "and immaterial, for the reason that it did not furnish a basis for the jury to find that the defendant knew that the practice of discharging the mail bag at this station was likely to cause the injury complained of here; that is, that the defendant might anticipate or expect that the mail bag would be thrown through the window, and injure some person on the inside of the waiting room." It is said that "the most that defendant could have anticipated or expected (if the evidence was properly admitted) would be that some person who might be standing on the platform or cinder bed might be hit by the mail bag." It is true that on no previous occasion did the mail bag go through the window, but it did strike against the end of the building. The building was 16 feet wide, and the window in the center so that, in striking against the corner of the building, it must have struck near the window. We think it not necessary that the plaintiff show that the mail bag had previously struck at this precise place. The test to be applied should be, Were the previous acts such that in common prudence the defendant ought to have anticipated that such an accident was liable to happen? And the evidence in this case was such as to make it proper to submit the question to the jury as the circuit judge did. This question has never been presented to this court before, but in a number of the states almost the precise question has been passed upon. We think a fair statement of the law as established by the decisions is this: The railroad company is not primarily liable for the negligence of the mail agent, but it does owe the duty of not permitting dangerous habits of the agent in delivering heavy packages from the car in such manner as to endanger persons lawfully on its premises to continue; and evidence of such a practice continued for a considerable period is notice to the company. *Snow v. Fitchburg R. Co.* 136 Mass. 552, 49 Am. Rep. 40; *Galloway v. Chicago, M. & St. P. R. Co.* 56 Minn. 340, 23 L. R. A. 442, 57 N. W. 1058; *Carpenter v. Boston & A. R. Co.* 97 N. Y. 494, 49 Am. Rep. 540. The cases cited by defendant's counsel (*Muster v. Chicago, M. & St. P. R. Co.* 61 Wis. 325, 50 Am. Rep. 141, 21 N. W. 223; *McGrath v. Eastern R.* 49 L. R. A.

Co. 74 Minn. 363, 77 N. W. 136; *Southern R. Co. v. Rhodes*, 58 U. S. App. 349, 86 Fed. Rep. 422, 30 C. C. A. 157) do not, as we read them, deny any of the propositions above stated.

Mr. Crane, a witness for plaintiff, was asked whether he was present at one time when an old gentleman was hit by a mail bag on the platform. It was objected to as immaterial and incompetent. The answer was given in the affirmative. On the cross-examination it developed that this transaction occurred some thirteen or fourteen years before the trial. The cross-examination developed that the transaction was remote from the time of the injury to plaintiff, and a motion to strike out would have been proper; but no such motion appears to have been made. The question itself was not improper, nor did the defendant's counsel ask to have the question limited as to time, or suggest that the time was too remote. There was no error in the ruling.

The plaintiff called as a witness the mail agent who threw the bag causing the injury, and in connection with his testimony offered in evidence a notice given by the attorney of the company notifying him of the pendency of the suit, stating among other things, "You are notified that your act caused said injury, and your negligence, if any, occasioned said actions," and stating that he would be held responsible to answer and pay any verdict recovered, and tendering him control of the suits. The purpose of introducing this paper is not stated. It may have been to show the interest or bias of the witness; but, as his interest already appeared, it is difficult to see how the paper became important. We do not discover how its bare introduction could have damaged defendant. The paper contained no admissions of liability on the part of the company.

In the argument plaintiff's counsel referred to this notice as follows: "Why did they serve notice on him to come in and help defend the suit? They knew a judgment stared them in the face. They knew their negligent acts made them liable and responsible for it." This was excepted to. The circuit judge began his charge as follows: "Before I give you the law in the case, I think I had better suggest to you something briefly regarding one suggestion made by Mr. Dean in his argument, and that is about the notice served upon Mr. Fulton. I thought possibly, in his zeal, he might have said something that you might misconstrue. As a matter of fact, he did not say anything really out of place. That notice the railroad company had a perfect right to serve. It was a fair and proper thing for it to do. It was not served on the government. It was served on Mr. Fulton, an employee of the government, to protect its legal rights. Should a judgment be rendered against it, if it desired or felt that Mr. Fulton was the man that should pay any damages, should any be rendered, it had a perfect right to serve that paper. I want to call to your attention more particularly that the fact of serving that paper is not an ad-

mission that it is liable, and you ought not to find it so from the fact of serving that paper." While it is manifest that counsel made an improper use of this paper as evidence of an admission by defendant, it is equally manifest that the court took pains to remove any false impression from the minds of the jury. We do not think the judgment should be disturbed on this ground, as we feel satisfied that the jury could not have failed to understand the caution of the court.

Other exceptions were noted to the argument of counsel. We do not find in it any such abuse of privilege or distortion of the evidence as called for the interposition of the court.

Error is assigned on the refusal of the court to grant a new trial. We do not find the verdict so clearly against the evidence as to justify us in reversing it on that ground. We also think that there was evidence to support the theory given to the jury by the charge.

As to the claim that the verdict was excessive, it is true that \$7,000 is a large sum. The injury is, however, severe. Besides being very painful, it caused permanent disfigurement to the eye and loss of sight. We do not think the award of damages so grossly excessive as to justify us in interfering.

The judgment will be affirmed, with costs.

Hooker, J., did not sit. The other Justices concur.

Eldridge F. BACON, *Plff. in Err.*,
v.

William REICH.

(.....Mich.)

1. The doctrine of merger will not be applied to prevent the use of the original cause of action for breach of contract on which a judgment for damages has been recovered, as a counterclaim to a suit for the contract price of the articles covered thereby by one who took an assignment of the claim before recovery of the judgment, where the assignor was insolvent, and the judgment was taken against it without notice of the assignment for protection against liability on the contract, since the assignee, although not in privity as to the judgment, is so as to the cause of action on which it was based.

2. Objections that testimony is incompetent and immaterial will not justify reversal on the ground that the plea was not sufficiently definite to warrant its admission.

(*Grant, Ch. J., and Montgomery, J., dissent.*)

(October 3, 1899.)

NOTE.—For set-off against assigned claim of debtor's demand against assignor, see *Bradley v. Thompson Smith's Sons* (Mich.) 23 L. R. A. 306, and *note*.

For set-off against judgment in hands of assignee, see *Benson v. Haywood* (Iowa) 23 L. R. A. 335, and *note*.
49 L. R. A.

ERROR to the Circuit Court for Wayne County to review a judgment in favor of defendant in an action for the purchase price of certain articles in which defendant sought to recoup damages for breach of the contract. *Affirmed.*

The facts are stated in the opinion.

Messrs. Bacon & Palmer for plaintiff in error.

Mr. Louis C. Wurzer, for defendant in error:

There is no showing whatever that the plaintiff was misled by any defects in the notice of recoupment, if there are any.

Hopkins v. Briggs, 41 Mich. 175, 2 N. W. 199; 14 Enc. Pl. & Fr. p. 1090.

A defect or insufficiency of formal notice is overcome by actual notice.

Goodwin v. White, 1 Browne (Pa.) 273.

The doctrine of merger applies only to parties and privies to a judgment.

15 Am. & Eng. Enc. Law, p. 336; *Freeman, Judgm.* § 162; *Armour Bros. Bkg. Co. v. Ad-dington* (Ind. Terr.) 37 S. W. 100.

A judgment does not drown the debt, but only becomes a higher evidence of it—but a higher evidence only against those against whom it may be used, and who are bound by it; toward those against whom this higher evidence cannot be used, the next best evidence, that is, the claim itself, must and may be used. And even against the parties themselves, where justice requires it, a judgment will be construed, not as a new debt, but an old debt in a new form.

Johnson v. Provincial Ins. Co. 12 Mich. 216, 86 Am. Dec. 49; *Owens v. Bowie*, 2 Md. 457; *Donald v. Kell*, 111 Ind. 1, 11 N. E. 782; *Freeman, Judgm.* § 244.

With respect to merger no inflexible rule can be formulated. The question depends upon the interests and intent of the parties, and demands of justice and equity.

Franklyn v. Hayward, 61 How. Pr. 43; *Sheldon v. Edwards*, 35 N. Y. 279; *Brennan v. Tietsort*, 49 Mich. 397, 13 N. W. 790; *Rinkelberg v. Peterson*, 76 Mich. 112, 42 N. W. 1080; *Morehouse v. Baker*, 48 Mich. 335, 12 N. W. 170; *Huntoon v. Russell*, 41 Mich. 316, 2 N. W. 38.

The assignee of a chose in action stands exactly in the shoes of the assignor, and he acquires no greater rights than the assignor had in the thing assigned.

Storey v. Dutton, 46 Mich. 539, 9 N. W. 844; *Hovell v. Medler*, 41 Mich. 641, 2 N. W. 911; *Edson v. Gates*, 44 Mich. 257, 6 N. W. 645; *McKenna v. Kirkwood*, 50 Mich. 545, 15 N. W. 898.

Hooker, J., delivered the opinion of the court:

The defendant recovered a judgment against the Architectural Iron Works for a breach of a contract. He was afterwards sued by the assignee of the iron works for the price of the articles furnished to him under the contract, the assignment being made before his action for damages was instituted. In this action he sought to set off or recoup his damages, which was permitted by

the trial court. The plaintiff has appealed the case, contending that the claim for damages is merged in the defendant's judgment, and therefore will not again support an action or defense, and that the judgment cannot be set off against the plaintiff, for the reason that there is a want of privity. It is also claimed that the plea was insufficient to warrant the admission of this proof. It must be admitted that the plaintiff is not privy to the judgment, because he acquired his rights, whatever they are, before plaintiff began his action. *Bartero v. Real Estate Sav. Bank*, 10 Mo. App. 76; *Powers v. Heath*, 20 Mo. 319; *Mathes v. Cover*, 43 Iowa, 512; *Todd v. Flournoy*, 56 Ala. 99, 28 Am. Rep. 758; *Marshall v. Croom*, 60 Ala. 121; *Cook v. Parham*, 63 Ala. 456; *Coles v. Allen*, 64 Ala. 98; *Winslow v. Grindal*, 2 Me. 64; *Weed Sewing Mach. Co. v. Baker*, 1 McCrary, 579, 40 Fed. Rep. 56; *Rigelow, Estoppel*, 135, 136. He is privy, however, to the injury upon which defendant's judgment rests. It is also true that the claim of the defendant was merged in the judgment against the iron works, and the judgment would be a bar to another action, or an attempt to recoup the damages against the Architectural Iron Works. But the judgment could be set off in an action brought by the iron works, or an action might be brought upon it. We deem it unnecessary to cite authorities in support of these principles, which are elementary. It is nevertheless true that the plaintiff took this claim subject to the equitable right of the defendant to have his damages applied upon it, and all that can prevent is the technical rule that they are merged in a judgment against plaintiff's assignor. Theoretically, this may be said to be no hardship, because, if the defendant shall pay the plaintiff's claim, he would yet have the right to collect his judgment for damages, which would work out exact justice to all. Practically, however, this is not so, because he cannot collect his judgment. The iron works is insolvent, and was at the time the plaintiff, who was a stockholder in the concern, took his assignment, and the defendant cannot collect his judgment in any other way than to set it off against his contract obligation. Furthermore, the record contains evidence that he was ignorant of the assignment at the time he took his judgment, and had a right to suppose that by obtaining the judgment he had settled the question of his liability on the contract, and was led to do so to avoid liability in a garnishment suit which was adjourned for the purpose. But for the previous assignment, this would have been so, because the judgment would have bound all persons afterwards acquiring title to the claim from the iron works. According to more recent cases, the doctrine that claims become merged in judgments "is supported on the grounds that the allowance of a new suit is a superfluous and vexatious encouragement to litigation, injurious to the defendant, and of no benefit to the plaintiff." 15 Am. & Eng. Enc. Law, p. 339, and cases cited. The doctrine, if rigorously applied, 49 L. R. A.

may work hardship and injustice, and it seems to be lawful to disregard it in some cases. Thus, a foreign judgment does not bar an action upon the original claim. *Vanquelin v. Bouard*, 15 C. B. N. S. 341c; *Wilson v. Tunstall*, 6 Tex. 221; *Wood v. Gamble*, 11 Cush. 8, 59 Am. Dec. 135; *New York, L. E. & W. R. Co. v. McHenry*, 21 Blatchf. 400, 17 Fed. Rep. 414. See also *Olcott v. Little*, 9 N. H. 259, 32 Am. Dec. 357. In *Eastern Township's Bank v. Beebe*, 53 Vt. 177, 38 Am. Rep. 665, it is said that "a foreign judgment, when shown in evidence upon a matter within the jurisdiction of the court, and in which the court had jurisdiction of the parties, so that they were personally bound by the judgment in the country where rendered, is conclusive upon the matter therein adjudicated. But it at the same time is held that the original cause of action is not so merged by that judgment that it is incapable of being the subject of a suit in a country foreign to that in which the judgment was recovered. The books are uniform in making the distinction between merger of the cause of action and conclusiveness of effect, as matter of evidence, when the effect of a foreign judgment is brought in question in a suit upon the same original cause of action." In cases where, through mistake or fraud, it would be inequitable to treat such judgments as a bar, the doctrine cannot be invoked. The case of *Ferrall v. Bradford*, 2 Fla. 508, 50 Am. Dec. 293, is in point. We quote: "The plaintiffs in the court below took judgment against only one of the joint obligors, and, when that fact is pleaded by the defendants in bar, they reply that they did only do so because their attorney was circumvented, and induced to dismiss the proceedings as to the other defendants, in consequence of the fraudulent representations of one of the defendants. It matters little as to the mode or manner in which fraud is effected. A court must look to the effect, and ask if the result is a consequence of the fraud. Here the defendants seek to avail themselves of a legal defense, arising from a state of facts which they themselves, by their fraud, have produced. They admit, virtually, by their demurrer, that the plaintiffs have been deprived of a legal right by their fraud, and they seek now, by their defense, to take advantage of their own wrong,—a defense admitted to arise from their own fraudulent act. The question now is, Will such a defense be available, tolerated, or allowed? Law, reason, justice, and morality unite in a negative response." "At the first blush, we thought we discovered some difficulty arising from the fact that only one of the defendants is alleged to have been guilty of the fraud, but it soon disappeared; for we find this principle broadly laid down,—that interests gained by one person by the fraud of another cannot be held by them; otherwise, fraud would always place itself beyond the reach of the court." *Clark v. Rowling*, 3 N. Y. 216, 53 Am. Dec. 290, denies the unyielding character ascribed to merger, as shown by the following extract from the opinion of Mr. Justice Hurlbut:

"It is true that the notes as evidence of an indebtedness were merged in the judgment, which, being greater security, operated to extinguish the lesser; but does it therefore follow that the judgment to all intents became a new debt, and that the merger or extinguishment of the notes was so complete as that, for the purpose of protecting the defendants in an equity connected with their original indebtedness, we may not look behind the judgment, and see upon what it was founded? A judgment, instead of being regarded strictly as a new debt, is sometimes held to be merely the old debt in a new form, so as to prevent a technical merger from working injustice. And this exception to the doctrine contended for by the plaintiff has obtained, especially in cases of insolvency and bankruptcy, for the protection as well of the creditor as the debtor, and has been applied impartially for the benefit of both." In *Stevens v. Damon*, 29 Vt. 521, it was held that "the judgment of the justice in such a suit will not be a bar to a subsequent suit for the recovery of the account of the plaintiff which was not presented, if its presentation was omitted by mistake, or for any other sufficient reason." See *Cramer v. Singer Mfg. Co.* 93 Fed. Rep. 636, 35 C. C. A. 508; *Fox v. Althorp*, 40 Ohio St. 322; *Kane v. Morehouse*, 46 Conn. 300 (closely resembles *Stevens v. Damon*); *Wyman v. Mitchell*, 1 Cow. 316, and other cases cited in the case of *Clark v. Rowling*, 3 N. Y. 216, 53 Am. Dec. 290; also *Johnson v. Provincial Ins. Co.* 12 Mich. 216, 86 Am. Dec. 49.

In the case before us, there is evidence from which it might be found that the course taken by the defendant in procuring a judgment for the breach of the contract was due to the concealment on the part of the iron works of the fact of the transfer of the claim, or, at least, of the mistake of the defendant in supposing that it belonged to the iron works at that time. We think the hardship and injustice of a strict application of the rule of merger are so apparent that we are justified in considering the case within the principle of the cases cited, and holding that, although the plaintiff was not strictly in privity as to the judgment, he was as to the cause of action upon which it was based, and that the defense made was proper. We think this conclusion renders it unnecessary to discuss the subject of election of remedies raised by the briefs.

The further point is made that the defense was not admissible under the pleadings. The case began in justice court. The plea was presumably oral, and consisted of "the general issue, notice of set-off, and recoupment." This was not a sufficiently definite plea, under the case of *Kerr v. Bennett*, 109 Mich. 546, 67 N. W. 504, but it was amendable, and, had attention been called to it, doubtless would have been amended.

The objections shown in the record do not indicate that the sufficiency of the plea was attacked. They are simply that certain questions and testimony were incompetent and immaterial. That might mean that the plea was insufficient or that the defense of 49 L. R. A.

recoupment could not be proved, because of the former judgment, which seems to have been, then, as here, the main contention. Such objections are admirably adapted to the concealment of the real point relied upon, and we have often held that they will not justify a reversal. The authorities are collected in the recent case of *Detzur v. Stroß Brewing Co.* 119 Mich. 282, 77 N. W. 950.

The judgment should be affirmed.

Moore and Long, JJ., concurred.

Grant, Ch. J., dissenting:

This suit originated in justice court. Defendant entered into a contract with the Architectural Iron Works, a corporation, by which it agreed to furnish defendant certain iron trusses for the sum of \$400. The iron works, being indebted to the plaintiff, assigned the amount due upon the contract to him. The justice returned that "the defendant pleads the general issue, notice of set-off, and recoupment." Defendant, claiming a breach of contract, sued the iron works, and recovered a judgment for \$358 damages, from which no appeal was taken, and the judgment remained in full force and effect. It was admitted that \$100 was due upon the contract. The court permitted the defendant to recoup damages, and verdict and judgment were rendered for him.

1. The notice of recoupment was too indefinite to permit any evidence under it. *Kerr v. Bennett*, 109 Mich. 546, 67 N. W. 504; *Roethke v. Philip Best Brewing Co.* 33 Mich. 340; *Delaware & H. Canal Co. v. Roberts*, 72 Mich. 49, 40 N. W. 53; *Darrah v. Gow*, 77 Mich. 16, 43 N. W. 851. Had objection been seasonably made, it should have prevailed, unless defendant had asked leave to amend. But the record discloses that this point was not raised until the testimony was concluded, and then the plaintiff requested the court to instruct the jury "that, under the plea and notice filed in this case, the defendant cannot be allowed for any of the items of his claim." Under the record as it now appears, plaintiff saw fit to go to trial in both the justice and circuit courts without any objection to the sufficiency of the plea and notice. We think a plaintiff should not be permitted to raise such an objection at the close of the trial.

2. Defendant, claiming damages for violation of contract on the part of the Architectural Iron Works, had two courses open to him. He could have waited until the iron works or its assignor sued him, and then have recouped his damages, or he could have brought an independent action for damages. He chose the latter. The tort became merged in the judgment, which became a new debt, unaffected by the claim upon which it was based. Judgments are contracts, and are subject to set-off in actions of assumpsit. 1 Freeman, Judgm. § 217; 15 Am. & Eng. Enc. Law, pp. 338, 339. The latter authority states the rule as follows: "And the present rule undoubtedly is that no second suit can be maintained on the same cause of action, irrespective of the question wheth-

er the judgment in the first suit was of a higher or lower nature than the cause of action, the reason for the rule being that the judgment is a judicial determination of the rights of the parties, into which the plaintiff has voluntarily elected to transform his claim." The authorities in support of this are cited in note 7. The general rule, as above stated, is admitted, but it is urged that there are exceptions to it, and that the present case forms one of the exceptions. In *Eastern Townships Bank v. Beebe*, 53 Vt. 177, 38 Am. Rep. 665, the opinion recognizes the rule, but appears to limit it to domestic judgments. The opinion says: "It [the judgment] is not so merged unless it has become a debt of record, so that the record itself has become a cause of action. . . . The books are uniform in making the distinction between merger of the cause of action and conclusiveness of effect, as matter of evidence, when the effect of a foreign judgment is brought in question in a suit upon the same original cause of action." The same rule was announced by this court in *Bonesteel v. Todd*, 9 Mich. 371, 80 Am. Dec. 90. We are not dealing with a foreign judgment, and the rule of those cases does not apply. In *Ferrall v. Bradford*, 2 Fla. 508, 50 Am. Dec. 293, suit was brought against three parties upon a joint bond. The Bradfords, by fraud, procured a judgment to be rendered against the other obligor alone. The court would have applied the maxim, *Transit in rem judicatum*, but for the fraud of defendants. In that case there was no judgment against the defendants, but only against their joint obligor. So, it was held in *Bonesteel v. Todd*, 9 Mich. 371, 80 Am. Dec. 90, that a judgment rendered against two joint debtors in the state of New York, one of whom was not served with process and did not appear, did not bind the party not appearing, and did not prevent the plaintiff from suing upon the original cause of action in this state. In *Clark v. Rowling*, 3 N. Y. 216, 53 Am. Dec. 290, the sole question was the effect of a discharge in bankruptcy upon a judgment rendered after the petition in bankruptcy was filed, the decree in bankruptcy being rendered after judgment was taken. The basis of the decree in *Clark v. Rowling* is found in *Wyman v. Mitchell*, 1 Cow. 316, where the same question arose. Of that case the court in *Clark v. Rowling* says: "And the court held that, although the original undertaking of the defendant was so merged in the judgment that no suit could be maintained upon it, yet that it was proper to inquire into the time and circumstances of the contract upon which the first judgment was founded, for the purpose of taking the case out of the operation of the defendant's discharge." All the cases there cited involve the effect of a discharge in bankruptcy. In *Stevens v. Damon*, 29 Vt. 521, the sole question litigated was whether items omitted by mistake from an account sued upon in justice court were merged in the judgment, upon the ground that a party cannot split up his cause of action. It is there said: "Ordinarily, such a judgment will bar a subsequent suit on the 49 L. R. A.

account so omitted, as the plaintiff cannot divide his account and make it the subject of several actions." A like case is *Kane v. Morchouse*, 46 Conn. 300. In *Fox v. Althorp*, 40 Ohio St. 322, the sole question was the right of the plaintiff to maintain four suits for monthly instalments for overdue rent. Four suits had been begun before a justice of the peace for the instalments due on the 1st days of September, October, November, and December. Judgment was rendered on the suits involving the September and October instalments, and the justice then rendered verdict upon the same evidence in each of the other suits. Defendant paid the judgments for the instalments due in November and December, and appealed the other judgments to the common pleas, and there pleaded satisfaction of the judgment in bar. The court found that practically the four suits were tried as one, and the court based its judgment upon the ground that the defense was purely technical, and that defendant acquiesced in the severance. In *Oramer v. Singer Mfg. Co.* 93 Fed. Rep. 636, 35 C. C. A. 508, the sole question was whether a party was bound by a judgment rendered in a suit brought by him against another company, and was *res judicata* as to the latter suit. The decision was based upon the fact that the real party defending had not done so openly, to the knowledge of the opposite party, and therefore was not bound by the judgment. In these cases it was not sought to reopen the judgments for the purpose of contesting the original causes of action, where judgments had been rendered against defendants who had been served with process, or who had appeared and contested the suits. Nor do they involve a case like the present, where the party, having a choice of two remedies, has chosen to bring his suit for damages. Defendant Reich had been garnished, and evidently disclosed in the garnishment suits his claim for damages, which was greater than the amount due upon the contract. Evidently, at his request, the garnishment suit was held to permit him to establish in a separate suit his claim for damages. I see no reason why he could not have made that defense in the garnishment suit, which would have wiped out the claim assigned to Bacon. I find no evidence of fraud or deception on the part of Bacon or his assignor in the assignment of this claim, or any evidence that it was assigned for the purpose of defeating Reich. The rule of law involved cannot, in my judgment, be changed by the fact that the iron works has become insolvent. The original cause of action in Reich against the iron works, has, in the language of *Eastern Townships Bank v. Beebe*, become so merged in the judgment "that the record of itself has become a cause of action." The only office which that judgment can now serve is as a set-off. *Huntoon v. Russell*, 41 Mich. 316, 2 N. W. 38. Judgment should be reversed, and new trial ordered.

Montgomery, J., concurred with the Chief Justice.

KENTUCKY COURT OF APPEALS.

J. S. WHEELER, *Appt.*,
v.
TRADERS' DEPOSIT BANK.

(.....Ky.....)

One who, at the request of the principal debtor, places his name as surety on a note after the signatures of several makers, guarantees the genuineness of such signatures to an innocent payee, and cannot be released from liability on the ground that one signature is a forgery.

(February 24, 1900.)

NOTE.—*Guaranty, by one signing obligation as surety, of the genuineness of other signatures.*

- I. *Introductory.*
- II. *Promissory notes.*
 - a. *Prior signatures.*
 - b. *Subsequent signatures.*
- III. *Bonds.*
 - a. *Prior signatures.*
 - b. *Subsequent signatures.*

I. *Introductory.*

The main case, to the effect that one signing an obligation as surety guarantees the genuineness of preceding signatures, is supported by nearly all of the cases. Those holding the contrary have either been repudiated in the states in which they were rendered, or were decided on the ground that the agent of the obligee procured the signatures.

One case, that of *Sharp v. Allgood*, 100 Ala. 183, 14 So. 16, holds that a surety signing a note on condition that another specified person shall sign it as comaker is not liable where such person's name is forged, even though the payee did not know of the condition; but this case seems to have been decided on the ground that the condition was not fulfilled, rather than on the ground of the forgery.

On this question as to the effect of a parol agreement that the execution of an instrument by a surety shall not take effect until others have signed it, see *Benton County Sav. Bank v. Boddicker* (Iowa) 45 L. R. A. 321, and *note*.

On the question of the drawee's duty to know the signature of the drawer, see *Germania Bank v. Boutell* (Minn.) 27 L. R. A. 635, and *note*.

As to implied guaranty of genuineness on sale of negotiable paper, see *Strauss v. Hensley* (D. C.) 36 L. R. A. 92, and *note*.

On the liability of person whose signature is forged on commercial paper, see *Traders' Nat. Bank v. Rogers* (Mass.) 36 L. R. A. 539, and *note*.

II. *Promissory notes.*a. *Prior signatures.*

There seems to be no exception to the rule that one signing a note as surety guarantees the genuineness of every preceding signature, and is liable notwithstanding the forgery, if the payee had no notice thereof, as held by the main case, which states that the payee has the right to presume that the surety would not have signed if any other name was forged.

Thus, *Selsor v. Brock*, 8 Ohio St. 302, holds that one who signs a note as surety after other

APPPEAL by defendant from a judgment of the Circuit Court for Montgomery County in plaintiff's favor in an action brought to hold defendant liable as surety on a promissory note. *Affirmed.*

The facts are stated in the opinion.

Mr. B. F. Day, for appellant:

The appellee having, through its cashier, W. W. Thompson, loaned the money to Stacy, and delivered to said Stacy and had him to sign and take the paper sued on, and carry it to Morgan county to secure the signatures of sureties, and he, the said Stacy, having returned said note, purport-

ing names, which it is claimed were forged, distinctly sanctions and affirms their genuineness, although he does not warrant it, and he is liable to the payee if the latter knew nothing of the forgery.

And in *Schmidt v. Archer*, 113 Ind. 365, 14 N. E. 543, the court states, by way of argument, that one who signs a note as surety in the belief that the preceding forged names were genuine would be bound, where the obligee accepted the instrument without notice of the forgery.

And in *Chase v. Hathorn*, 61 Me. 505, holds that one who signs a note as surety is liable, although the preceding signatures of the purported principals on the faith of which he signed were forgeries.

And *Des Moines Nat. Bank v. Chisholm*, 71 Iowa, 875, 33 N. W. 234, holds that one who signs an accommodation note under the belief, induced by the fraud of the person accommodated, that a prior forged signature is genuine, is liable to a holder for value without notice of the forgery.

And *Trevathan v. Caldwell*, 4 Heisk. 535, holds that one who signs an accommodation note as surety under the names of other apparent parties with ample means of knowledge of the facts of the case is liable, although one of the preceding signatures was forged, where the payee was innocent of all wrong in the matter.

And in *Helms v. Wayne Agricultural Co.* 73 Ind. 325, 38 Am. Rep. 147, which was an action on a note joint in form, but which the defendant had signed as surety, an instruction that the law implies an assertion on the part of each signer that all names are genuine, was held proper, the court also holding that one signing such a note is liable notwithstanding the forgery of a preceding signature, if the obligee accepted the note without notice of the forgery.

This case was followed in *Wayne Agricultural Co. v. Cardwell*, 73 Ind. 555, in which the same note was involved.

Stoner v. Millikin, 85 Ill. 218, holds that one who refuses to sign a note as surety unless the principal first gets another specified signer, and then signs in reliance on a forgery of such other person's signature, is not released because of the forgery, as the creditor assumes only the risk resulting from the loss of the security whose name is forged.

And *Wheeler v. Barr*, 7 Ind. App. 381, 34 N. E. 591, holds that a surety cannot escape liability on the ground that a name preceding that of the surety to the note was forged, although he believed the signature to be genuine, where the payee accepted the note without knowledge of the forgery, and the principal did not act as the payee's agent in forging such signature, although the payee had asked the principal to obtain the signature, and failed to notify

ing to be signed by Gevedon, appellant, and others, and having passed the signature of Gevedon as genuine, and having received the proceeds of the note, and placed the same to his own account, and having deceived, and by fraudulent representations while so acting for appellee procured the signature of appellant to said paper, the appellant is released, unless he, either by some act, induced the appellee to accept said note and part with its money or did something after the note was accepted by the appellee by which it was delayed in the collection of the note, by which it lost. Stacy was the agent of the bank to procure the signature of sureties, and the bank, upon reasonable inquiry, had the evidence before it to have determined whether or not the signature of Gevedon to the note sued on was genuine or a forgery.

There must be a purpose or intention to

the person whose name was forged that he had a note signed by him on subsequently seeing him.

And Mosher v. Carpenter, 13 Hun. 604, holds that the indorser of a genuine note, who, at the request of the payee, signs as cosurety a note which such payee had forged and transferred, is liable to a subsequent bona fide transferee of the forged note, although he signed under the belief that it was the genuine note, where he had the opportunity to examine it before signing, as the warranty of genuineness of preceding signatures applies to a surety as well as to an indorser.

In Talbot v. Wilkins, 52 Ark. 437, 12 S. W. 1071, a justice of the peace had wrongfully collected and appropriated the amount of a judgment recovered before him, and then, representing that a constable had done so, induced a friend of the latter to sign as surety a note purporting to have been signed by the constable but on which his name was in reality forged, the judgment creditor being induced to accept the note in settlement of his supposed claim against the constable. The claim was made in the argument that the surety was estopped by signing the note to show that the principal's name was forged, but the decision was rendered in favor of the surety on the ground of an entire want of consideration without the expression of any opinion on the question of estoppel.

b. Subsequent signatures.

The weight of authority seems, also, to require a surety to see to the genuineness of subsequent signatures, and to hold him liable notwithstanding the forgery of such a signature.

Thus, Grossman's Appeal (Pa.) 10 Cent. Rep. 339, 11 Atl. 725, holds that one who signs a note as surety with the understanding that the principal shall procure the name of another specified person as surety is not relieved from liability because the principal forged such person's name, where the payee had no knowledge of the condition, and had no reason to suspect the forgery.

And Hunter v. Fitzmaurice, 102 Ind. 449, 2 N. E. 127, holds that one who signs a note as surety, stating in the payee's presence that he will not be bound until it is also signed as surety by another specified person, is liable, although the principal forges the name of such person, and then gives the note to the payee, who receives it without knowledge of the forgery. In this case the court also holds that the fact that the payee said at the time the surety

deceive or mislead, on the part of the appellant, to work an estoppel, and the appellee acting upon it in good faith, exercising reasonable care and diligence under all the circumstances; but, failing to exercise reasonable care and diligence, the appellee will not be permitted to estop the appellant, a stranger to the transaction, from pleading the truth.

Herman, Estoppel, p. 418; *Lasley v. Lackey*, 4 Ky. L. Rep. 806.

The appellant on this note had the right to plead that the signature of one of the parties purporting to sign it was not genuine, and to call upon the appellee to prove it.

Chany v. City Bank, 6 Ky. L. Rep. 215.

Before the conduct of a party will estop him from relying upon the truth, the other party must have been induced to act upon what he has done, and be without a reason-

signed it that he wished additional security did not make the principal his agent in accomplishing the forgery.

Sharp v. Allgood, 100 Ala. 183, 14 So. 16, holds, on the contrary, that a surety who signs a note only on condition that another specified person shall sign as comaker is not liable where such person's name is forged, even though the payee did not know of the condition, as it was the latter's duty to inform himself of the genuineness of the signatures before acting on them. This case seems to have been decided, however, on the ground that the condition on which he signed was not met. It is also to be observed that some, at least, of the authorities on which the decision was rendered, such as *Linn County v. Farris*, 52 Mo. 75, 14 Am. Rep. 389, and *Pepper v. State ex rel. Harvey*, 22 Ind. 399, 85 Am. Dec. 430, have been repudiated in the states in which they were rendered.

III. Bonds.

a. Prior signatures.

In all cases of private bonds the court seems to have held that a surety warrants the genuineness of preceding signatures, or, at least, is liable notwithstanding a forgery of such a signature.

Thus, *Lombard v. Mayberry*, 24 Neb. 674, 40 N. W. 271, holds that one who signs as surety a bond guaranteeing the payment at maturity of notes sold, without being induced to do so by the obligee, and without imposing any condition as to other signatures, is liable, although some of the preceding signatures are forged, as by so signing he admits without warranty the genuineness of such other signatures.

This case was followed in *Kansas City Terra Cotta Lumber Co. v. Murphy*, 49 Neb. 674, 68 N. W. 1030, which holds that one who was induced to sign a bond as surety under the belief that a prior forged signature of a cosurety is genuine, is not relieved from liability where the obligee did not know of the forgery.

And *York County Mut. F. Ins. Co. v. Brooks*, 51 Me. 506, holds that one who signs a bond for the fidelity of the collecting agent of an insurance company is not discharged because the name of a prior surety is forged, as his own signature is an implied assertion of the genuineness of the preceding ones.

And *Terry v. Hazlewood*, 1 Duv. 104, holds that one signing as surety a bond for the proceeds of tobacco in a warehouse is liable thereon, although the name of another surety is forged.

able way to have discovered the defect upon which the estoppel is relied.

Abney v. Bell, 7 Ky. L. Rep. 443.

The purchaser of a negotiable note, and especially so where the party as in this case loans the money direct to the party committing the fraud, takes the note at his peril as to its genuineness.

Cason v. Grant County Deposit Bank, 13 Ky. L. Rep. 635.

Mr. Roy G. Kern, with *Mr. Thomas J. Bigstaff*, for appellee:

After considering the signature of Gevedon as genuine, and signing the note after Gevedon's name was signed to it, appellant cannot, after it has passed into the hands of appellee bank, who, knowing that appellant's name was genuine, and under the law believing that he guaranteed the genuineness of the signature of said Gevedon,

now be permitted to say that Gevedon's name was a forgery.

Hall v. Smith, 14 Bush, 604; *Bigelow*, Estoppel, 5th ed. p. 492.

The note was signed by appellant, and given to the principal Stacy to deliver to the bank. In such cases the principal is regarded as the agent of the surety.

Hubble v. Murphy, 1 Duv. 278.

Under a general plea of *non est factum* a question as to the conditional signing and delivering of a writing cannot be considered; it must be specially pleaded.

Hall v. Smith, 14 Bush, 604; *Carroll's Code*, p. 80, notes 32, 33; *Garrett v. Ashcraft*, 19 Ky. L. Rep. 38, 39 S. W. 51; *Young v. Hildreth*, 5 Ky. L. Rep. 113.

The acceptance of a bill, or the indorsement of a bill, is a conclusive admission, in favor of a bona fide holder for value, that

And *Hall v. Smith*, 14 Bush, 604, after citing the above case, says, by way of argument, that the true signatures to such bond were evidence to the obligee that all the signatures were genuine, and that such obligee had the right to presume that the sureties would not assume the liability without knowing who had or was to become liable with them.

Some cases have made a distinction between bonds of a private and those of a public nature, and have held that the surety was not liable in case of a forgery of another surety's name, seemingly in most cases on the ground that the person procuring the signature acted as agent of the obligee. Most of these cases have, however, been repudiated in the states in which they were rendered.

Pepper v. State ex rel. Harvey, 22 Ind. 399, 85 Am. Dec. 430, holds that one who signs a county treasurer's bond as surety is released from liability where the signature of a prior surety was forged, on the ground that the treasurer in procuring the signing of the bond acted as the agent of the obligee, or that his acts were afterward adopted by the obligee. But on a subsequent appeal, *State ex rel. McCarty v. Pepper*, 31 Ind. 76, the court held that the surety was not relieved because of the forgery, on the ground that he was not influenced to sign by any preceding name, the court also stating that there were cases which would hold him as affirming the genuineness of the preceding signatures.

And *Seely v. People use of Neece*, 27 Ill. 173, 81 Am. Dec. 224, holds that one who signs the office bond of a master in chancery under a belief that a prior forged signature is genuine is not liable, even though the obligee did not participate in the fraud, as by such fraud the surety was made to assume a different and greater liability than he intended.

This case was followed in *Cornell v. People*, 87 Ill. App. 400, in which a surety on a constable's bond was held to be released because of the forgery of a preceding signature as surety, where he had relied in good faith on the principal's representation that the signature was genuine.

But the above case of *Seely v. People use of Neece*, 27 Ill. 173, 81 Am. Dec. 224, was overruled in *Stoner v. Millikin*, 85 Ill. 218, *supra*, II. a, which was an action on a promissory note on which a prior signature was forged.

And *Stern v. People use of St. Clair County*, 102 Ill. 540, referring to the overruling of the above case of *Seely v. People use of Neece*, holds that a surety on a county treasurer's bond is 49 L. R. A.

not relieved because of the forgery of the signature of a prior surety.

And in *People v. Coons*, no opinion filed, cited in the above case of *Stern v. People use of St. Clair County*, on p. 554, a similar decision was rendered in an action on a treasurer's bond.

And *United States v. Boyd*, 8 App. D. C. 440, holds that a surety on the bond of a pension agent is not relieved from liability because the prior signature of a surety is forged, where he trusted to the principal in signing the bond, as he cannot shift the loss to the obligee, who received the bond in reliance on the genuineness of all the signatures, and to whom the signature of a surety might well be regarded as a representation of the genuineness of a preceding signature.

Chamberlin v. Brewer, 3 Bush, 561, however, holds that one who signs a sheriff's bond as surety, relying on the genuineness of preceding signatures, is not liable where some of them are forged. The ground of such decision is that the bond, when presented to him for signature, was in the hands of the court or officer who was to approve it, and that he had the right to believe in such case that the preceding signatures were genuine.

And in *Gasconade County use of School Twp. No. 44 v. Sanders*, 49 Mo. 192, it is held that one who signs as surety a bond to a county for money loaned by it is not liable where the bond was presented by a justice acting as agent for the county, who, on the refusal of such surety to sign unless another specified person should sign as cosurety, forged the signature of such person, and made use of the money for his own purposes.

But *Carr v. Moore*, 2 Ind. 602, holds that a surety on a bond to a school commissioner to secure a loan from the school fund was liable although the name of a prior surety was forged, where no misrepresentation was shown to have been made to such surety. The court also said that if the principal had been guilty of fraud in inducing the surety to sign, it could not have affected the result if the obligee did not participate therein.

Cook v. Boyd, 16 B. Mon. 556, holds that one who signs as surety a bond to prevent the levy of an attachment under the belief that a preceding surety's signature is genuine is not relieved from liability because such signature is forged, where the obligee did nothing to deceive him.

And *Bigelow v. Comegys*, 5 Ohio St. 256, holds that a surety on a replevin bond cannot

the signature of the drawer in the one case, and all the prior parties in the other, is genuine.

Bigelow, Estoppel, § 1, p. 480.

Paynter, J., delivered the opinion of the court:

This action is based upon a writing which reads as follows:

Mt. Sterling, Ky., Feb. 26, 1893.

Ninety days after date, we, or either of us, promise to pay to the order of the Traders' Deposit Bank, Mt. Sterling, Ky., two hundred and seventy-five dollars, at their office in Mt. Sterling, for value received, with interest from maturity at the rate of — per cent per annum until paid, and the attorney's fees if suit be instituted on this note.

W. R. Stacy.

N. B. Haney.

W. M. Gevedon.

J. S. Wheeler, Surety.

No. 1,036. Due May 29. P. O. —

W. R. Stacy applied to the cashier of appellee to borrow money, and was told that he could do so by giving good security, and thereupon the cashier handed him a blank note which he took, and afterwards returned it to the bank, purporting to have been signed by W. R. Stacy, N. B. Haney, W. M.

Gevedon, and J. S. Wheeler. The bank accepted the note, credited Stacy with its proceeds, which were subsequently drawn out by him. Gevedon interposed a plea of *non est factum*, which he succeeded in sustaining to the satisfaction of a jury. The cashier believed the name of Gevedon to be his genuine signature at the time the note was accepted. It is insisted for Wheeler that he signed the note believing that the signature of Gevedon was genuine, and that he would not have done so except for that fact. It is also insisted for him that he is not bound on the note because Gevedon was adjudged not to be liable on it. The cashier had no reason to doubt the genuineness of Gevedon's signature. Wheeler signed the note as surety, and in doing so he guaranteed to the bank that every preceding signature was genuine. The bank had the right to presume that he would not have signed the paper if the name of Gevedon had been forged; therefore the appellant is bound on it, notwithstanding the name of Gevedon may have been a forgery. Stacy was acting for himself when he procured the signature of Wheeler to the note, as the bank was in nowise instrumental in obtaining his name to it. The note purported to be a complete instrument, and the bank had no notice of any wrong, and it was the fault of Wheeler in trusting Stacy, and he must

avoid liability on the ground that he was induced to sign by the representation of the principal obligor, in which the obligee did not participate, that the forged signature of an apparent surety was genuine.

And State *ex rel.* Brown v. Baker, 64 Mo. 167, 27 Am. Rep. 214, holds that one who signs an administration bond on which the name of an apparent surety is forged cannot escape liability on the ground of such forgery, where the bond was complete on its face, and the officers accepting did not know of the forgery.

And State *ex rel.* Hewitt v. Hewitt, 72 Mo. 603, holds that one who is induced to sign a guardian's bond on the representation and under the belief that a prior forged signature of a surety is genuine is nevertheless liable if the bond is filed in the probate court, and is regular and complete on its face, and the officers of the court had no notice of the representation or the forgery.

And Linskie v. Kerr (Tex. Civ. App.) 34 S. W. 765, holds that one who signs as surety the bond of a surviving husband is not released because a prior signature as surety was forged, if the obligee accepted the bond without notice of the forgery.

b. Subsequent signatures.

Colquitt v. Simpson, 72 Ga. 501, holds that the president of a bank chosen as a state depository, whose duty it is to furnish security on the bond required, and who signs it individually as surety, cannot escape liability on the ground that the name of one of the sureties which appeared on the bond after his own was forged.

And Mathis v. Morgan, 72 Ga. 517, 53 Am. Rep. 847, holds that a surety on the bond of 49 L. R. A.

a state depository cannot be relieved because of the forgery of a subsequent signature of a surety whose name preceded his own in the body of the bond, although he signed on the understanding that all the parties named in the bond should sign, and in reliance on a forged affidavit as to the amount they were worth, purporting to have been signed by some of the parties named in the bond as sureties, where such bond with all the signatures thereon apparently genuine was delivered to and acted on by the governor.

And in Sullivan v. Williams, 43 S. C. 489, 21 S. E. 642, the court held, McIver, Chief Justice, dissenting, that a surety on a bond for the release of an attachment could not introduce evidence in an action on the bond that the name of one of the principals to the bond was forged after the surety signed, and that the bond on its face bore evidence of the forgery, where it had been intrusted to the other principals to procure the lacking signatures.

Linn County v. Farris, 52 Mo. 75, 14 Am. Rep. 389, on the contrary, holds that one who signs a county treasurer's bond on condition that the principal shall not deliver it until it is signed by another specified person as surety is not liable where such other person's name is forged by the principal. The decision seems to have been rendered, however, on the ground that the surety never in fact executed the bond as the condition had not been performed, rather than on the ground of the forgery. The case, moreover, was criticised, and in effect overruled, in State use of Bothrick v. Potter, 68 Mo. 212, 21 Am. Rep. 440, which holds that a surety on a bond to the state is liable notwithstanding an unfulfilled agreement to procure another surety on the bond.

J. H. H.

suffer. The bank did not practice any fraud upon Wheeler, but the party whom he trusted did. When one of two innocent persons must suffer, the one whose negligence

contributed to the loss must bear it. *Holl v. Smith*, 14 Bush, 611; *Terry v. Hazlewood*, 1 Duv. 109.
The judgment is affirmed.

MINNESOTA SUPREME COURT.

John BRAUN, *Respt.*,
v.
NORTHERN PACIFIC RAILWAY COMPANY, *Appt.*

(.....Minn.....)

- *1. The law implies a contract on the part of a parent who enters a railroad train with a child *non sui juris* and subject to payment of fare, to pay the fare of such child.
2. If he refuse to pay such fare, both may be expelled and removed from the train, even though the parent tenders payment of his own fare.
3. The forcible ejection and removal of a child of tender years from a railroad train on which it has taken passage with its parent, for the failure of the parent to pay the child's fare, is, whether rightful or wrongful, in effect the ejection and removal of the parent. If, in such case, the parent has paid his own fare before the removal of the child, such fare, or the unearned value thereof, must be returned, or offered to be returned, as a condition precedent to the right of removal.

(May 9, 1900.)

APPPEAL by defendant from an order of the District Court for Ramsey County overruling a motion for new trial after verdict in favor of plaintiff in an action brought to recover damages for alleged wrongful ejection from defendant's train. *Affirmed*.

The facts are stated in the opinion.

Messrs. C. W. Bunn and L. T. Chamberlain, for appellant:

If defendant had contracted to carry plaintiff's son the expulsion of the boy was wrongful. If no contract for carriage had been made, inasmuch as fare was neither paid, tendered, nor intended to be paid, defendant had a right to eject the boy, as it did, without physical injury, either at a station or elsewhere.

Wyman v. Northern P. R. Co. 34 Minn. 210, 25 N. W. 349.

A principal is only bound by acts of a special agent strictly within his authority, and a third party is bound at his peril to ascertain the limit of that authority.

1 Am. & Eng. Enc. Law, *Agency*, p. 351.

Even if the preceding conductors, knowing

*Headnotes by BROWN, J.

NOTE.—As to ejection of custodian for non-payment of child's fare, see also *Lake Shore & M. S. R. Co. v. Orndorff* (Ohio) 38 L. R. A. 140. 49 L. R. A.

the boy's age, carried him free, it is immaterial. Defendant is not bound thereby, not even if preceding conductors on the defendant's own road had done so.

Cox v. Los Angeles Terminal R. Co. 109 Cal. 100, 41 Pac. 794; *Poulin v. Canadian P. R. Co.* 6 U. S. App. 298, 17 L. R. A. 800, 52 Fed. Rep. 202, 3 C. C. A. 23; *Dietrich v. Pennsylvania R. Co.* 71 Pa. 432, 10 Am. Rep. 711; *Weikle v. Minneapolis, St. P. & S. S. M. R. Co.* 64 Minn. 296, 66 N. W. 963; *National Bank of Commerce v. Chicago, B. & N. R. Co.* 44 Minn. 224, 9 L. R. A. 263, 46 N. W. 342, 560.

The alleged contract is either without consideration or invalid as an attempted variation by parol of a contemporaneous written contract.

Tickets are contracts for the carriage of one person each.

Dunlap v. Northern P. R. Co. 35 Minn. 203, 28 N. W. 240; *Poulin v. Canadian P. R. Co.* 6 U. S. App. 298, 17 L. R. A. 800, 52 Fed. Rep. 197, 3 C. C. A. 23; *Hill v. Syracuse, B. & N. Y. R. Co.* 63 N. Y. 103, 29 Am. Rep. 103; *Fetter, Carr.* § 276.

The policy of the law arising from necessary business methods requires every passenger of fare-paying age to show some written evidence of his right to ride. If he does not he cannot expect to ride. His ejection furnishes no ground for damages, and his only cause of action is for the breach of contract.

Poulin v. Canadian P. R. Co. 6 U. S. App. 298, 17 L. R. A. 800, 52 Fed. Rep. 197, 3 C. C. A. 23; *Bradshaw v. South Boston R. Co.* 135 Mass. 498, 46 Am. Rep. 481; *McKay v. Ohio River R. Co.* 34 W. Va. 65, 9 L. R. A. 132, 11 S. E. 737; *Frederick v. Marquette, H. & O. R. Co.* 37 Mich. 342, 26 Am. Rep. 531; *Forton v. Milwaukee, L. S. & W. R. Co.* 54 Wis. 234, 41 Am. Rep. 23, 11 N. W. 482; *Townsend v. New York C. & H. R. R. Co.* 56 N. Y. 295, 15 Am. Rep. 419; *Peabody v. Oregon R. & Nav. Co.* 21 Or. 121, 12 L. R. A. 823, 26 Pac. 1053.

Messrs. Stevens, O'Brien, Cole, & Albrecht and Moritz Heim for respondent.

Brown, J., delivered the opinion of the court:

This action is one to recover damages for the alleged wrongful expulsion of plaintiff and his infant son from one of defendant's passenger trains on August 7, 1898. The facts are as follows: On August 5, 1898, plaintiff applied to a railroad ticket agent at Cleveland, Ohio, for through railroad

tickets from that city to Hebron, in the state of North Dakota, for himself, wife, four children, and two adult persons, not members of his family. What occurred between him and the ticket agent is best disclosed by the evidence, as follows:

Q. Well, did you have any talk with this man before you bought the ticket?

A. Yes.

Q. Now tell us slowly, what that talk was, so all these gentlemen will understand you.

A. I come to the office, and ask what it cost,—a ticket to North Dakota, Hebron; one ticket. He tell me it cost \$29,—one ticket.

Q. He told you \$29, the price of the ticket?

A. Yes; one ticket. And he says when I buy more tickets I get cheaper. And I tell him I got four small children, and I and my wife and two girls, and he says—

Q. He says what?

A. He says, 'I give you four tickets for the whole family, for the whole eight persons, and you pay me for every ticket \$27.-25.' And I say, 'All right,' and I give him \$100, and put my name, and he gave me four tickets.

Q. Was anything said between you about the ages of the children?

A. No, nothing. I ask him before I buy the tickets, 'I got four small children.' He ask me how old the oldest one. I told him eight years. He says: 'All right. He pay nothing.'

The tickets were delivered to plaintiff, and he at once started on his journey with the members of his party, reaching St. Paul on the morning of August 7. The agent of whom such tickets were so purchased was an agent of the Nickel Plate Railroad Company, but was authorized to sell through tickets over connecting lines between Cleveland, by way of and over defendant's line, to said Hebron, North Dakota. As stated, plaintiff's party consisted of four adult persons and four children. Among the children was a boy of the age of eight years. Plaintiff obtained no separate ticket for the boy, and had no written evidence that he was entitled to passage with the other members of the party, but plaintiff claims that his right of passage was covered and secured by the contract with the Cleveland agent under which the tickets were purchased. Counsel for defendant do not question the authority of this agent to sell the tickets to plaintiff, nor the validity of the tickets. But they do question and contest the validity of the alleged contract for the passage of the boy without payment of fare. They insist that the authority of the Cleveland agent was limited to selling tickets, and that he had no authority or power to contract for the transportation of children without tickets, nor to agree for the defendant company that children over five years of age should be carried free. Defendant's passenger rates and instructions to agents were offered and received in evidence, from which it appears, among other things, that children under twelve and over five years are required to pay half-fare rates for tickets or transportation. Whether the Cleveland agent had authority to make a contract, binding on defendant, for the transportation of plaintiff's boy free,—for such is the result of the transaction shown by plaintiff's testimony,—is a question clothed in much doubt, and is difficult of solution. We are not agreed on the subject. And as another feature of the case, presented by the pleadings and evidence, renders a decision of the question unnecessary, we pass it without discussion. The evidence tending to prove such contract may be referred to upon the question whether plaintiff entered defendant's train with his boy, and insisted upon his passage without a ticket other than the one he himself possessed, in good faith, and without wrongful intent to defraud the company; and it was proper for the consideration of the jury on the question of damages. While we differ on the question of the authority of the Cleveland agent to enter into the alleged contract for the free transportation of the boy, we are agreed that plaintiff's recovery should be sustained on the rule laid down in the case of *Wardwell v. Chicago, M. & St. P. R. Co.* 46 Minn. 514, 13 L. R. A. 596, 49 N. W. 206.

Plaintiff and his party entered one of defendant's trains on the morning of August 7, 1898, at St. Paul, to continue their journey to Hebron. Before arriving at Minneapolis, the conductor or ticket collector in charge of the train took up their tickets, and returned in place thereof conductor's checks or tickets, the precise nature of which is not shown by the evidence; but we may assume, basing such assumption upon a common knowledge of the custom of railroad companies in such matters, that the tickets or checks returned to plaintiff were the ordinary checks given by conductors, and entitled the plaintiff to passage on that day and train only. On discovering that plaintiff's eight year old son had no ticket, the conductor demanded that his fare be paid, or that he leave the train. Plaintiff refused to pay the fare, claiming that he was entitled to free passage under the contract with the Cleveland agent. The conductor refused to recognize such contract, and ejected the boy from the train as it was leaving the station at Minneapolis, but did not return, or offer to return, to plaintiff his ticket. The train was in motion at the time, but the boy was in no way injured. Upon the expulsion of his son, plaintiff left the train, and remained with him. Before doing so, he handed to his wife the conductor's checks or tickets given him in lieu of his tickets, and she continued on her journey with the other members of the party. Plaintiff and his son resumed their journey some four days later. It is conceded that plaintiff had a ticket entitling him to passage on defendant's train to Hebron, and it may be conceded that his son, who was of fare-paying age, had no ticket and no right to a free passage; and we have for consideration the question whether the

expulsion of the son from the train for the failure of the father to pay his fare, without first having returned, or offered to return, the latter's ticket, was a violation of the contract to carry the father to his destination, or such a wrong as to render it liable in damages. The father having entered the train with his son, who, as we have noted, was but eight years old, and having refused to pay his fare when demanded, the defendant had the lawful right to eject them both from the train. *Beckwith v. Cheshire R. Co.* 143 Mass. 68, 8 N. E. 875; *Lake Shore & M. S. R. Co. v. Orndorff* (Ohio) 38 L. R. A. 140, and cases cited in the note. This is on the theory that, as the parent is in charge of the child who is *non sui juris*, the law implies a contract on his part to pay the child's fare, and, on his refusal to do so, both may be expelled from the train. *Philadelphia, W. & B. R. Co. v. Hoefflich*, 62 Md. 300, 20 Am. Rep. 223, 18 Am. & Eng. R. Cas. 373. There is no claim that plaintiff was personally expelled or removed from the train, or that he was requested or ordered to get off. The contention on his part in this respect is that the forcible removal of his son was, under the circumstances, a justification for his leaving the train, and, in effect, his removal as well as the removal of the son. Counsel for defendant conceded on the argument that, if the removal of the son was wrongful, it would operate as the removal of the father, but contended that, if the removal of the son was rightful, then such removal would not operate as the removal of the father. We cannot concur in this latter contention. The reason for the rule that the expulsion of the child operates as an expulsion of the parent is the same, whether applied to a case where the child may be lawfully and rightfully removed, or to a case where such removal is wrongful. The reason for the rule is found in the laws of humanity and nature. It is the parent's duty to care for and protect his child. There is an inseparable bond of unity between them. And to hold that where the child is forcibly removed and ejected from a railroad train in a strange city, among strangers, whether rightfully or wrongfully, the act of the parent in following the child is purely voluntary on his part, and that such removal of the child is not in effect the removal of the parent, would do violence to the sacred relations existing between parent and child, and the laws of humanity and nature. In such case the departure of the parent from the train is not voluntary in the sense that it is of his own choosing or of his own free will. On the contrary, the act of the railroad company in removing the child is the inducement, the cause, and it would be unreasonable to say that under such circumstances the parent left the train of his own free will. So we conclude that the ejection of a child of tender years from a railroad train for the failure of the parent in charge of and accompanying the child to pay its fare, whether rightful or wrongful, is in effect the ejection and removal of such parent. *Gibson v. East Tennessee, V. & G. R. Co.* 30 Fed. Rep. 904.

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It remains to be considered whether the failure of defendant to return to plaintiff his ticket, or its unearned value, renders it liable to him in this action. The complaint is broad enough to sustain such recovery, and we believe the question is ruled by the case of *Wardwell v. Chicago, M. & St. P. R. Co.* 46 Minn. 514, 13 L. R. A. 596, 49 N. W. 206. It is there held that such failure to return the fare actually paid by the passenger renders the company liable. We quote from the opinion in that case: "As precedent to the right to expel him from the train, he [the conductor] should have returned to plaintiff what he was entitled to of the money, and until he did that he had no right to put him off. It is true, he returned it to him immediately after the expulsion. But the wrong had then already been committed, and could not be repaired by doing what ought to have been done before the expulsion." It was not the duty of plaintiff to demand the return of his ticket before leaving the train, but, on the contrary, it was the duty of the conductor of the train to return it, or its equivalent, as a condition precedent to his right to eject him. *Bland v. Southern P. R. Co.* 55 Cal. 570, 36 Am. Rep. 50. Nor is it important or material to the right of action that a ticket was subsequently furnished him, with which he continued his journey. *Wardwell v. Chicago, M. & St. P. R. Co.* 46 Minn. 514, 13 L. R. A. 596, 49 N. W. 206. It is not disputed but that defendant's conductor or collector took up plaintiff's ticket, returning to him a conductor's check; and it is not claimed that the original ticket was returned, or offered to be returned, before the boy was ejected. If, as suggested by a member of the court, the original ticket had been canceled by the conductor, and thereby rendered worthless and of no value as an evidence of plaintiff's right of passage on a subsequent train, then it was the duty of defendant to return in lieu thereof its unearned value, or some evidence or token which would answer every purpose of the ticket uncanceled. We are unable to distinguish this case on principle from the *Wardwell Case*, and feel constrained to follow and apply the law there laid down. A verdict of \$200 was sustained in that case, and no reason occurs to us why the same amount should not be sustained in this case. We have examined all the assignments of error, and find none of sufficient consequence to warrant a new trial. The charge of the court that the jury might take into consideration the plaintiff's pecuniary condition, in reduction of damages,—for such is the effect of the charge,—was in defendant's favor, and furnishes no ground for complaint. The fact that the instruction on this subject was favorable to defendant was recognized by its counsel, as shown by the exception taken thereto, and no exception was taken because it was adverse to defendant's rights or interests.

The order appealed from is affirmed.

A petition for rehearing having been filed,

Brown, J., on May 22, 1900, handed down the following response:

In view of the vigor and earnestness shown in appellant's application for a reargument on this cause, we deem it not out of place to add just a word in denying it. The original opinion was prepared after such consultation and examination as the press of business before the court would warrant, and the statement there made concerning the custom of conductors in taking up tickets from passengers, and returning to them a substitute amounting to no more than an evidence that the passenger has paid his fare, was based on what we supposed and believed, and still suppose and believe, to be known to every person who has ever traveled on railroad trains. The authorities supporting us are numerous. *Isaacson v. New York C. & H. R. Co.* 94 N. Y. 278, 46 Am. Rep. 142;

Smith v. Potter, 46 Mich. 258, 41 Am. Rep. 161, 9 N. W. 273; *Merchants' Nat. Bank v. Hall*, 83 N. Y. 338, 38 Am. Rep. 434; *Gregory v. Wendell*, 39 Mich. 337, 33 Am. Rep. 390; *Downey v. Hendrie*, 46 Mich. 498, 41 Am. Rep. 177, 9 N. W. 828. "Judges cannot denude themselves of that knowledge of the incidents of railway traveling which is common to us all." *Siner v. Great Western R. Co.* L. R. 4 Exch. 123. And we may add, further, in taking final leave of the case, that the "conductor's exchange checks" appended to the application for reargument corroborate the assumption indulged in by the court. They expressly provide that they are good for one continuous passage to place of destination. And plaintiff, having begun his passage thereunder, was bound to continue it, otherwise the check would be invalid. Application denied.

MISSISSIPPI SUPREME COURT.

ILLINOIS CENTRAL RAILROAD COMPANY, *Appt.*,
v.
Paul SIMS.

(.....Miss.....)

The negligence of a gratuitous bailee of a mule while using the animal for the very purpose for which it was loaned is imputable to the owner, so as to prevent recovery against a third person whose negligence, combined with that of the bailee, caused the mule's death.

(February 5, 1900.)

A PPEAL by defendant from a judgment of the Circuit Court for Madison County in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's mule. *Reversed.*

Statement by **Woods, Ch. J.**:

This suit was brought by appellee, Paul Sims, against the Illinois Central Railroad Company, to recover damages for the injury of a mule by running cars in the town of Canton. The mule in question was at the time of the injury being driven by one Dixon to whom the owner, Paul Sims, had loaned it for the time being. The mule was driven upon the railroad track by Dixon, and struck by the cars, and fatally injured. On the trial the evidence as to the contributory negligence of the party driving the mule was conflicting. Witnesses for plaintiff testified that Dixon drove up to the crossing, and stopped for some time, as a switch engine was seen there, and it was thought that it would cross, but that the switch engine stopped, and that Dixon started across the

railroad slowly with his wagon and team; that there were some box cars standing on the track, that prevented Dixon from seeing the north-bound passenger train, which was nearing the crossing, and ran into Dixon's wagon, and injured the mule. Several witnesses for defendant testified that when Dixon drove on the track the north-bound passenger train, which was due at that time, was coming near the crossing, and that the whistle had blown, and that the bell was ringing; that one Kennedy, an engineer of the railroad company, who was walking along the track near the crossing, hallooed to Dixon to "look out," and motioned to him to stop; that Dixon hurried his team, and attempted to cross before the train, and that the wagon was struck, and the mule injured. The court below gave a peremptory instruction to the jury to find a verdict for plaintiff, and from a verdict in accordance with the instruction defendant appeals.

Messrs. Mayes & Harris for appellant.
Mr. H. B. Greaves for appellee.

Woods, Ch. J., delivered the opinion of the court:

It appears that the appellee had loaned his mule to one Dixon, to be used by him (Dixon) in hauling sand, and while so using the animal for the purpose for which it was loaned the injury was inflicted which caused its death. The case is one of injury by a stranger to a bailor's property in the hands and care of a bailee, and the question to be determined is: If the bailee was guilty of contributory negligence in the act complained of, is his contributory negligence imputable to the bailor? Acting within the scope of his employment, the negligence of the agent is imputed to his principal, that of the servant to his master, and that of a bailee for hire to the bailor. Why the contributory negligence of a gratuitous bailee, while using the property for the very pur-

NOTE.—As to the liability of a third person to a bailor for injury to property in possession of the bailee, see also *New Jersey Electric R. Co. v. New York, L. E. & W. R. Co.* (N. J. L.) 43 L. R. A. 849.
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pose for which it was loaned, should not be imputed to the bailor who intrusted it to the bailee to be thus used, we are unable to see. There is the same privity of contract, in all essential features, as in bailment for hire and as in engagements between principal and agent and between master and servant. This view is re-enforced by the consideration of another question, *viz.*, Could a gratuitous bailee, who was guilty of contributory negligence, recover in his own name against a stranger for an injury to property loaned? Certainly not, for the defense to his complaint would be upon the service. But the bailor and the bailee must recover, if at all, on the same facts, and under the same circumstances. We have held that the bailee may, in a proper case, recover in his own name. *Baggett v. McCormack*, 73

Miss. 552, 19 So. 89. Whatever entitles to a recovery entitles either bailor or bailee to such recovery; *e converso*, whatever forbids a recovery to the bailee will also defeat the bailor's action. The evidence offered by the appellant tended to show that Dixon, the bailee in charge of the mule, and using it in accordance with the terms of the bailment, was guilty of contributory negligence in the act of injury; and, if this had been satisfactorily established, then this negligence must be imputed to Paul Sims, the bailor, and should defeat a recovery.

The evidence should have been submitted to the jury, that it might have passed upon the question of Dixon's contributory negligence; and, because this was not done, *the case will be reversed*, and remanded for a new trial.

MISSOURI SUPREME COURT (Division 1).

Thomas UTLEY, *Appt.*,

v.

Phillip M. HILL *et al.*, *Respts.*

(.....Mo.....)

1. A ruling of the trial court upon the weight of evidence is not subject to review.
2. The liability of bank directors and officers under Rev. Stat. 1889, § 2760, for deposits accepted with the directors' assent, after they had knowledge that the bank was insolvent or in failing circumstances, does not extend to deposits received when they did not have actual knowledge of the bank's condition, but acted in good faith and were innocent of wrong doing, although they were negligently ignorant of the bank's condition, which they could have ascertained if they had not neglected to investigate or keep posted as to its affairs.
3. False statements in a report which a banking corporation is required to make to the secretary of state by Rev. Stat. 1889, § 2752, making it a misdemeanor punishable by fine or imprisonment for the directors to refuse to make the statement, or wilfully and corruptly to make a false statement, will not make the directors liable to a common-law action for deceit by one who made a deposit in the bank, relying on such report, if they made the statements in good faith, honestly believing them to be true.
4. A court may act upon the evidence reported by a referee, and find therefrom different conclusions of fact from those reported by him, instead of again referring the case.

(March 14, 1900.)

APPEAL by plaintiff from a judgment of the Circuit Court for Saline County in favor of defendants in an action brought to hold defendants liable as directors of an insolvent bank for losses to plaintiff as a depositor because of negligence and false state-

NOTE.—As to the liability of bank directors, see *Swentzel v. Penn Bank* (Pa.) 15 L. R. A. 305, and *note*; *Warner v. Penoyer* (C. C. A. 2d C.) 44 L. R. A. 781; and *Lamson v. Beard* (C. C. A. 7th C.) 45 L. R. A. 822.

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ments on the part of defendants which were alleged to have caused the loss. *Affirmed.*

The facts are stated in the opinion.

Messrs. Leslie Orear and Alf F. Reector, for appellant:

The finding of the referee in this case is a general finding, and the law does not require the report of the referee to be in any particular form, or that he shall incorporate special findings of fact with the general finding.

Mo. Rev. Stat. 1889, § 2153.

The court erred in eliminating from consideration, in determining the liability of the defendants under the first count of the petition, the effects of negligent ignorance, or that knowledge with which the performance of a duty imposed by law would clothe the defendants, and conclusively charge them with such knowledge.

3 *Thomp. Corp.* § 4107; *Delano v. Case*, 121 Ill. 249, 12 N. E. 676, 17 Ill. App. 531; *Solomon v. Bates*, 118 N. C. 311, 24 S. E. 478; *Tate v. Bates*, 118 N. C. 287, 24 S. E. 482; *Baater v. Coughlin*, 70 Minn. 1, 72 N. W. 797.

The duties prescribed by the Missouri statute for bank directors are personal duties, and by express provision of the statute the directors are thus brought into direct relationship to the depositors and creditors, and the directors are, as a matter of law, conclusively bound to know: (1) Those things which are necessary for them to know in order to properly perform their duties; (2) those things which a proper performance of their duties would bring to their knowledge shortly after their occurrence.

State v. Battley, 131 Mo. 464, 33 S. W. 41; *Finn v. Brown*, 142 U. S. 56, 35 L. ed. 936, 12 Sup. Ct. Rep. 136; *Martin v. Webb*, 110 U. S. 7, 28 L. ed. 49, 3 Sup. Ct. Rep. 428; *German Sav. Bank v. Wulfekuhler*, 19 Kan. 60; *Marshall v. Farmers' & M. Sav. Bank*, 85 Va. 676, 2 L. R. A. 534, 8 S. E. 586; *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 779; *Seale v. Baker*, 70 Tex.

283, 7 S. W. 742; *Kitchen v. St. Louis, K. C. & N. R. Co.* 69 Mo. 224; *Morgan v. Skiddy*, 62 N. Y. 319; *Gillet v. Phillips*, 13 N. Y. 117; *Feld v. Roanoke Investment Co.* 123 Mo. 618, 27 S. W. 635; *Brannin v. Loving*, 82 Ky. 370.

If a person dealing with trust property fails to investigate when put upon inquiry he is chargeable with all knowledge that it is reasonable to suppose he would have acquired if he had performed his duty.

Lord v. Goodall, N. & P. S. S. Co. 4 Sawy. 300, Fed. Cas. No. 8,506; *Laurence v. Dana*, 4 Cliff. 68, Fed. Cas. No. 8,136; *May v. Chapman*, 16 Mees. & W. 360.

Where there is a duty of finding out and knowing, negligent ignorance has the same effect in law as actual knowledge.

3 Thomp. Corp. § 4108; *Kitchen v. St. Louis, K. C. & N. R. Co.* 69 Mo. 265; *Loring v. Groomer*, 110 Mo. 641, 19 S. W. 950; *Alcorn v. Chicago & A. R. Co.* 108 Mo. 92, 18 S. W. 188; *Vaughn v. Tracy*, 22 Mo. 420; *Drey v. Doyle*, 99 Mo. 466, 12 S. W. 287; *Abbe v. Justus*, 60 Mo. App. 308.

The statute makes such directors the active agents of banking corporations in directing and managing the affairs of such banks, and these duties cannot be delegated by them to any other agency so as to permit them to escape the effects of the knowledge of such facts as the personal performance of those duties would disclose.

3 Thomp. Corp. §§ 4107, 4108; *Mechem, Agency*, §§ 185, 186; 1 *Morawetz, Priv. Corp.* § 536; 1 *Perry, Tr.* §§ 287, 402; *Thompson v. Greeley*, 107 Mo. 577, 17 S. W. 962.

The statute makes the failure of the bank prima facie evidence of both assent and knowledge on the part of the directors, and they may be estopped from denying knowledge on the same principle of law as would work an estoppel to deny any other fact.

Seale v. Baker, 70 Tex. 290, 7 S. W. 742; *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 779; *Janet v. Nims*, 7 Colo. App. 88, 43 Pac. 147; *Bigelow, Estoppel*, § 538; 1 *Morse, Banks & Banking*, § 128; 3 *Wait, Act. & Def.* 436; *Kinkler v. Jurica*, 84 Tex. 116, 19 S. W. 359; *State v. Buck*, 108 Mo. 622, 18 S. W. 1113.

No man is permitted to set up or rely upon his own fault, or breach of duty in exculpation of, or as defense to, liability.

Williams v. McKay, 40 N. J. Eq. 189, 53 Am. Rep. 779; *Gordon v. Bruner*, 49 Mo. 572; *Louisville & N. R. Co. v. Alexander*, 16 Ky. L. Rep. 306, 27 S. W. 981; *Oakland Bank of Savings v. Wilcox*, 60 Cal. 126; *Thompson v. Greeley*, 107 Mo. 577, 17 S. W. 962.

If the defendant directors knew that the Citizens' Stock Bank was open for the transaction of business and the reception of deposits at the time that plaintiff deposited his money in said bank, they must be found as assenting to the reception of deposits.

State v. Sattley, 131 Mo. 491, 33 S. W. 41; *Seale v. Baker*, 70 Tex. 283, 7 S. W. 742; *State v. Yetzer*, 97 Iowa, 423, 66 N. W. 737; *Patterson v. Stewart*, 41 Minn. 84, *sub nom.* 49 L. R. A.

Patterson v. Minnesota Mfg. Co. 4 L. R. A. 745, 42 N. W. 926.

Published statements are intended for the public, and are intended to be relied upon; and though such statements may not be addressed to the person injured, yet, if he sees them, and relies upon them, and acts to his injury, he has a civil remedy for damages for fraudulent deceit.

The fraudulent intent is shown when the statements are shown to be false, and were published by the defendants with the intention that they should be relied upon, although the defendants may not have known such statements to be false, but did know and were conscious of the fact that the said statements were published by them without knowing whether they were true or false.

Hamill v. Abell, 120 Mo. 188, 25 S. W. 516; *Dulaney v. Rogers*, 64 Mo. 201; *Walsh v. Morse*, 80 Mo. 568; *City Bank v. Phillips*, 22 Mo. 85, 64 Am. Dec. 254; *Oable v. McCune*, 26 Mo. 371, 72 Am. Dec. 214; *Ring v. Charles Vogel Paint & Glass Co.* 44 Mo. App. 111; *Prescott v. Haughey*, 65 Fed. Rep. 653; *Litchfield v. Hutchinson*, 117 Mass. 197; *Bigelow, Fr.* 509, 516; *Cook, Stock & Stockholders*, §§ 353, 354; *Bolles, Bank Officers*, § 87, p. 48; *Cooley, Torts*, 2d ed. § 404, p. 577; *Bank of Atchison County v. Byers*, 139 Mo. 627, 41 S. W. 325; *Trimble v. Reid*, 19 Ky. L. Rep. 604, 41 S. W. 319; *Hun v. Cary*, 82 N. Y. 70; *Solomon v. Bates*, 118 N. C. 321, 24 S. E. 478; *Bigelow, Estoppel*, 5th ed. 610; *Nauman v. Oberle*, 90 Mo. 666, 3 S. W. 380; *Union Nat. Bank v. Hunt*, 76 Mo. 439.

Where the defendants in an action for deceit are charged with the duty of knowing the condition of the banking corporation and managing its affairs, and are conscious of the fact that they have the means of knowledge at their command, and publish such statements as to the financial condition of such corporation showing the same to be solvent without knowing whether such statements are true or false, but publish them as true as of their own knowledge, when they are conscious of the fact that they have no knowledge on the subject, such statements, if false and intended to be relied upon by the public, are fraudulent.

Cooper v. Schlesinger, 111 U. S. 148, 28 L. ed. 382, 4 Sup. Ct. Rep. 360; *Brooks v. Hamilton*, 15 Minn. 26, Gil. 10; *Hubbard v. Weare*, 79 Iowa, 678, 44 N. W. 915; *Graves v. Lebanon Nat. Bank*, 10 Bush, 23, 19 Am. Rep. 50; *Cooley, Torts*, § 494; *Bolles, Bank Officers*, § 87, p. 48; *Prewitt v. Trimble*, 92 Ky. 180, 17 S. W. 356; *Cook, Stock & Stockholders*, 2d ed. §§ 353, 354; *Cole v. Cassidy*, 138 Mass. 427, 52 Am. Rep. 284; *Morse v. Swits*, 19 How. Pr. 275; *Cazeaux v. Mahi*, 25 Barb. 583; *Meyer v. Amidon*, 23 Hun, 553; *Fisher v. Mellen*, 103 Mass. 506; *Central R. Co. v. Kisch*, L. R. 2 H. L. 100; 2 *Addison, Torts*, § 1184; *Solomon v. Bates*, 118 N. C. 321, 24 S. E. 478; *Caldwell v. Bates*, 118 N. C. 323, 24 S. E. 481; *Tate v. Bates*, 118 N. C. 287, 24 S. E. 482; *Seale v. Baker*, 70 Tex. 283, 7 S. W. 742; *Bigelow, Estoppel*, § 538; *Nevada Bank v. Portland Nat. Bank*, 59 Fed.

Rep. 345; 3 Sutherland, Damages, §§ 587, 588; *Caldwell v. Henry*, 76 Mo. 254.

Messrs. W. M. Williams, Samuel Boyd, John A. Rich, S. B. Burks, Thomas Shackelford, and Davis & Dugins for respondents.

Marshall, J., delivered the opinion of the court:

This is an action by a depositor in the Citizens' Stock Bank of Slater against the directors thereof to recover \$8,000, lost by the failure of that bank. The petition is in two counts. The first count is predicated upon § 2760, Rev. Stat. 1889, which makes directors of a bank individually responsible for deposits accepted, with their assent, after they had knowledge that the bank is insolvent or in failing circumstances. The second count is an action for deceit, charging that the plaintiff was induced to make such deposit by reason of false and fraudulent representations that the bank was solvent, such representations consisting of the reports made to the secretary of state, as required by § 2752, Rev. Stat. 1889. All other such misrepresentations were withdrawn at the trial, and are therefore no longer in this case. The answers are general denials. On motion of the plaintiff, and over the objection of the defendants, the case was sent to a referee, "to hear and try the issues."

The referee's report, omitting formal preliminary recitals, is as follows: "That in said cause I find the issues upon the pleadings and evidence as follows: I find the issues in said cause, from the evidence, in favor of plaintiff; that is, I find the facts stated in the petition in both counts are true as therein alleged, except as herein otherwise indicated. I find especially the following facts: First, that one Joseph Field acted as cashier of the Citizens' Stock Bank of Slater, Missouri, from 1882 until the assignment thereof, December 17, 1894; that during all that time he was elected at each annual election in December of each year a director of said bank, and was annually appointed cashier [here follows a finding as to the terms for which the defendants were elected directors, covering the periods involved in this case]; that defendant Hill was elected annually as president of said bank from the time of its organization, in September, 1882, being elected annually by the board of directors, and that he continued to act as its president until the assignment of said bank. I further find from the evidence that the statements made to the said secretary of state, and signed by said president and cashier, were attested as correct by defendants J. W. Field, R. B. Eubank, and W. I. Garnett, by their signatures as directors to the one purporting to show the condition of said bank February 20, 1894, and referred to in evidence; that the statement in evidence made to said secretary of state, and purporting to show the condition of said bank June 2, 1894, was signed and attested by defendants P. C. Storts, R. B. Eubank, and W. I. Garnett as directors; that the statements in evidence made to said secre-

tary of state, showing the condition of said bank January 17, 1891, and May 16, 1891, were signed and attested by defendants Wm. I. Garnett, J. W. Field, and R. B. Eubank as attesting directors; that the statements to said secretary of state in evidence, showing the condition of bank January 2, 1892, and May 16, 1892, were signed by the defendants Wm. I. Garnett and J. W. Field; that the statements in evidence to said secretary of state showing the condition of said bank October 31, 1892, and April 22, 1893, were signed by defendants Garnett, Eubank, and Field as attesting directors; that the statement in evidence showing the condition of said bank September 16, 1893, made to said secretary of state, was signed by defendants Storts and R. B. Eubank; that at the time of signing said statements said defendants knew that the same would be published and were being published in the newspapers published and circulated in Slater, where said bank was situated; that the statements aforesaid represented and showed said bank to be in a good and solvent condition, whereas, in fact, I find from the evidence that said bank was insolvent at the dates mentioned in said several statements, and had been insolvent from December, 1887, until its close, December 15, 1894; that said several defendants, when they signed said several statements, did so without any examination of the books, notes, and securities claimed to be in the possession of said bank, and without knowing whether the statements contained therein as to the condition of said bank were true or not; that they severally signed said statements relying on said cashier's statement or representations that the same was true, and without knowing whether the same was true or not; that they signed said statements with the knowledge and expectation that the same would be published in the newspapers published and circulated among the people where the said bank was situated; that said statements were signed by said defendants without any order of the board of directors of said bank as such board; that said defendants signed said statements with full knowledge on their part that they had not examined the cash, notes, or books showing the condition of said bank, and which purported to be in the possession of said bank. I find further from the evidence that the directors of said bank only held annual meetings, and then for the election of cashier and other officers; that these meetings were just after the annual election of directors by the stockholders; that they never at any time required the cashier or any of the officers of said bank to give any bond; that the reputation of said Joseph Field while acting as cashier of said bank was that of a good business man, as well as a man of integrity and wealth, up to the time of said bank's assignment, and that defendants had knowledge of and relied on said reputation of said cashier for integrity and wealth. I further find from the evidence that during the said time said defendants were acting as directors of said bank they were frequently about the

bank, and had access to the books, papers, notes, and securities belonging to said bank, and that they could, by the exercise of ordinary care and diligence, have known the true condition of said bank at the time of said several statements so made to the secretary of state as aforesaid, or could, with the means of knowledge at their command, have known that said bank was insolvent at the dates of said several statements so signed by them as aforesaid, by examination. That the books of said bank, which were accessible to said defendants, and could have been examined by them if desired, showed that one Mead Mercantile Company was constantly indebted from December 30, 1887, to the date of said assignment to said bank, in divers large sums of money, evidenced by notes and overdrafts, ranging from about \$4,500, November 7, 1887, up to \$77,000, December 15, 1894, with an overdraft of \$7,825.97 at last-named date. That said indebtedness, December, 1888, amounted to over \$60,000; June, 1889, to about \$44,000; December, 1890, \$45,000; December, 1891, to over \$74,000; June, 1892, over \$75,000; December, 1892, \$73,000, with overdraft for \$10,787.42 in addition; June, 1893, over \$73,000; December, 1893, \$73,000, with overdraft for \$12,474.49; June, 1894, \$64,500 in notes with overdraft of \$14,483.29; December 15, 1894, note for \$77,000, with overdraft for \$7,825.97. That one firm, composed of W. B. Storts and J. D. Eubank, styled 'Storts & Eubank,' were constantly indebted to said bank in notes and large overdrafts from December 30, 1887, to February 13, 1892, in amounts ranging from \$52,000 at the former date in notes (and overdrafts for \$1,895.11) to \$117,294 at the latter date. That between said dates the amount of indebtedness gradually increased, until June, 1891, it amounted in notes to \$146,691, and overdraft for \$10,778.32. That their overdraft alone amounted, June 30, 1888, to \$16,401.19, with notes at over \$52,000. That their indebtedness in June, 1889, was over \$90,000; June, 1890, over \$122,000; December, 1890, over \$136,000. That said firm continued indebted to said bank, according to the books at the time of the assignment of the bank, for \$117,294. That said book showed an individual indebtedness of said W. B. Storts of over \$8,000 in June, 1891; over \$19,000, December, 1891; nearly \$25,000, June, 1892; over \$30,000, December, 1892; over \$35,000, June, 1893; over \$38,000, December, 1893, over \$54,000, June, 1894; and over \$57,000 at the closing of said bank. That part of said indebtedness consisted in overdrafts at those dates. That the books of said bank showed on their face a constant indebtedness on the part of said cashier between December 30, 1887 (when he owed the bank \$7,000 in notes and overdrafts), and over \$19,000 at the close of the bank, on December 15, 1894. That the account of said cashier showed almost a constant overdraft, and frequently for large amounts. For instance, in December, 1890, his account showed notes due from him \$6,000, and overdrafts \$13,529.46; June, 1892, \$11,340

in notes, and over \$2,600 in overdrafts; in December, 1892, the same amount of notes, and \$9,341.84 overdrafts; June, 1893, notes due by him \$11,912, and overdraft \$11,939.83; December, 1893, over \$14,000 in notes and overdrafts; in June, 1894, \$12,100 in notes, and \$8,164.96 in overdrafts. That one firm, of B. P. Storts & Co. (said Joseph Field being a member of said firm), as shown by said books, was indebted to said bank in notes and overdrafts, in December, 1891, for over \$6,000; in June, 1892, nearly \$17,000; in December, 1892, over \$15,000; in June, 1893, nearly \$17,000; in December, 1893, nearly \$22,000 (the overdrafts being over \$7,000); in June, 1894, over \$32,000; on December 15, 1894, \$42,300 in notes, and \$4,179.70 overdrafts. That one Josiah Baker, Jr., was between December 30, 1887, and December 15, 1894, constantly indebted as shown by the books of said bank, for large amounts of notes and overdrafts,—that is to say, over \$17,000 at the former date, and at the latter date \$77,500 in notes and \$9,790.59 in overdrafts. That said accounts showed that in June, 1889, he owed the bank over \$86,000; June, 1890, about \$50,000; June, 1891, over \$76,000; June, 1892, \$83,000 in notes, and \$13,094.39 in overdrafts; June, 1893, over \$71,000; in December, 1893, over \$56,000; in June, 1894, over \$68,000. I find that said debtors were insolvent. I further find from the evidence that defendants all had knowledge that said debtors aforesaid were indebted to said bank at various times while they were acting as directors, but the evidence does not disclose that defendants had knowledge of the full extent of the indebtedness of said defendants; that said defendants had knowledge that said Joseph Field was a member of the firm of B. P. Storts & Co.; that defendants had knowledge that all said debtors aforesaid were using a good deal of money out of said bank, and that said Field, as cashier, was cautioned by them not to let any one man or party have too much money. I further find from the evidence that said directors, while acting as directors, committed to said cashier almost exclusively, if not entirely so, the matter of loaning money, and gave little or no personal attention on their part to the same; that, while they thus committed the management of loans and the taking of security to said cashier almost exclusively, they were about the bank frequently, making inquiry about the bank and its condition, and accepted assurances from said cashier that the same was always prospering; that, by a by-law adopted by the stockholders of said bank in 1882, it was provided that the cashier 'shall have full power and authority to create indebtedness against the bank, to sign all issues of indebtedness and make indorsements for the bank, and receive and receipt for and pay out money for the bank;' that defendants Garnett, Storts, and Hill were present at the adoption of said by-laws; that defendants knew during the time they were acting as directors that said bank was from time to time borrowing money from other banks, but it does not appear from the

evidence that they had actual knowledge of the extent of the indebtedness of said Citizens' Stock Bank to other banks while acting as directors. I further find from the evidence that said cashier, Joseph Field, was a brother of defendant J. W. Field, and that Wm. Storts and B. P. Storts, debtors of said bank aforesaid, were and are sons of defendant Storts; that Jerome D. Eubank, a member of said firm of Storts & Eubank, was, and is, a son of defendant R. B. Eubank. I furthermore find from the evidence that defendants, at no time while acting as directors, counted the cash or examined the securities and footed the same up, so as to know the amount of assets, or examined the securities given, if any, to secure money loaned, and that they did not require such securities to be exhibited to them for their sanction, nor did they give special directions to said cashier not to loan to the various debtors aforesaid shown to be so largely indebted to said bank. I further find from the facts and circumstances in evidence that defendants had their suspicions aroused by the character and kind of business of some of said debtors of said bank to such an extent that they were thereby put upon inquiry, and had they performed their duty, and examined properly into the facts, they could have discovered, by reason of such examination, the insolvency of said bank. I further find that said official statements, signed and attested by defendants, made to the secretary of state, as aforesaid, were materially different from the general balance book kept by the cashier of said bank while defendants were directors; that, by comparison of said official statements with said balance book, it will be seen that the assets and resources are often greatly inflated, often to the extent of many thousand dollars, while the liabilities often appear diminished by many thousands of dollars in the published statements as compared with the amounts shown by the books. Particularly is this shown to be true with reference to the items of 'Loans and Discounts, Undoubtedly Good, on Personal and Real-Estate Security,' 'Due from Other Banks, Good on Sight Draft,' 'Cash and National Bank Notes,' 'Surplus Funds on Hand,' 'Deposits Subject to Draft at Sight by Banks,' 'Deposits Subject to Draft at Sight by Individuals,' 'Deposits Subject to Draft at Given Dates.' These discrepancies occur all along from 1887 until the close of the bank, and range in amounts from \$25,000 to \$50,000, and often more. Said published statements were materially false, and did not state or show the true condition of the bank at the dates mentioned therein, and particularly were false as to the items of the amount of loans and discounts, and undoubtedly good, on personal or collateral security, and loans secured on real-estate security. I find further that, if defendants did in fact examine the balance books kept by the bank, and compare the same with the statements in evidence signed and attested to be correct, they must necessarily have known such statements were false, but I conclude they did not make such

comparisons or examinations. I furthermore find that had said directors, at any of the dates when they made their said statements to the secretary of state and for publication, examined the books kept by said bank, they could have ascertained the indebtedness in favor of the bank, and the character of the notes, and insufficiency of the securities therefor, to such an extent that they would thereby have discovered the insolvency of said bank. I think, as a matter of law, that when said defendants signed said statements to the secretary of state they should be held to have meant to do so as of their own personal knowledge; that the public had a right to rely on the correctness of such statements so published; that plaintiff and the public had a right to rely on the published statements as being true, and that on the faith of such statements plaintiff did rely and deposit his money as stated in petition; that it was the duty of defendants, as managing officers of said bank, to know its condition, to acquaint themselves with the assets, cash, and notes, and the nature of the security therefor; that they had no right to abdicate their function, and rely entirely upon the cashier employed by them, however good his reputation, to do their work; that if they could thus shield themselves from their duty of examining the books, and acquainting themselves with the loans made from time to time, and the securities taken therefor, there would be no necessity for the appointment of directors, under our statutes; that the law requiring three directors to attest as correct the sworn statement of the cashier and president contemplates that said directors should not be mere figureheads, but that they should sign such statements with personal knowledge of what they were doing, otherwise the publication of such statement at the place where the bank is kept would be without significance; that these statements must have been intended to advise the public with reference to the financial condition of the bank, so the public could act advisedly as to making deposits: that defendants, as directors, having special means of knowledge, would be presumed by the public, from the nature of their positions, having access to the books, notes, securities, and cash of the bank (while the public has not), to have correct knowledge, and to make no statements that would be false or misleading; that having assumed to know, as of their own personal knowledge, the actual financial condition of the bank, and signed statements purporting to show a healthy, sound condition of the same, they must be held to have intended their statements to be believed, and, if in fact materially false, they will be bound for such false statements, and cannot shield themselves under the plea that they were ignorant of the true condition of the bank when they signed such statements; that, in order to hold the defendants liable, it is not necessary that they corruptly or intentionally signed statements knowing at the time they were false, and with the intention and purpose of deceiving the public thereby. In this case I do not find from the

evidence that defendants continued on the business of the bank for the purpose of enabling them to reimburse themselves on account of having signed and indorsed obligations of said bank which did not appear in said statements and representations so made as charged in petition, nor that said business was continued for the purpose of enabling defendants to prefer themselves on account of deposits made in said bank by them as charged in said petition; that otherwise the facts so charged in the first and second counts of the petition, as hereinbefore modified, are found for plaintiff. The third count in said petition was dismissed by plaintiff. As a result of my conclusion as to the facts and the law applicable thereto, I find that the defendants are indebted to plaintiff in the sum of \$7,760, being amount deposited by plaintiff, less a credit of 3 per cent paid by assignee of said Citizens' Stock Bank; that said amount so found shall bear interest from the filing of this suit, January 25, 1895, at 6 per cent." And the referee also filed with his report all of the evidence taken on the hearing of said cause.

In due time the defendants filed exceptions (32 in number) to the report. The court sustained the 1st, 3d, 4th, 15th, 17th, 18th, 19th, 20th, 21st, 22d, 25th, and 26th, and overruled the others. Those sustained are as follows: "We except to the report of the referee: (1) Because said referee predicates his findings on the ground that the defendants had, in the management of the affairs of the Citizens' Stock Bank, as directors of said bank, been guilty of negligence which was not an issue in this case, and had been settled by a judgment of this court in another case." "(3) Because the conclusion of law of said referee, as stated in his report, that the plaintiff is entitled to recover upon the first count of the petition, is not supported by the findings of fact made by said referee in said report, in this: that said referee does not find as a matter of fact that the defendants, or either of them, did receive or assent to the reception by the Citizens' Stock Bank of Slater of the deposits by plaintiff, or did create or assent to the creation of the debt due by such bank to the plaintiff after they, or either of them, had knowledge of the fact that said bank was insolvent or in failing circumstances, but, upon the contrary thereof, found, as a matter of fact, that said directors did not have such knowledge, but simply were put upon inquiry, or by the exercise of reasonable diligence, might have obtained knowledge of the insolvency of the bank, before plaintiff's deposits were made in said bank, or the indebtedness to him was created; and, as a matter of law upon this finding of fact, the plaintiff is not entitled to recover upon the first count of the petition, as the referee erroneously reports. (4) Because the referee erroneously finds as a matter of fact that the defendants were guilty of negligence in the discharge of their duties as directors of said bank, and concludes as a matter of law that by reason of such negligence the plaintiff is entitled to recover upon the first count of the petition

upon the statutory cause given by § 2760 of the Revised Statutes of this state, and also is entitled to recover upon the second count for fraudulent representations, whereas, as a matter of law, such negligence is not sufficient to authorize a recovery upon either count of the petition herein." "(15) Because the referee finds that the defendants, as directors of the Citizens' Stock Bank, had their suspicions aroused by the character and kinds of business of some of the debtors of said bank to such an extent that they were put upon inquiry, and by properly discharging their duties could have discovered the insolvency of the bank, which finding is against the evidence and against the weight of evidence." "(17) Because the referee failed to find specifically each fact made an issue by the pleadings, and did not find whether or not the defendants, or either of them, received or assented to the reception of a deposit or deposits in the Citizens' Stock Bank by the plaintiff, or created or assented to the creation of a debt by the Citizens' Stock Bank to the plaintiff, when they knew the bank to be insolvent. (18) Because the referee finds that the statements furnished by the Citizens' Stock Bank to the secretary of state were intended by the defendants to induce the plaintiff to deposit his money in said bank or permit said bank to become indebted to him, which finding is against the evidence and against the weight of evidence. (19) Because the referee finds that the defendants were guilty of negligence in the performance of their duties as directors of the Citizens' Stock Bank, and bases his conclusions of law that the plaintiff is entitled to recover upon such findings, when in truth no such issue is raised by the petition in this cause, nor were any such issues referred to said referee, and the finding upon that point is not within the issues made by the pleadings in this cause. (20) Because the referee erroneously reports as a matter of law that the defendants must be held to have intended the statements filed with the secretary of state by the Citizens' Stock Bank, and thereafter published in the local papers at Slater, attested by them as directors of said bank, to have been made as of their own personal knowledge, whereas, as a matter of law, the plaintiff had no right to rely upon said statements as having been made by defendants as of their own personal knowledge, or as their personal statements and representations. (21) Because said referee erroneously reports and finds as a conclusion of law that the reports of the financial condition of said bank, made to the secretary of state, and published in the papers at Slater, were intended by defendants to induce the plaintiff and the public to give credit to said bank, and that said statements were the individual statements of the directors, and not the statements of the corporation, and therein said referee erred as a matter of law. (22) Because the uncontradicted facts introduced before the referee, and included in the testimony returned by him with his report, showed that the defendants, in signing and attesting the state-

ments of the financial condition of said bank to be filed with the secretary of state, in good faith wholly believing said statements to be true, and believing that they had sufficient knowledge of the affairs of said bank for the said statements, and yet said referee wholly fails to find and report distinctly and in express terms his conclusion of fact that said defendants did believe said statements to be true, and did make the same in good faith, only relying upon the reports made to them by the officers in charge of the books of said bank when the evidence before said referee fully established said fact, and the same should have been found as a matter of fact by said referee, and not stated in his report inferentially, as said referee does state the same." (25) Because the referee erroneously reports and holds, as a matter of law, that when the defendants, as directors of the Citizens' Stock Bank, signed and attested reports of its financial condition, that it was their duty to know the condition of the bank, and that they had no right to rely upon the statements of the cashier and officers in charge of the books as to their contents, but were themselves bound to know what said books contained, and that they must have had personal knowledge of the exact financial condition of the bank, and, in effect, that they were warrantors of the truthfulness of the statements aforesaid, and are liable for fraudulent misrepresentations if said statements were not absolutely correct, although believed by them to be true, and signed in reliance upon statements furnished by officers in charge of the bank of good repute, and without any facts known to defendants to excite their suspicions that such representations were false, whereas the defendants could not be held liable in an action of deceit upon any such finding of facts, and the referee erroneously reports to the contrary. (26) Because the referee's conclusions of law as to the second count of the petition are not supported by his findings of facts applicable to said count, in this: that the facts found by said referee as to the statements of the financial condition of said bank showed that said statements were attested by defendants and signed by them as directors of said bank, and that said statements appear to be the actual statements of the corporation, and were attested by defendants under the honest belief that they were true, and in reliance upon statements made to them by officers in charge of the books of the bank, and that the defendants could not be held to have made said statements falsely and fraudulently, upon the facts found by said referee, nor can they be held liable upon such facts in an action of deceit for the statements therein referred to,"—which said exceptions were afterwards taken up by the court for hearing, to wit, on the — day of August, 1897, at the said June term of the said circuit court, and, after hearing the argument of counsel, the said exceptions were taken under advisement by the court until the October term, 1897, of said Saline county circuit court.

Afterwards, to wit, on the first day of the said October term, 1897, to wit, on the 4th day of October, 1897, the plaintiff asked the court to give the following declarations of law: "The court declares the law as follows: (1) That if the evidence shows that the defendants were directors of the Citizens' Stock Bank, and that the same was a banking institution, organized and doing business under the provisions of chapter 42, art. 7, Mo. Rev. Stat., at the time stated in the plaintiff's petition, and that the said defendants, as such directors, kept said bank open for the reception of deposits therein, and while so keeping said bank open for that purpose the plaintiff deposited therein the sum of money alleged in the petition, and that the said defendants assented to the reception of said deposit after they had knowledge of the fact that the said bank was in an insolvent condition or in failing circumstances, then the finding must be for the plaintiff, and his damages assessed at such sum as the evidence may show was so deposited by him in said banking institution and remains unpaid. (2) The court further declares the law to be that if the defendant directors knew that the Citizens' Stock Bank was open for the transaction of business and the reception of deposits at the time that the plaintiff deposited his money in said bank, as stated in the petition, then the said defendants must be found as assenting to the reception of said deposits by said bank, unless the defendant directors objected thereto. (3) The court further declares the law to be that it was the duty of the defendant directors, under their office, to manage and control the affairs of the Citizens' Stock Bank, and it was their duty to know the condition of said bank, and, if the evidence shows that the plaintiff deposited his money in said bank while the same was in an insolvent condition or in failing circumstances, the law presumes that the said deposit was made with the assent of the defendants as directors, and that they had knowledge of such insolvency at the time; and, unless the defendants rebut said presumption by evidence, such presumption becomes conclusive, and the burden of proof is placed upon the defendants to show want of such knowledge or assent; and where such legal presumption is sought to be overcome by evidence, as in this case, the presumption of knowledge of said bank's insolvency is sought to be denied by the testimony of the defendants, the said knowledge must be found as a fact; but such knowledge need not be proved by direct evidence, but may be proved by facts and circumstances. And if the evidence shows that the defendants had opportunities for knowing the true condition of said bank, and were frequently at its banking house, and made inquiries of its officers as to its condition, and examined its assets and books, and had knowledge of such facts and circumstances which, if followed up by a reasonably prudent person, would have disclosed the true condition of said bank, then such knowledge may be inferred from such facts and circumstances and such opportunities for knowing

the condition of said bank. (4) The court further declares the law to be that if the evidence shows that the plaintiff, at the time stated in the second count of the petition, deposited any sum of money in the Citizens' Stock Bank, and prior to making said deposit the defendants represented the said bank to be in a solvent condition, by making and publishing written statements showing said bank to be in a solvent condition, which said statements were seen and relied upon by the plaintiff before making said deposits, and that at the time said statements were so made and published by the defendants that the said bank was in an insolvent condition, and that said statements were false, and that the defendants knew at the time that said statements were false, or that the defendants were conscious of the fact that they did not know whether the said statements were true or false, and published the same knowing that they had no knowledge as to whether said statements were true or false, and such statements were made for the purpose of inducing the plaintiff or other persons who might see them to believe that said bank was in a solvent condition, then the finding must be for the plaintiff, and his damages assessed at such sum as the evidence may show was so deposited by him in said bank and such sum as may remain unpaid. (5) The court further declares the law to be that the statements required by law to be made to the secretary of state by the defendant directors should be a true statement of the condition of the Citizens' Stock Bank, of which they were directors, at the time stated in said statements so made and signed by them, and that the said statements are for the information of the public when the same are published as required by law, and that the plaintiff and the public had a right to rely upon such published statements as being true, and that said statements read in evidence purported to be the corporate act of the board of directors of the Citizens' Stock Bank, and purported to be within the personal knowledge of such of the defendants as signed the same; and if the evidence shows that the said statements were false, and did not contain a true statement as to the condition of said bank, and the defendant directors knew at the time said statements were published that the same had not been authorized by the board of directors of said bank, and knew that the same was the individual act of said directors so signing and publishing said statements, and they knew that said statements were designed for publication, and were intended for the public, and that said statements were seen and relied upon by the plaintiff before making his said deposit, and that the defendants knew that they had no personal knowledge as to whether said statements were true or false, and that said statements were materially false, and that said bank was then in an insolvent condition instead of a sound condition, then said statements were made and published *scienter*, and the plaintiff is entitled to recover such damages as the evidence may show

that he has sustained in consequence thereof,"—which declarations of law the court refused to give, to which action of the court in refusing to give each of said declarations of law the plaintiff then and there excepted.

The court thereupon rendered a judgment upon the referee's report for the defendants, in words and figures as follows: "Now, at this day come again the parties, by their respective attorneys, and the exceptions heretofore filed by defendants to the report of Hon. Charles W. Sloan, referee, and this cause having been argued and submitted at the last term, and taken under advisement, and the court, being now fully advised of and concerning the premises, doth find from the report that the referee did determine as a fact and report that defendants did not have knowledge of the insolvency of the Citizens' Stock Bank, or of its failing condition or circumstances, at the times of the making of the deposit and the creation of the debts sued for in plaintiff's petition; and the court doth further find from said report that the referee determined and reported as a fact the various statements of the condition of the said Citizen's Stock Bank, signed by the defendants, were made by them without any knowledge or information that the same were untrue, but were made in the honest belief that said statements and representations of the condition of said bank set out and referred to in the petition were true, and that said statements and representations were made by defendants in good faith, and in reliance upon the assurances of the cashier of said bank that it was always prospering, and in reliance upon the facts furnished to them as to the financial condition of the said bank by the cashier in charge of its books; and the court, being satisfied that said finding of fact, as above set out, was proper and correct, upon the evidence reported by the referee, doth now sustain exceptions numbered 1, 3, 4, 15, 17, 19, 20, 21, 22, 25, and 26 filed by the defendants to the report of the referee, and doth now overrule all other exceptions filed by defendants to said report; and the court doth hold and determine, as a matter of law, upon the facts reported by said referee, that the plaintiff is not entitled to recover upon either count of the petition, and doth therefore find the issues for the defendants upon all the counts of the petition. Wherefore it is considered by the court that the plaintiff take nothing by his said writ, and that defendants go hence without delay, and that they have and recover of plaintiff their costs and charges in this behalf laid out and expended, and that execution issue therefor."

In proper time the plaintiff filed a motion for a new trial, which being overruled, he filed a bill of exceptions. In the abstract of the record it is stated that the evidence taken before the referee tended to support his findings of fact. The bill of exceptions did not preserve any of the evidence in the case, notwithstanding the defendants insisted upon it being embodied in full therein. So that this case is now before this court on the pleadings, the report of the referee, the

exceptions thereto, the instructions asked by the plaintiff, and the judgment of the court on the referee's report.

Of the exceptions sustained, the fifteenth and eighteenth are based upon the weight of the evidence, and the ruling of the trial court as to them will not be reviewed in this court—First, because it is the settled practice of this court not to review conflicting evidence, nor to review the rulings or findings of the trial court on such evidence; and, second, because, even if this were not so, there is no evidence before us in this case. The ruling of the trial court must therefore be taken to hold, in this regard, that the suspicions of the defendants were not aroused by the character and kinds of the business of some of the debtors of the bank to such an extent that they were put upon inquiry, and by the proper discharge of their duties they could have discovered the insolvency of the bank, and that the statements made by the defendants to the secretary of state were not intended to induce the plaintiff to deposit his money in the bank.

This leaves two questions of law in this case, to wit: First, in an action, under § 2760, Rev. Stat. 1889, by a depositor against the directors of a bank who assent to the reception of deposits after they have knowledge that the bank is insolvent or in failing circumstances, are such directors individually responsible for such deposits, unless it appears, from the whole case, that they had actual knowledge, or are they liable if it appears that they were negligently ignorant of the condition of the bank, in that they could have ascertained its condition if they had not neglected to investigate or keep posted as to the affairs of the bank, and are they so charged by law with the duty of managing the business of the bank that they are charged with knowledge, and are estopped to plead ignorance of its condition? and, second, are directors of a bank liable to depositors, in a common-law action for deceit, for statements made to the secretary of state, required by § 2752, Id., which were not true, but which they honestly believed were true, and which were in good faith based upon details furnished to them by the cashier of the bank, whose reputation was good? These questions will be treated in their order.

1. The first proposition necessitates a short retrospect of the law. The relation of a depositor to a bank is that of ordinary debtor and creditor. "The relation between the creditors and the corporation 'is that of contract, and not of trust.' *Briggs v. Spaulding*, 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. Rep. 924," followed in *Union Nat. Bank v. Hill*, 148 Mo., *loc. cit.* 396, 49 S. W. 1012. "But there is nothing, of either contract or trust, in all ordinary cases, to create any relation between the creditor and the directors." *Ibid.* Accordingly, it was held in *Union Nat. Bank v. Hill*, 148 Mo. 396, 49 S. W. 1012 (which was a suit by the creditors of this same bank against these same defendants to recover the deposits lost by the creditors by reason of the negligence

of the defendants in managing the affairs of the bank), that there could be no recovery by depositors against directors of a bank because of the negligence of the directors in managing the affairs of the bank; that the directors are liable for negligent performance of duty to the bank, or to its assignee, or to a receiver thereof, but not to the creditors, because of want of privity of contract or duty between them. So, also, in *Fusz v. Spaunhorst*, 67 Mo. *loc. cit.* 264, 265, the same doctrine was announced by this court, speaking through Sherwood, Ch. J. and it was further pointed out that, aside from statutory liability, directors were not liable individually to depositors for mere nonfeasance; that "nothing short of active participation in a positively wrongful act, intended and directly operating injuriously to the prejudice of the party complaining, will give origin to individual liability;" that the injury must be "occasioned by the malicious or fraudulent act of the party complained of." The case last referred to was an action by depositors against directors of a bank, and was based upon § 27, art. 12, Mo. Const. 1875, which is as follows: "Sec. 27. It shall be a crime, the nature and punishment of which shall be prescribed by law, for any president, director, manager, cashier, or other officer of any banking institution, to assent to the reception of deposits, or the creation of debts by such banking institution after he shall have had knowledge of the fact that it is insolvent, or in failing circumstances; and any such officer, agent, or manager shall be individually responsible for such deposits so received, and all such debts so created with his assent." It was held that this section of the Constitution was not self-enforcing, and that, as no statute had been passed carrying it into effect, there was no statutory liability of directors of a bank to its depositors, and as there was no such liability, except upon the grounds pointed out, at common law the defendants were not liable at all. By the act of May 15, 1877, the general assembly amended the law as to banks. Acts 1877, p. 28. Section 21 of that act was as follows: "No president, director, manager, cashier, or other officer or agent of any bank organized and doing business under the provisions of this act, or any law of this state, shall receive or consent to the reception of deposits, or create or consent to the creation of any indebtedness after becoming aware that such association is insolvent, or in failing circumstances. Every person violating the provisions of this section shall be individually responsible for such deposits so received and all such debts so contracted," etc. Then follow provisions allowing contribution to be recovered by one director from another, which is omitted, because not material here. At the same session the general assembly, by an act approved April 18, 1877 (Acts 1877, p. 239), amended Gen. Stat. chap. 201, relating to crimes, by adding a new section thereto, as follows: "If any president, director, manager, cashier, or other officer of any banking institution, do-

ing business in this state, shall receive or assent to the reception of any deposit of money or other valuable thing in such bank or banking institution, or if any such officer or agent, shall create or assent to the creation of any debts or indebtedness by such bank or banking institution, in consideration, or by reason of which indebtedness any money or valuable property shall be received into such bank or banking institution after he shall have had knowledge of the fact that it is insolvent or in failing circumstances, he shall be deemed guilty of larceny, and upon conviction thereof, shall be punished in the manner and to the same extent as is provided by law for stealing the same amount of money deposited, or valuable thing, if loss occur by reason of such deposit." The act of May 15, 1877, relating to civil liability, was amended by changing the words, "after becoming aware," to the words, "after he shall have had knowledge of the fact," and was carried into the Revision of 1879, with an amendment as to contributions not material here, and became § 918, art. 7, chap. 21. The act of April 23, 1877 (Acts 1877, pp. 35, 36), now § 2761, Rev. Stat. 1889, makes the insolvency or failing circumstances of the bank prima facie evidence of the knowledge and assent of the directors. The act of April 18, 1877, relating to criminal liability, was carried into the Revision of 1879, and became § 1350, art. 3, chap. 24, but it was amended by that revision by adding thereto the following proviso: "Provided, that the failure of any such bank or banking institution shall be prima facie evidence of knowledge on the part of any such officer or person that the same was insolvent or in failing circumstances when the money or property was received on deposit." The act of 1887 (Acts 1887, p. 162) extended the criminal law so as to apply to private banks. The provision as to civil liability was carried into the Revised Statutes of 1889 without any change whatever. The provision as to criminal liability (being § 1350, Rev. Stat. 1879, as amended by the act of 1887) was carried into the Revision of 1889 without change, and appears as § 3581 thereof.

Thus we see that, so far as civil liability is concerned, the only change material to this inquiry that has been made in the law since the two acts of 1877 were passed was to strike out the words, "after becoming aware," and to substitute the words, "after he shall have had knowledge of the fact," that the bank is insolvent or in failing circumstances; thereby using the same words that are employed in the Constitution and, in the criminal statute. It will be noted, however, that the criminal statute has been changed so as to make the failure of the bank prima facie evidence of knowledge on the part of any officer that the bank was insolvent or in failing circumstances when the deposit was received. *State v. Darrah*, 152 Mo. 522, 54 S. W. 226, was a criminal prosecution, under § 3581, against the president of a bank for receiving deposits after he had knowledge that the bank

was insolvent or in failing circumstances, and it was held error to refuse an instruction which declared the law to be that, notwithstanding the failure of the bank was prima facie evidence of such knowledge, still the burden of proof was not changed by the statute, but that the defendant could show the condition of the bank and circumstances tending to exonerate him from criminal liability, and then, on the whole case, the burden of proof would still rest on the state; and the same is true as to proceedings under the civil statute.

This decision disposes of the plaintiff's claim that the defendants are estopped from showing want of knowledge because it is their duty under the law to know. If anything further were needed to be said as to this contention, it would be sufficient to add that the statute only makes the failure of the bank prima facie knowledge of insolvency, whereas, if the defendants are estopped to deny knowledge because it was their duty to know, or because if they had not been negligent they would not have been ignorant, then the failure of the bank would necessarily be conclusive knowledge of insolvency, and, if this were true, there would be no defense to a suit of this character or to a criminal prosecution. It would be enough to prove the deposit and the failure of the bank, and the court would have to instruct the jury to return a verdict for the plaintiff. This would make directors and officers of a bank guarantors to the depositors of all money deposited in the bank. The history of the law, its language, and the prior decisions of this court demonstrate that neither the framers of the Constitution nor the lawmakers ever intended to provide for any such revolution in the liability of directors of a bank. The law is drastic and penal, but it does not cut off all defense. It was intended to reach and punish the guilty, not to ruin and disgrace the honest, directors, who acted in perfect good faith and without guilty knowledge. Such a construction as is here contended for would shut the doors of every bank in the state, because honest and responsible directors would not serve as such officers, and thereby incur liabilities and penalties far beyond what the law imposes on them in similar relations to all other corporations, or else a far worse condition than closing the banks would be brought about; for irresponsible and conscienceless persons could alone be induced to accept directorships or offices in banks, intending to "make hay while the sun shone," and when the crash came take a change of venue to some other jurisdiction, where the extradition laws do not apply.

The liability of directors under the criminal law must be regarded as settled by the *Darrah Case*. The civil and criminal statutes, though passed as separate acts, were passed at the same session of the general assembly, and were both enacted to carry into effect the provisions of § 27, art. 12, of the Constitution, which provides for a criminal and civil liability both, and therefore these acts may be, and should be, read together,

and a judicial construction of one applies with equal force to similar provisions of the other. The Constitution and both acts require that, to subject a director or officer to the pain and penalties denounced, "he shall have had knowledge of the fact that it is insolvent, or in failing circumstances," when he assented to the receipt of the deposit. The word "knowledge" here employed must be taken in its common acceptation; that is, in the plain or ordinary meaning and usual sense of the word. *State v. Jones*, 102 Mo. 305, 14 S. W. 946, 15 S. W. 556; *Warren v. Barber Asphalt Paving Co.* 115 Mo. 572, 22 S. W. 490; *State ex rel. Dickason v. Marion County Ct.* 128 Mo. 427, 30 S. W. 103, 31 S. W. 23. It ought to be so construed that no man who is innocent can be punished or endangered. *State v. McLain*, 49 Mo. App. 398; 4 Bacon, Abr. *Statutes*. So treated, we may properly look to the source to which men generally apply for the meaning of the word "knowledge." Webster Dict. defines "knowledge:" "(1) The certain perception of truth; belief which amounts to, or results in, moral certainty; indubitable apprehension." "(5) Information; intelligence; as, 'to have knowledge of a fact.'" The knowledge which the law requires that a director shall have had means a guilty knowledge, not an innocent, bona fide, ignorance arising from neglect to keep posted or to inquire. It must be construed to have been intended as a sword with which to punish the guilty, and a shield to protect the innocent. If this had not been the intention, the liability would have been made absolute and unqualified, instead of dependent upon knowledge. The framers of the organic and of the statute law must be held to have understood how the business of a bank is conducted. They must have known that the directors are drawn from the busiest men in the community; men who have carved success out of chaos, who have succeeded where the great multitude has failed; men who are not expected and could not afford, to give their whole time to the business of the bank. The lawmakers knew that the active management of a bank usually devolves upon the president and cashier, and that to the latter is usually intrusted the management of the details. They knew that few directors had the time, and fewer still the capacity, to examine the books of a bank, and ascertain its solvency; that even in their own business they could not take off a trial balance from the books they employed experts to keep for them, either because they had not time to do so for themselves, or because they did not have the capacity to do so. The law imposes a liability on directors of a bank which directors of no other corporation are subject to. It is a liability which is not limited to any specific amount; it is as broad as the wrongdoing—the fraud—of the director. It is a personal liability for every cent a depositor lost which a director consented to have deposited in the bank after the director shall have had knowledge of the insolvency of the bank or that it was in failing circumstances. It is an

unlimited liability, but it is not an absolute one. It is qualified by a condition the existence or nonexistence of which may make the director liable for the total amount lost by the depositor, or may not make him liable for a cent thereof. The liability is measured by the knowledge. As was said in *Fusz v. Spaunhorst*, 67 Mo. 264, 265, the directors are not liable to the depositors, "unless the injury were occasioned by the malicious or fraudulent act of the party complained of; mere nonfeasance will not answer." So it is that the plaintiff in a suit of this character must allege a fraud committed by the defendant,—a wilful act done,—in order to hold the defendant liable, and, having alleged a fraud, the burden rests on the plaintiff to prove it. And as was aptly stated by Black, J., in *Van Raalte v. Harrington*, 101 Mo. 611, 11 L. R. A. 424, 14 S. W. 710: "It is one thing to say knowledge may be inferred from facts and circumstances sufficient to put a person upon inquiry, . . . but it is a different thing to say such circumstances are, as a matter of law, knowledge." In this case there is no pretense that the defendants had actual knowledge, and the judgment of the trial court finds the fact to be, not only that they had no knowledge, but also that their suspicions were not even aroused to such an extent as would have put a prudent man on inquiry. The judgment of the circuit court in this regard is this: "And the court doth further find from said report that the referee determined and reported as a fact the various statements of the condition of the said Citizens' Stock Bank, signed by the defendants, were made by them without any knowledge or information that the same were untrue, but were made in the honest belief that said statements and representations of the condition of said bank, set out and referred to in the petition, were true, and that said statements and representations were made by defendants in good faith, and in reliance upon the assurances of the cashier of said bank that it was always prospering, and in reliance upon the facts furnished to them as to the financial condition of the said bank by the cashier in charge of its books, and the court being satisfied that said findings of fact, as above set out, were proper and correct upon the evidence reported by the referee," etc. In the case of *Union Nat. Bank v. Hill*, 148 Mo. 396, 49 S. W. 1012, this court held that they were not liable in a suit by creditors for negligence in the management of the affairs of the bank. But one conclusion can be drawn from these conditions, and that is that the judgment of the circuit court on the first count of the petition is right.

This conclusion is in harmony with adjudications upon analogous statutes in other jurisdictions.

State v. Tomblin, 57 Kan. 841, 48 Pac. 144, was a criminal prosecution, under the statute of Kansas, against the defendant, charging that as president, director, and managing officer of a bank he "received deposits of money when the bank was insol-

vent, knowing that it was in that condition." The supreme court of Kansas said: "While the instructions fairly state the law in the main, the concluding paragraph of the fourteenth instruction given seems to imply that the defendant might be held guilty in a criminal prosecution if, through his negligence, he did not know the actual condition of the bank when it was in fact insolvent. It was proper for the jury to take into consideration the defendant's relation to the bank as a managing officer, and the duties he owed to it, for the purpose of determining whether he actually knew its insolvent condition, but mere negligence would not render him guilty of a crime. It was incumbent upon the state to establish, not only the fact of insolvency, but the defendant's knowledge of it." *Minton v. Stahlman*, 96 Tenn. 98, 34 S. W. 222, was an action by a depositor against the officers and directors of a bank to recover a deposit received when the bank was alleged to be insolvent, and lost by the subsequent failure of the bank. The declaration alleged that defendants were officers of the bank, "and having due notice and knowledge of such facts and circumstances as by ordinary diligence and business skill would have shown them its true financial condition, which was that of insolvency, and having reason and cause to know that anyone depositing money or evidences of debt therein for collection was liable to lose the money so deposited or collected by reason of its insolvency, etc., did continue to keep open and operate the same as a bank, and invite the custom and patronage of plaintiff and others, and that plaintiff being induced thereby, and deceived and misled by such wrongful act of defendants," deposited his money, and lost it. The defendants demurred to this charge, on the ground that "they are not liable, as directors of the Bank of Commerce, for receiving deposits when they merely had notice or knowledge of facts and circumstances which, by use of ordinary diligence and business skill, would have shown the said Bank of Commerce to be insolvent. In order to be liable, it must appear that they knew the said bank to be insolvent, and wilfully and knowingly received the deposits."

The statute of Tennessee [Mill. & V. Code, § 2507] provides: "And if any director or directors of any of the banks in this state shall be guilty of any fraud or wilful mismanagement of the affairs of such bank by which any loss shall be occasioned to its creditors such director or directors, upon legal ascertainment of the fact, shall be individually liable for such loss." The supreme court quoted and followed the decision of this court in *Fuss v. Spaunhorst*, 67 Mo. 264, 265, and held: "It was held by this court, in *Hume v. Commercial Bank*, 9 Lea, 728, that 'this section provides for a case of intentional fraud and wilful mismanagement.' It is not tantamount to a charge of intentional fraud or wilful mismanagement to allege that 'having due notice and knowledge of such facts and circumstances as, by ordinary diligence and business skill,

would have shown them its true financial condition, which was that of insolvency.' This, at most, is a charge of negligence and inattention; whereas, there is no liability to creditors or depositors, under this statute, without fraud or wilful mismanagement."

Deaderick v. Bank of Commerce, 100 Tenn. 457, 45 S. W. 786, was a bill by depositors against directors of a bank for the loss of their deposits by the failure of the bank, which is alleged to have occurred by the fraud, gross neglect, and wilful mismanagement of the directors "in permitting and sanctioning certain loans to insolvent parties, without proper security, whereby the bank was wrecked." The action was based on the statute of Tennessee, above set out. The facts in that case and in the case at bar bear so striking a similitude that it is worthy of more than a passing reference. There a son of one of the directors was the cashier. The case was referred to a referee, who reported in favor of the plaintiffs, and held the directors liable, and the chancellor entered a decree accordingly. The court of chancery appeals reversed that finding, and discharged the defendants. The case was appealed to the supreme court, where, referring to the decision of the appellate court, it was said: "Continuing, that court says: 'It is manifest, from the evidence, that in the first years of this bank's existence its directory paid but little attention to its affairs. The Duncans seem to have dominated. W. M. Duncan was believed to be, and from the record was, then, a man of large means, and he was allowed free access in obtaining loans from the funds of the bank to carry on his own speculations and enterprises. While this is true, it is equally true that the other directors in the bank believed, with great confidence, that he approached the condition financially of a semi-millionaire, and that he was amply good for all his engagements. It appears, however, that in the larger or higher banking circles of the city, in 1891, his credit began to wane, but with his own banking people it was 'unquestioned' until several months of 1892 had passed. Concluding on this point, the court of chancery appeals say: 'We find much evidence in the record that the loans specifically reported by the special commissioner, and made the basis of the chancellor's decree, were imprudent, and made without that care, caution, and prudence which is ordinarily supposed to govern the action of the prudent business man.' But, while this is so, they again say: 'We have been unable to discover any proof which, with its fair and legitimate inferences, leads to the belief that appellants are chargeable, as directors, with fraud, or any wilful mismanagement of their directory trust, in connection with the renewal or continuance of the loans.' Upon this finding by the court of chancery appeals it is clear that, in so far as complainants rest their right to recover upon the statutory liability of these directors to them as creditors of this bank, their bill must fall."

Patterson v. Stewart, 41 Minn. 84, *sub nom. Patterson v. Minnesota Mfg. Co.* 4 L.

R. A. 745, 42 N. W. 926, was a suit by a creditor against a director of a manufacturing company based upon a "violation of the statute of Minnesota, which provided: "If any corporation organized and established under the authority of this act shall violate any of its provisions, and shall thereby become insolvent, the directors ordering or assenting to such violation shall be jointly and severally liable in an action founded on this statute for all debts contracted after such violation as aforesaid." The officers, by authority of the directors, loaned its credit by making and indorsing accommodation paper, in consequence of which the company failed, and this was the violation of the statute upon which the plaintiff predicated a right to recover. The supreme court (41 Minn. 93, 4 L. R. A., *loc. cit.* 751, 42 N. W. 929) said: "Plaintiff's contention is that it is the duty of a director to know what is being done in corporate matters; that it is negligence for him not to know; and therefore he is conclusively presumed to have known; and, not objecting, he must be deemed assenting. Such a construction would impose this severe statutory liability for at least every act of mere negligence for which he would be liable at common law; but, as the act is highly penal, we do not think it ought to receive so broad a construction. The language of the various sections all tends to indicate that the legislature intended that something more than mere negligence should be necessary to subject a person to those heavy penalties,—something amounting to wilful, or, at least, intentional, violation of legal duty, either ordering the act done, participating in doing it, or assenting to its being done with knowledge that it was being or about to be done."

Other cases might be added, but the principles would not be more clearly enunciated by a multiplication of precedents. Of course, it must not be understood that it is intended to be held that a director can shut his eyes to facts, circumstances, and conditions, and then say he did not know what he must have seen if he had used his senses; for such conduct would be fraudulent and wilful disregard of duty. No such condition is presented by this record. The defendants were negligent, but they acted in good faith, were innocent of wrongdoing, and hence are not to be charged as if they had acted with knowledge, and therefore were guilty of fraud. They were guilty of nonfeasance, but not of misfeasance; of negligent omission of duty, but not of fraudulent commission of wrong. It follows that the first proposition must be decided in favor of the defendants, and that the judgment of the circuit court that a case against them, under § 2760, Rev. Stat. 1889, had not been made out by the proof, is right.

2. The second proposition is, Are directors of a bank liable to depositors, in a common-law action for deceit, for statements made to the secretary of state, required by § 2752, Rev. Stat. 1889, which were not true, but which they honestly believed were true, and which were, in good faith, based upon details furnished to them by the cashier of the bank,

whose reputation was good? The decision of this court in *Fuss v. Spaunhorst*, 67 Mo. *loc. cit.* 264, that, "aside from statutory provisions or one of similar nature in the organic law, the directors or officers of an incorporated bank would not be individually responsible, in an action at law, for injury resulting to a creditor or depositor, unless the injury were occasioned by the malicious or fraudulent act of the party complained of. Mere nonfeasance will not answer; nothing short of active participancy in a positively wrongful act intendedly and directly operating injuriously to the prejudice of the party complaining, will give origin to individual liability as above indicated,"—must be taken as the major premise of the syllogism by which this proposition is solvable. And the duty of directors of a bank, under the law, in making statements to the secretary of state, is the minor premise. Section 10 of the act of 1877 (Acts 1877, p. 30, now § 2751, Rev. Stat. 1889) made it the duty of every banking corporation to furnish to the secretary of state, when required by him, a statement verified by the president and cashier, and attested by three directors, "of the actual condition of such corporation at the close of business on the day designated, and which day shall be prior to such call." Section 10 of the act (now § 2752) also prescribed the form of the statement. Section 11 of the act (now § 2753) required the statement to be published in one or more daily newspapers published in the city or county where the bank was located, or in such a weekly paper, if there was no such daily, and a copy to be posted in the banking house accessible to all. Section 12 of the act (now § 2754) made it the duty of the secretary of state to call for such a statement not less than twice each year, and provided that "the secretary shall give no notice to any person whomsoever of the day on which he will call for such statement." For a violation of his duty the secretary of state was subject to removal from office and a fine of not less than \$500. The act then provided: "And should any president or secretary of any such corporation, or any director thereof, refuse to make the statement so required of them, or shall wilfully and corruptly make a false statement, they, and each of them, shall be deemed guilty of a misdemeanor, and upon conviction thereof, upon information or indictment, shall be punished by a fine for each offense, not exceeding five hundred and not less than one hundred dollars, or by imprisonment not less than one nor more than twelve months in the city or county jail, or by both such fine and imprisonment." The statute which created the duty of making these statements to the secretary of state, therefore, denounced the penalty for refusing to perform the duty, and also prescribed the punishment, if the statement was wilfully or corruptly false. Under this condition of the law, can it be said that any other liability or penalty can be applied than that the law itself imposes? Can it be that in this way the common-law action of

deceit has been enlarged by statute? Or can it be maintained that this statute overcomes the nonliability declared in the case of *Fusz v. Spounhorst*? The first canon of construction of a statute law is that "an affirmative enactment of a new rule implies a negative of whatever is not included or is different, and, if by the language used a thing is limited to be done in a particular form or manner, it includes a negative that it shall not be done otherwise." *Ex parte Joffe*, 48 Mo. App. 360; *Sutherland*, Stat. Constr. § 140; *Wells v. Pontotoc County Supers*, 102 U. S. 625, 26 L. ed. 122. *Sutherland*, Stat. Constr. § 208, lays down the rule: "When a law imposes a punishment which acts upon the offender alone, and not as a reparation to the party injured, and where it is entirely within the discretion of the lawgiver, it will not be presumed that he intended that it should extend further than is expressed, and humanity would require that it should be so limited in construction." *Sedgw. Stat. & Const. L.* 2d ed. pp. 341 *et seq.*, points out that, "where a precise remedy for the violation of a right is provided by statute, it often becomes a matter of interest to know whether the statutory remedy is the only one that can be had, or whether it is to be regarded as merely cumulative, the party aggrieved having also a right to resort to his redress for the injury sustained, at common law, or independently of the statute. In regard to this we have already noticed the rule that where a statute does not vest a right in a person, but only prohibits the doing of some act under a penalty, in such a case the party violating the statute is liable to the penalty only; but, that where a right of property is vested by virtue of the statute, it may be vindicated by the common law, unless the statute confines the remedy to the penalty." And again, at page 343, the same author says: "But, on the other hand, it is a rule of great importance, and frequently acted upon, that where by a statute a new right is given and a specific remedy provided, or a new power and also the means of executing it are provided by statute, the power can be executed and the right vindicated in no other way than that prescribed by the statute." *Endlich*, Interpretation of Statutes, § 465, says: "If the statute which creates the obligation, whether private or public, provides in the same section or passage a specific means or procedure for enforcing it, no other course than that thus provided for can be resorted to for that purpose." This has been the rule followed in Missouri ever since the case of *Riddick v. The Governor*, 1 Mo. 147, where it was said: "It is an incontrovertible maxim of law that a statute imposing a penalty for a new-created offense, or for a breach of duty, and defining the particular mode in which and before what tribunal the penalty shall be recoverable, must be strictly pursued." And then, pointing out that the act under consideration imposed a new duty upon sheriffs and imposed a penalty for its violation, and prescribed the method of enforcement to be pursued and the tribunal to

try the cause, the court said: "We are at once led to the conclusion that they [the lawmakers] intended to provide, specifically, an adequate remedy for the neglect of each particular duty thereby created, and a different construction would subject the sheriff to a liability which we cannot reasonably suppose he ever intended to incur." This rule is recognized and approved in *Ellis v. Whitlock*, 10 Mo. 781; *State v. Canton*, 43 Mo. 51; *Moore v. White*, 45 Mo. 206. So, on the same principle, it was said by *Norton, J.*, in *Parish v. Missouri, K. & T. E. Co.* 63 Mo., *loc. cit.* 286: "So far as the law is to be regarded as punitive, it should be strictly construed, and so as not to enlarge the liability it imposes, nor allow a recovery, unless the party seeking it brings his case strictly within the terms or conditions authorizing it. So far as it is to be considered as compensatory for an injury done, it is to be construed as any other statute." This question is set at rest, however, in *People's R. Co. v. Grand Ave. R. Co.* 149 Mo., *loc. cit.* 253, 50 S. W. 829.

Applying these rules to the case at bar, we have this result: Before the enactment of this statute there was no obligation on directors or officers of a bank to make any kind of a statement of the actual condition of the bank to the secretary of state or to anyone else, nor to publish any such statement in the newspapers. The obligation and duty so to do was created by the statute. The same act which imposed the duty prescribed the penalty for its violation and the tribunal before which the penalty should be enforced; that is, made it a misdemeanor punishable on information or indictment, by fine and imprisonment. The conclusion is inevitable and unavoidable that no other penalty can be exacted or enforced than that prescribed by the act. Nor can a false statement made by directors of a bank to the secretary of state be made the basis of a common-law action for deceit. The reason is plain. The law exacts the statement; hence it is not voluntarily made. The statement is required to be made to the secretary of state, so that he may take steps to close the bank if it is dangerous to the welfare of the people for it to continue business, but it is in no sense a statement made by the directors with intent to induce persons to deposit their money in the bank, and therefore a common-law action of deceit cannot be predicated upon it. But, above all, the law imposes the duty and prescribes the punishment for a violation thereof. The law vests no right of property or of action in anyone which may be vindicated by the common law, and therefore the penalty imposed by the law is exclusive, and no other remedy is open to anyone.

Proceeding along different lines the courts of other jurisdictions have reached the same result as to the liability of a bank director in a common action of deceit for false statements as to the condition of the bank, where the duty to make such a statement was or was not imposed and the penalty prescribed for a violation of such duty. The principle

upon which the directors have been held liable in those cases is that they knew the statement to be false, not merely that they might, by ordinary care, have known that fact, and that, if they acted in making such statements in good faith, upon details furnished by the ordinary managers and clerks whom they have employed, they cannot be held liable in a common-law action of deceit. *Pieratt v. Young*, 20 Ky. L. Rep. 1815, 49 S. W. 964; *Cowley v. Smyth*, 46 N. J. L. 380, 50 Am. Rep. 432; 1 Cook, Stock, Stockholders, & Corp. Law, 3d ed. § 158. By this, however, it must not be understood that no action for deceit will lie against a director of a corporation, banking or otherwise (there is no difference), who has made false and fraudulent representations as to the condition of the bank, whereby others have been misled and damaged. Such misrepresentations need not be personally made, but may consist of voluntary reports or prospectuses which are false, and made fraudulently, and published or circulated. 1 Morawetz, Priv. Corp. 2d ed. § 573. But this rule cannot be invoked in this case, for all evidence of this kind was withdrawn by the plaintiff, so the referee reports, and the right of recovery was placed squarely upon the reports made to the secretary of state. For these reasons the circuit court was right in entering judgment for the defendants on the deceit count of the petition.

3. It is urged, however, that the circuit court had no power to set aside the findings of fact by the referee, and make findings itself, but that it must accept the report as to matters of fact, or else set it aside, as in cases at law with reference to the verdict of a jury. This contention finds support in *Lingenfelder v. Wainwright Brewing Co.* 103 Mo. 589, 15 S. W. 844. But in that case both sides conceded and contended that such was the law, and the court treated the case as counsel had done. But in *Wentzville Tobacco Co. v. Walker*, 123 Mo., loc. cit. 671, 27 S. W. 639, the question was contested and decided. There it was held: "In causes

wherein the court may lawfully direct a compulsory reference, it may likewise act upon the evidence reported by the referee, and find therefrom different conclusions of fact from those reported by the referee. This should now be taken as settled law, under the rulings in *Caruth-Byrnes Hardware Co. v. Wolter* (1886) 91 Mo. 484, 3 S. W. 865, and *State ex rel. Walker v. Hurlstone* (1887) 92 Mo. 327, 5 S. W. 38, without reopening the question they adjudge. It was hence entirely competent for the trial court in the case at bar to set aside the finding of the referee in favor of plaintiff, and then to find for the defendants upon the evidence reported by the referee." This is the true rule; for while this court, on appeal, has always treated the report of a referee as a special verdict, and refused to disturb it if there was substantial evidence to support it (*Berthold v. O'Hara*, 121 Mo., loc. cit. 97, 25 S. W. 845), still the power of the circuit court is very different; for in such cases, a jury being waived, the case is triable before the court, and, because the court has not the time to try such cases, it calls in the aid of a referee to take the testimony. The referee's power is limited to recommending a judgment. The duty and responsibility as to the judgment rests upon the court. The referee can aid, but not bind, the judge. And, with all the evidence before the court, it would be a useless and expensive proceeding to refer the case to the same or another referee; for, perchance, the referee would find the facts the same way again, and so the expensive luxury would have to be repeated, until some referee could be found who would find the facts as the judge all the while believed they should be found, and as he could and should have found them upon the coming in of the first report. After full investigation and this protracted discussion, no error has been found in the action of the trial court, and its judgment is therefore affirmed.

All concur, except Robinson, J., absent.

NEBRASKA SUPREME COURT.

Frank THOMPSON, Exr., etc., of James Thompson, Deceased, et al., Appts.,
v.

George W. WEST et al.

(.....Neb.....)

- *1. In the absence of a general saving clause, the repeal of a statute will not affect a suit previously brought to enforce a right founded thereon or accrued thereunder.
2. The repeal of the statute permitting

*Headnotes by NORVAL, Ch. J.

NOTE.—For power of religious society to acquire real estate, see also *Hamsher v. Hamsher* (Ill.) 8 L. R. A. 556; and *Alden v. St. Peter's Parish* (Ill.) 30 L. R. A. 232.
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the recovery of deficiency judgments did not affect actions then pending.

3. An incorporated religious society has no power to acquire or hold real estate for any purpose other than that of promoting the object of its creation.
4. A contract entered into by such a corporation for the purchase of real estate as a matter of speculation merely is *ultra vires* and void.
5. Where, in an action by an indorsee of a promissory note, it is established that the instrument was illegal in its inception, the burden is cast upon the plaintiff to show that he is an innocent holder for value and before due.
6. The action of the majority of a board of trustees of a religious society will not bind the latter without no-

tice to or participation therein by the other members of the board.

7. A corporation cannot ratify a contract which it had not the power to make.

(March 7, 1900.)

APPEAL by plaintiffs from a decree of the District Court for Lancaster County in favor of defendants denying a deficiency judgment in a proceeding to foreclose a mortgage. *Affirmed.*

The facts are stated in the opinion.

Messrs. Morning & Berge, for appellants:

It is not contended by the defendant church that the money it received from plaintiffs was used for any other purpose than to carry on the work of the church. It admits that whatever it did in connection with this matter was done by its trustees to further the interests of the church.

Wright v. Hughes, 119 Ind. 324, 21 N. E. 907.

The board of trustees were charged with the responsibility of managing the financial affairs of the church, and the board purchased said real estate for no other purpose except to build up and strengthen the financial interests of the church, which it had a right to do.

Wright v. Hughes, 119 Ind. 324, 21 N. E. 907; *Spear v. Crawford*, 14 Wend. 20, 28 Am. Dec. 515; *Rivanna Nav. Co. v. Dawson*, 3 Gratt. 12, 46 Am. Dec. 183; *Bissell v. Michigan S. & N. I. R. Cos.* 22 N. Y. 271.

Whatever may be said about the transaction with Mills, it cannot be urged as against plaintiffs. The defense of *ultra vires* cannot be urged by a corporation to the injury of an innocent third party.

Bank of Genesee v. Patchin Bank, 13 N. Y. 313, 19 N. Y. 312; *Gansevoort v. Williams*, 14 Wend. 133; *Catskill Bank v. Stall*, 15 Wend. 364; *Evans v. Wells*, 22 Wend. 324; *Mechanics' Bkg. Asso. v. New York & S. White Lead Co.* 35 N. Y. 505; *Farmers' & M. Bank v. Butchers' & D. Bank*, 16 N. Y. 129, 69 Am. Dec. 678; *Olcott v. Tioga R. Co.* 27 N. Y. 546, 84 Am. Dec. 298; *Bank of the State v. Muskingum Branch of Bank of State of Ohio*, 29 N. Y. 619.

So far as this case is concerned the defendant church borrowed money from plaintiffs, and obligated itself to pay that money back, which it was clearly authorized by law to do.

Dan. Neg. Inst. § 382; *Bradbury v. Boston Canoe Club*, 153 Mass. 77, 26 N. E. 132; *Morville v. American Traot Soc.* 123 Mass. 129; *Davis v. Old Colony R. Co.* 131 Mass. 258, 41 Am. Rep. 221; *Aurora Agri. & Horticultural Soc. v. Paddock*, 80 Ill. 263; *Thompson v. Lambert*, 44 Iowa, 239; *Burt v. Ratelle*, 31 Ohio St. 116; *Susquehanna Bridge & Bank Co. v. General Ins. Co.* 3 Md. 305, 56 Am. Dec. 740.

Powers granted to a corporation may always be used by it subject only to express limitations imposed by its charter.

Wright v. Hughes, 119 Ind. 324, 21 N. E. 907; *New England F. & M. Ins. Co. v. Robinson*, 25 Ind. 536; *Jones v. New York Guaranty & Indemnity Co.* 101 U. S. 622, 25 L. ed. 1030; *Reichwald v. Commercial Hotel* 49 L. R. A.

Co. 106 Ill. 439; *Booth v. Robinson*, 55 Md. 419; *Hays v. Galion Gaslight & Coal Co.* 20 Ohio St. 330; *Memphis & L. R. R. Co. v. Dow*, 22 Blatchf. 48, 19 Fed. Rep. 388; *Green's Brice, Ultra Vires*, § 223.

It is of little consequence now whether the formalities of a meeting of the board were adhered to or not.

Scott v. First Free Methodist Church, 50 Mich. 528, 15 N. W. 891; *Scott v. Middletown, U. & W. G. R. Co.* 86 N. Y. 207; *Sherman v. Fitch*, 98 Mass. 59; *Lyndeborough Glass Co. v. Massachusetts Glass Co.* 111 Mass. 315; *Brown v. Winnisimmet Co.* 11 Allen, 326; *Arlington v. Peirce*, 122 Mass. 270; *Hoyt v. Thompson*, 19 N. Y. 207; *Union Gold-Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640, 24 L. ed. 648; *Moss v. Rossie Lead Min. Co.* 5 Hill, 137; *Farmers' Loan & T. Co. v. Walworth*, 1 N. Y. 433; *Martin v. Niagara Falls Paper Mfg. Co.* 122 N. Y. 165, 25 N. E. 305; *Main v. Casserly*, 67 Cal. 127, 7 Pac. 426; *Bradley v. Ballard*, 55 Ill. 413, 7 Am. Rep. 656.

Where a contract has been executed and fully performed on the part of the corporation, or of the party with whom it contracted, either will be permitted to insist that the contract was not within the power of the corporation.

Wright v. Hughes, 119 Ind. 324, 21 N. E. 907; *Pisley v. Western P. R. Co.* 33 Cal. 198, 91 Am. Dec. 623; *Foulke v. San Diego & G. S. P. R. Co.* 51 Cal. 365; *Kennedy v. California Sav. Bank*, 101 Cal. 495, 35 Pac. 1039; *Aultman v. Waddle*, 40 Kan. 195, 19 Pac. 730; *Gribble v. Columbus Brewing Co.* 100 Cal. 67, 34 Pac. 527; *Chicago & A. R. Co. v. Derkes*, 103 Ind. 520, 3 N. E. 242; *Baker v. Roberts*, 14 Ind. 552; *Smock v. Pierson*, 68 Ind. 405, 34 Am. Rep. 269; *State Board of Agri. v. Citizens' Street R. Co.* 47 Ind. 407, 17 Am. Rep. 702; *Louisville, N. A. & C. R. Co. v. Flanagan*, 113 Ind. 488, 14 N. E. 370; *Panchoast v. Travelers' Ins. Co.* 79 Ind. 172; *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. ed. 659; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504.

The law never sustains the defense of *ultra vires* out of regard for the corporation. It does so only where the most persuasive considerations of public policy are involved.

Wright v. Hughes, 119 Ind. 324, 21 N. E. 907; *Wright v. Pipe Line Co.* 101 Pa. 204, 47 Am. Rep. 701; *Oil Creek & A. River R. Co. v. Pennsylvania Transp. Co.* 83 Pa. 160; *Ottawa Northern Pl. Road Co. v. Murray*, 15 Ill. 336.

Corporations having the right to receive bills or notes in payment of debts have the implied right to indorse them.

Dan. Neg. Inst. § 385; *Lucas v. Pitney*, 27 N. J. L. 221; *McIntire v. Preston*, 10 Ill. 48, 48 Am. Dec. 321; *Frye v. Tucker*, 24 Ill. 180; *Hardy v. Merriweather*, 14 Ind. 203; *Buckley v. Briggs*, 30 Mo. 452.

The contract of indorsement is incident to the negotiation of mercantile paper, and the right to transfer such paper includes the

power to enter into the collateral contract which an indorser assumes.

Bank of Genesee v. Patchin Bank, 13 N. Y. 309; *Folger v. Chase*, 18 Pick. 63; *Wright v. Boyd*, 3 Barb. 523; *Fleckner v. Bank of United States*, 8 Wheat. 338, 5 L. ed. 631; *Farmers' & M. Bank v. Butchers' & D. Bank*, 16 N. Y. 125, 69 Am. Dec. 678.

The laws which prescribe the mode of enforcing a contract, which are in existence when it is made, are so far a part of the contract that no changes in these laws which seriously interfere with that enforcement are valid, because they impair its obligation within the meaning of the Constitution of the United States.

Barnitz v. Boverly, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042; *State ex rel. City Water Co. v. Kearney*, 49 Neb. 325, 68 N. W. 533; *Bishop, Contr.* § 565; *Jackson v. Creighton*, 29 Neb. 310, 45 N. W. 638; *White v. Rourke*, 11 Neb. 519, 9 N. W. 689; *State ex rel. Clarke v. Cathers*, 25 Neb. 250, 41 N. W. 132; *State ex rel. Brown v. McPeak*, 31 Neb. 139, 47 N. W. 691; *Second Ward Sav. Bank v. Schranck*, 97 Wis. 250, 39 L. R. A. 569, 73 N. W. 37; *Peninsular Lead & Color Works v. Union Oil & Paint Co.* 100 Wis. 488, 42 L. R. A. 331, 76 N. W. 359.

Whatever may have been the right at law, there is no doubt in equity that the assignee of the bond and mortgage would have the right to a decree against the one who assumed the mortgage or his personal representatives for the deficiency. Upon a foreclosure the creditor is entitled to the benefit of the collateral obligations, etc.

Halsey v. Reed, 9 Paige, 446; *Richards v. Yoder*, 10 Neb. 429, 6 N. W. 629; *South Omaha Nat. Bank v. Wright*, 45 Neb. 27, 63 N. W. 126; *Keller v. Ashford*, 133 U. S. 610, 33 L. ed. 607, 10 Sup. Ct. Rep. 494.

In the absence of a statute a court of equity can give a deficiency judgment against one assuming payment on the ground that this is an equitable obligation.

2 Jones, *Mortg.* § 1711; *Flentham v. Steward*, 45 Neb. 640, 63 N. W. 924; *Palmeter v. Carey*, 63 Wis. 426, 21 N. W. 793, 23 N. W. 536; *Brereton v. Miller*, 7 Utah, 426, 27 Pac. 81.

Mr. T. F. A. Williams, for appellees:

The transaction on which appellants base their claim to a deficiency judgment against the church was beyond the powers of the church corporation.

Where a statute forbids a corporation to make a contract the contract is void, even though not expressly declared to be so.

Taylor, Priv. Corp. 3d ed. § 297.

The power of a corporation to purchase real property is limited by the objects of its creation, and even where there are no express restrictions it cannot purchase for a purpose foreign to those objects.

7 Am. & Eng. Enc. Law, 2d ed. p. 718.

Only such powers and rights can be exercised under grants to corporations as are clearly comprehended within the words of the act or derived therefrom by necessary implication, regard being had to the objects of the grant.

Sutherland, Stat. Constr. 1891 ed. § 380.

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The speculation entered into by the board in the case at bar was *ultra vires*.

Morawetz, Priv. Corp. 2d ed. § 393; 7 Am. & Eng. Enc. Law, 2d ed. pp. 718, 728, 789, 790; 5 Thomp. Corp. 1896 ed. §§ 5772, 5810; *Harriman v. First Bryan Baptist Church*, 63 Ga. 186, 36 Am. Rep. 117; *Day v. Spiral Springs Buggy Co.* 57 Mich. 146, 58 Am. Rep. 563, 23 N. W. 628; *Waldo v. Chicago, St. P. & F. du L. R. Co.* 14 Wis. 625; *Alexander v. Cauldwell*, 83 N. Y. 480; *Atty. Gen. v. Great Northern R. Co.* 6 Jur. N. S. 1006; *Davis v. Old Colony R. Co.* 131 Mass. 258, 41 Am. Rep. 221.

If James Thompson took the note and mortgage without notice, the burden is on appellants to show it.

The taint of *ultra vires* is clearly shown by the record to attach to the whole transaction from the original deal between the board and Mills to the present hour. In such case the ordinary presumption in favor of James Thompson, that he took without notice, does not attach, and the burden is on appellants to show that he had no notice of the *ultra vires* of the original transaction.

Benjamin's Chalmer's Bills & Notes, 2d Am. ed. p. 113; 4 Am. & Eng. Enc. Law, 2d ed. pp. 321-323; *Wortendyke v. Meehan*, 9 Neb. 221, 2 N. W. 339; *Olsted v. New England Mortg. Security Co.* 11 Neb. 487, 9 N. W. 650; *Dorst v. Backus*, 18 Neb. 231, 24 N. W. 681; *Knob v. Williams*, 24 Neb. 630, 39 N. W. 786; *Lincoln Nat. Bank v. Davis*, 25 Neb. 376, 41 N. W. 281; *Kelman v. Calhoun*, 43 Neb. 157, 61 N. W. 615.

The holder does not meet the burden cast on him by proof of value merely, but must also prove that he gave value within the conditions which the law prescribes to establish the character of a bona fide holder.

Jones v. Gordon, L. R. 2 App. Cas. 616; *Giberson v. Jolley*, 120 Ind. 301, 22 N. E. 306; *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191, 10 L. R. A. 676, 25 N. E. 402.

He was chargeable with notice of the powers of the church and its officers under its charter.

Taylor, Priv. Corp. 3d ed. § 267; *Lucas v. White Line Transfer Co.* 70 Iowa, 541, 59 Am. Rep. 449, 30 N. W. 771.

The power given to the trustees is given to them as a board, and, they having taken no action, as a board, in the matter of the negotiation to Thompson of the securities, the church is not liable thereon.

3 Thomp. Corp. 1895 ed. §§ 3905, 3950; *People's Bank v. St. Anthony's Roman Catholic Church*, 39 Hun, 498; *Ross v. Crockett*, 14 La. Ann. 823; *Cammeyer v. United German Lutheran Churches*, 2 Sandf. Ch. 186; *Chicago & N. W. R. Co. v. James*, 22 Wis. 194; *Hartford Bank v. Hart*, 3 Day, 491, 3 Am. Dec. 274; *Harper v. Calhoun*, 7 How. (Miss.) 203.

If the contract is *ultra vires* in the sense of being *malum in se*, immoral, opposed to sound public policy, or against the provisions of the statute law enacted to safeguard the rights of the public, then it may be conceded that it cannot be affirmed or ratified; since any attempt at ratification is an a'

tempt to repeat the offense against the public.

7 *Thomp. Corp.* § 8430; *Tullock v. Webster County*, 46 Neb. 211, 64 N. W. 705; *Douglas County v. Keller*, 43 Neb. 635, 62 N. W. 60; *State v. Nebraska Distilling Co.* 29 Neb. 700, 46 N. W. 155; *Kent v. Quick-silver Min. Co.* 78 N. Y. 159.

A corporation cannot ratify a contract it could not make.

Durkee v. People ex rel. Askren, 53 Ill. App. 396; *Taymouth Twp. v. Koehler*, 35 Mich. 22; *Preston v. Missouri & P. Lead Co.* 51 Mo. 43; *Downing v. Mount Washington Road Co.* 40 N. H. 230; *Hatch v. Western U. Teleg. Co.* 9 Abb. N. C. 430; *National Trust Co. v. Miller*, 33 N. J. Eq. 155; *Lucas v. White Line Transfer Co.* 70 Iowa, 541, 59 Am. Rep. 449, 30 N. W. 771; *Lincoln Land Co. v. Grant*, 57 Neb. 70, 77 N. W. 349; *Tullock v. Webster County*, 46 Neb. 211, 64 N. W. 705; *Gutta Percha & R. Mfg. Co. v. Ogalalla*, 40 Neb. 775, 59 N. W. 513.

James Thompson dealt with the church at his peril.

Gutta Percha & R. Mfg. Co. v. Ogalalla, 40 Neb. 775, 59 N. W. 513; *Lucas v. White Line Transfer Co.* 70 Iowa, 541, 59 Am. Rep. 449, 30 N. W. 771; 7 *Thomp. Corp.* 1899 ed. §§ 8308, 8309; *Morawetz, Priv. Corp.* 2d ed. §§ 580, 591, 592; *Taylor, Priv. Corp.* 3d ed. § 264.

No estoppel ever arises in a case like the one at bar where the other party knew that the contract was *ultra vires*.

5 *Thomp. Corp.* 1895 ed. § 6009; *Lucas v. White Line Transfer Co.* 70 Iowa, 541, 59 Am. Rep. 449, 30 N. W. 771; *Davis v. Flagstaff Silver Min. Co.* 2 Utah, 74.

No action of any sort, whether on contract or implied contract or for money had and received or of *quantum meruit* or *quantum valebat*, will lie to recover back money paid or the price of materials furnished or services rendered, under a contract *ultra vires*, because *per se* immoral, or opposed to public policy, or expressly prohibited by the Constitution or a statute.

Richardson v. Scotts Bluff County (Neb.) 81 N. W. 309.

Appellants cannot recover in this present action, and could recover, if at all, only in an action for money had and received.

Waddill v. Alabama & T. Rivers R. Co. 35 Ala. 323; *Utica Ins. Co. v. Cadwell*, 3 Wend. 296; *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132; *Miller v. American Mut. Acci. Ins. Co.* 92 Tenn. 167, 20 L. R. A. 765, 21 S. W. 39; *Day v. Spiral Springs Buggy Co.* 57 Mich. 146, 58 Am. Rep. 563, 23 N. W. 628; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094; *Davis v. Old Colony R. Co.* 131 Mass. 258, 41 Am. Rep. 221; *Pearce v. Madison & I. R. Co.* 21 How. 441, 16 L. ed. 184; *Ashbury R. Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653; *Re Cork & Y. R. Co.* L. R. 4 Ch. 748; *Gutta Percha & R. Mfg. Co. v. Ogalalla*, 40 Neb. 775, 59 N. W. 513; *Lincoln Land Co. v. Grant*, 57 Neb. 70, 77 N. W. 349; *Pittsburgh, O. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 131 U. S. 371, 33 L. ed. 49 L. R. A.

157, 9 Sup. Ct. Rep. 770; *Powder River Live Stock Co. v. Lamb*, 38 Neb. 339, 56 N. W. 1019.

In the absence of statute, at the common law, the mortgagee after default could maintain ejectment to recover the possession or sue on the note or foreclose the mortgage. All these remedies he could pursue concurrently.

Dimick v. Grand Island Bkg. Co. 37 Neb. 394, 55 N. W. 1006; *Bing v. Morse*, 51 Neb. 842, 71 N. W. 712; 1 *Beach, Modern Eq. Jur.* 1892 ed. § 499.

The mortgagee could first sue on the note. 2 *Jones, Mortg.* 3d ed. § 1220.

Or first foreclose his mortgage and later sue on the note for the balance not realized at the sale of the mortgaged premises.

2 *Jones, Mortg.* 3d ed. § 1227; *Dunkley v. Van Buren*, 3 Johns. Ch. 330; 2 *Pingrey, Mortg.* 1893 ed. § 1560.

A court of chancery could enter a deficiency judgment in the foreclosure action, if at all, only where the debt, without the mortgage, was such that a court of chancery would have jurisdiction of it and could enforce it.

Jones, Mortg. 3d ed. § 1711; *Morgan v. Wilkins*, 6 J. J. Marsh. 28.

The jurisdiction of equity in mortgages is simply to decree redemption or foreclosure.

Fleming v. Sitton, 21 N. C. (1 Dev. & B. Eq.) 621; *Wightman v. Gray*, 10 Rich. Eq. 518; *Downing v. Palmateer*, 1 T. B. Mon. 64; *M'Gee v. Davie*, 4 J. J. Marsh. 70; *Crutchfield v. Coke*, 6 J. J. Marsh. 89; *Dunkley v. Van Buren*, 3 Johns. Ch. 330; *Palmer v. Hurris*, 100 Ill. 276; *Stark v. Mercer*, 3 How. (Miss.) 377; *Hunt v. Lewin*, 4 Stew. & P. (Ala.) 138; *Orchard v. Hughes*, 1 Wall. 73, 17 L. ed. 580; *Noonan v. Lee*, 2 Black, 499, *sub nom. Noonan v. Braley*, 17 L. ed. 278; *Winsor v. Ludington*, 77 Mich. 215, 43 N. Y. 866; *Wiltsie, Mortg. Foreclosures*, 1889 ed. §§ 195-197.

The act of 1897 repealed §§ 847 and 849 of the Code, under which deficiency judgments in foreclosure cases had been entered both against the mortgagor and third parties liable on the mortgage debt.

The simple repeal of the sections giving the equity court power in the foreclosure case to decree deficiency clearly invades no contract right.

Newark Sav. Inst. v. Forman, 33 N. J. Eq. 436; *State ex rel. Munday v. Rahway Assessors*, 43 N. J. L. 338; *Van Rensselaer v. Snyder*, 9 Barb. 302, 13 N. Y. 299; *Guild v. Rogers*, 98 Barb. 502; *Onkey v. Hart*, 14 N. Y. 22; *Jones v. Davis*, 6 Neb. 33; *Schoenheit v. Nelson*, 16 Neb. 235, 20 N. W. 206; *State ex rel. McKinnon v. Scott*, 17 Neb. 686, 24 N. W. 337.

The recovery of a deficiency judgment in a foreclosure case such as the one at bar awards to the mortgagee by statute an extraordinary remedy that he did not possess under the old chancery practice. The taking away of such extraordinary remedy by the repeal of §§ 847 and 849 does not of itself impair the obligation of prior contracts.

Stocking v. Hunt, 3 Denio, 274.

The legislative power to alter remedies is unrestricted except that it must leave a reasonable remedy.

Cooley, Const. Lim. 6th ed. pp. 442, 443; *Breitenbach v. Bush*, 44 Pa. 313, 84 Am. Dec. 442; *Johnson v. Higgins*, 3 Met. (Ky.) 567.

Norval, Ch. J., delivered the opinion of the court:

This was a suit to foreclose a real-estate mortgage executed and delivered by one George W. West to Ward S. Mills to secure the payment of one principal note and coupon notes thereto attached. The principal note was transferred by the payee, Mills, to the First Christian Church of Lincoln, and, by two of the trustees, sold and indorsed to James Thompson, now deceased. A decree of foreclosure was entered, the mortgaged premises were sold, and the sale confirmed, and, a deficiency existing after the proceeds of sale were applied on the debt, a judgment therefor was asked against said church as an indorser of the paper which request was denied. Plaintiffs appeal.

The only question raised is whether the court below erred in refusing to render a deficiency judgment against the church. It is disclosed by the record that certain of the trustees of the First Christian Church of Lincoln, and who assumed to act for it, purchased of Mills a number of vacant and unimproved lots situate in Mills' Second addition to University Place. The lots were purchased for the purpose of speculation, or with the view of being resold at an advance over the cost price; but the title to the property was permitted to remain in the name of Mills, who, on the trustees making the sale of a lot, at their request, executed a deed to the purchaser, and the latter gave to Mills a note, secured by a mortgage on the property for the unpaid purchase money. Mills thereupon indorsed and transferred the note and mortgage to the First Christian Church of Lincoln. One of these lots was sold to West, who executed the note and mortgage in suit to Mills for the amount of the purchase price remaining unpaid, and this note was indorsed without recourse by the payee, and delivered to said church. Subsequently the note and mortgage were transferred by certain of the trustees, in the name of the church, to James Thompson, plaintiffs' decedent. The governing board of the trustees of the church corporation never held any meeting for the purpose of taking an action relative to, nor did such board, as a body, authorize, the purchase and sale of the lots or the transfer of the note and mortgage in question. The defendant church contends that no deficiency judgment could properly be rendered against it, for the following reasons: (1) No judgment for a deficiency can be lawfully rendered in this state in a suit to foreclose a mortgage. (2) The contract relative to the purchase of the lots of Mills for the purpose of speculation was without the power of the First Christian Church of Lincoln, and therefore *ultra vires* and void. (3) The indorsement of the note and the sale thereof to plaintiff's de-

cedent was never authorized or sanctioned by the board of trustees of said church. These propositions will receive consideration in the order stated.

Prior to 1897 the following sections were parts of the Code of Civil Procedure of this state:

"Sec. 847. When a petition shall be filed for the satisfaction of a mortgage, the court shall not only have the power to decree and compel the delivery of the possession of the premises to the purchasers thereof, but on the coming in of the report of sale, the court shall have power to decree and direct the payment by the mortgagor of any balance of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in the cases in which such balance is recoverable at law; and for that purpose may issue the necessary execution, as in other cases, against other property of the mortgagor."

"Sec. 849. If the mortgage debt be secured by the obligation or other evidence of debt of any other person besides the mortgagor, the complainant may make such person a party to the petition, and the court may decree payment of the balance of such debt remaining unsatisfied after a sale of the mortgaged premises, as well against such other person as the mortgagor, and may enforce such decree as in other cases."

It is plain enough that under the quoted sections, and prior to their repeal, it was proper, in a foreclosure case, on the coming of the report of sales to enter a decree of judgment against the mortgagor and other persons liable for the payment of the mortgage debt. *Davenport Plow Co. v. Mewis*, 10 Neb. 317, 4 N. W. 1059; *Clapp v. Maxwell*, 13 Neb. 542, 14 N. W. 653; *Cooper v. Foss*, 15 Neb. 515, 19 N. W. 506; *Grand Island Sav. & L. Asso. v. Moore*, 40 Neb. 686, 59 N. W. 115; *Hare v. Murphy*, 45 Neb. 809, 29 L. R. A. 851, 64 N. W. 211; *Flenham v. Stearns*, 45 Neb. 640, 63 N. W. 924. But these sections of said Code were repealed by the legislature of 1897 (Laws 1897, chap. 95), and by reason thereof it is strenuously argued by counsel for the church that the power to enter deficiency judgments is abrogated in all cases without regard to the date the debt was contracted, or whether proceedings may have been taken to enforce the same at the time the repealing statute was adopted. On the other hand, it is argued by counsel for plaintiffs that the repealing act of 1897 had no application to suits then pending, nor to causes of action then accrued, nor decrees already entered. Whether or not a statute which denies the right to a deficiency judgment as to existing debts is unconstitutional, as impairing the obligations of contracts, the court is not at this time called upon to decide, and we refrain from now entering upon a discussion of the question. Section 2, chap. 88, Comp. Stat., declares that, "whenever a statute shall be repealed, such appeal shall in no manner affect pending actions founded thereon, nor causes of actions not in suit." If the jurisdiction of the district court to enter deficiency judgments exists independent of stat-

ute, as has been argued, it is too plain to require elaboration that it was not taken away by the repeal of §§ 847 and 849 of said Code. On the other hand, if the power to render a deficiency judgment is purely statutory, as was intimated in *Devries v. Squire*, 55 Neb. 438, 76 N. W. 16, it is equally clear that, as to creating suits, such right was not abolished by the repeal of said sections, owing to the provisions of § 2, chap. 88, Comp. Stat., quoted above. *Kleckner v. Turk*, 45 Neb. 176, 63 N. W. 469. The record not only conclusively shows that long prior to the adoption of said repealing act this suit was brought in the court below, a decree of foreclosure had been entered, the mortgaged premises sold thereunder, and the order denying a deficiency judgment against the church, which is sought to be reviewed by this proceeding, had been entered, and the cause docketed in this court. So that the repeal of said §§ 847 and 849 cannot be invoked to defeat the recovery of a deficiency judgment against the church.

Sections 42 and 55, chap. 16, Comp. Stat., follow:

"Sec. 42. The trustees or directors who may be appointed under the provisions of this subdivision, and their successors in office, shall have perpetual succession by such name as may be designated, and by such name be legally capable of contracting and prosecuting and defending suits, and shall have capacity to acquire, hold, enjoy, dispose of, and convey all property, real and personal, which they may acquire by purchase, donation, or otherwise, for the purpose of carrying out the intention of such society or association, but they shall not acquire or hold property for any other purpose."

"Sec. 55. No company or association incorporated under the provisions of this chapter shall employ its stock, means, assets, or other property, directly or indirectly, for any other purpose whatever than to accomplish the legitimate object of its creation."

The foregoing sections are taken from the chapter of the Compiled Statutes relating to corporations. Section 42 is especially applicable to religious societies, while § 55 is a general provision governing all incorporated companies. In view of these statutory provisions, the conclusion is irresistible that an incorporated religious society, like the defendant herein, has no power to acquire, purchase, or hold real estate for any purpose other than that of carrying out the purposes or objects for which the corporation was created. Argument or elaboration could not make the proposition plainer, or more readily understood. And it is equally clear that the buying and selling of real estate merely as a speculation, or for the profits realized by a religious society, is forbidden by statute. The speculation in real estate by the First Christian Church of Lincoln, or rather by certain members of the board of trustees in the name of the church, was foreign to the legitimate objects of the church, and the contracts relating thereto are *ultra vires* and void. *Taylor, Priv. Corp.* 3d ed. § 297. In 7 Am. & Eng. Enc. Law [2d ed.] p. 718, the 49 L. R. A.

rule is stated thus: "As has already been stated, the power of a corporation to purchase real property is limited by the objects of its creation. Even when there are no express restrictions, it cannot purchase for a purpose foreign to those objects. When a corporation is created for the purpose of dealing in real estate, its power to purchase the same is unlimited. But when a corporation is not organized to deal in land, as in case of railroad companies, banking companies, insurance companies, religious and educational corporations, etc., the purchase of land not needed in its business, for the mere purpose of holding and selling it again, is *ultra vires*; nor can such corporation purchase for any other purpose that does not tend directly to carry out its own legitimate objects." The text is fully sustained by numerous authorities cited in the notes on the same page. The record before us fails to show that the real-estate venture entered into on behalf of the First Christian Church of Lincoln was to forward or promote the legitimate object of the association, but that the lands were bought, held, and sold merely as a speculation.

It is argued in the brief of counsel for plaintiff that the proceeds derived from the sale of the lots were used to pay the indebtedness of the church, and in the construction of its church building. It does not appear that the board of trustees of the First Christian Church so used and applied the money derived from the sales of the land. Moreover, this argument of plaintiff is aptly met by the following excerpt taken from the brief of defendant: "If the mode of the application of the money is the factor that determines whether it is legitimate for a church to take part in a certain business, then a church corporation could secure a license and run a saloon or a billiard hall, or buy a circus outfit and tour the country, or trade horses, or construct a race track and pocket the receipts, provided, only, that the money so realized was applied to the payment of church obligations. It is not believed that counsel for appellants are so unacquainted with the proper functions of a church as to insist upon their argument. It has never been held that the innumerable avenues of the business world are thrown open to a church board to enter in and glean a profit for the church. The very conception of a church forbids it. It would be against public policy for the churches of the land to enter into the bitter competition of the market place. Religion, as exemplified by ecclesiastical bodies under such a régime, would become a hiss and a by-word, and public and private morals would suffer thereby."

It is insisted that James Thompson was an innocent holder of the note, and therefore the defense of *ultra vires* cannot be invoked against the plaintiffs. The *ultra vires* of the transaction being fully established by the evidence, the burden was cast upon the plaintiffs to prove that James Thompson acquired the note and mortgage as an innocent purchaser for the value, before maturity, and without notice. No such evidence having

been adduced on the trial, plaintiffs cannot claim the protection with which the law clothes an innocent purchaser of negotiable paper before due. Moreover, Mr. Thompson was chargeable with notice of the powers of the defendant church under the statute and its articles of incorporation.

Complaint is made in the brief of plaintiffs that the articles of incorporation of the defendant church do not comply with the provisions of § 169, chap. 16, Comp. Stat., in that said articles do not state the limit of indebtedness of the society, nor the manner in which it may enter into contracts; and by reason thereof it is insisted that there are no limitations or restrictions upon the power of the church to contract debts, and that it may enter into contracts, and charge its property, to the same extent as an individual might do. A short answer to this argument is that said § 169 was not in force when the First Christian Church was incorporated, but was adopted at a subsequent date, and does not control. The articles conformed to the statute existing at the time they were adopted and the defendant was incorporated. Again, said § 169 has no application to the case at bar, but relates alone, as expressly stated in the preceding section but one, to "churches, parishes, and societies of all religious bodies, sects, and denominations in this state having a central governing body with spiritual jurisdiction extending over the whole state, or a part thereof, being more than six counties." The First Christian Church of Lincoln does not belong to the class above described, and hence does not come within the provision of said § 169. The uncontradicted evidence shows that the board of trustees, or body which governs the defendant church, never authorized the purchase of the lands already mentioned, nor the sale or indorsement of the note in controversy, but that the lands were bought by two of the trustees, who negotiated and indorsed the note, for and on behalf of the church, without having been authorized in that behalf by the board of trustees, and without any meeting of the said board being called or held to take action in relation thereto. The trustees could only bind the corporation by acting together as a board. A majority of them in their individual names could not act for the board itself, and bind the corporation. It has been held that a majority of a school-district board cannot contract for the erection of a schoolhouse without a notice to or participation therein by the other members of the board. *People ex rel. Hunter v. Peters*, 4 Neb. 254. The same principle has been recognized in *Hutchinson v. Ashburn*, 5 Neb. 402; *State ex rel. Castor v. Saline County Supers.* 18 Neb. 422, 25 N. W. 587; *State ex rel. Carter v. School Dist.* 49, 22 Neb. 48, 33 N. W. 480. The following authorities are more or less in point on the question under consideration: 3 *Thomp. Corp.* §§ 3905, 3950; *Ross v. Crockett*, 14 La. Ann. 823; *Cammeyer v. United German Lutheran Churches*, 2 Sandf. Ch. 186; *Plymouth v. Plymouth County Comrs.* 16 Gray, 341; *North Carolina R. Co. v. Sweep* 49 L. R. A.

son, 71 N. C. 350; *People v. Coghill*, 47 Cal. 364. *Scott v. First Free Methodist Church*, 50 Mich. 528, 15 N. W. 891, cited by plaintiffs, lacks analogy. There two of the three members of a religious corporation borrowed money on the church property, secured by mortgage, without being previously authorized to make the loan by two thirds of the voting members present at a meeting of the society called for that purpose; and the mortgage was sustained because the society, with knowledge of the facts, subsequently ratified the loan. In the case at bar there is no notification for two reasons: First. It is not shown that the proceeds arising from the sale of the note were accepted and retained by the First Christian Church with knowledge of the facts. In the next place, the transaction relating to the real-estate speculation carried on by two of the trustees, with which was intimately connected the transfer of the paper in question, and part of the same transaction, was *ultra vires*, and without the power of the board of trustees, and could not be lawfully ratified by such board. The contract was incapable of ratification. *Tullock v. Webster County*, 46 Neb. 211, 64 N. W. 705; *Gutta-Percha & R. Mfg. Co. v. Ogalalla*, 40 Neb. 775, 59 N. W. 513.

The decree is affirmed.

HIGH SCHOOL DISTRICT NO. 137 of
Havelock, *Plff. in Err.*,
v.
County of LANCASTER.

(.....Neb.....)

- *1. The Constitution of this state requires, not only that the valuation of property for taxation, but the rate, as well, shall be uniform.
2. Sections 1, 3, chap. 62, Laws 1899 (subdiv. 6, chap. 79, Comp. Stat.), which provide that pupils residing without the limits of high-school districts in the state may attend such schools free of charge to them, and that an arbitrary sum shall be paid out of the general fund of the county as compensation to such high-school district for such tuition, which sum may in any case fall below or exceed the cost of such tuition, contravene §§ 1, 4, 6, art. 9, of the Constitution, which declare, among other things, that the legislature may provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises; that the legislature shall have no power to release or commute taxes; and that all taxes for municipal purposes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same.

(April 18, 1900.)

*Headnotes by NORVAL, Ch. J.

NOTE.—As to the equality or uniformity of taxation as between different districts, see *Cook v. Portland (Or.)* 13 L. R. A. 533; and *Daly v. Morgan (Md.)* 1 L. R. A. 757.

ERROR to the District Court for Lancaster County to review a judgment affirming the action of the county commissioners in disallowing a claim against the county for tuition of high-school pupils. *Affirmed.*

The facts are stated in the opinion.

Messrs. C. W. Corey, A. G. Greenlee, and Robert Ryan, for plaintiff in error:

The courts will not interfere by declaring acts invalid simply because they may differ with the law-making power respecting the wisdom or necessity thereof.

Alfalfa Irrig. Dist. Directors v. Collins, 46 Neb. 411, 64 N. W. 1086; *Cummings v. Hyatt*, 54 Neb. 35, 74 N. W. 411; *State ex rel. Simons v. Cornell*, 51 Neb. 556, 71 N. W. 300; *Brodhead v. Milwaukee*, 19 Wis. 658, 88 Am. Dec. 711; *Sharpless v. Philadelphia*, 21 Pa. 150, 59 Am. Dec. 759; *People ex rel. Water Comrs. v. East Saginaw*, 33 Mich. 164; *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24; *Stockton & V. R. Co. v. Stockton*, 41 Cal. 147; *Weismer v. Douglas*, 64 N. Y. 91, 21 Am. Rep. 586; *Loan Asso. v. Topeka*, 20 Wall. 664, 22 L. ed. 461.

Legislation is valid unless forbidden by the Constitution.

State ex rel. Atty. Gen. v. Moores, 55 Neb. 480, 41 L. R. A. 624, 76 N. W. 175; *State ex rel. Atchison & N. R. Co. v. Lancaster County Comrs.* 4 Neb. 537; *State ex rel. Abbott v. Dodge County Comrs.* 8 Neb. 124; *Hanscom v. Omaha*, 11 Neb. 37, 7 N. W. 739; *State ex rel. Hamilton County Comrs. v. Ream*, 16 Neb. 685; *Shaw v. State*, 17 Neb. 334, 22 N. W. 772; *State ex rel. Sayre v. Moore*, 40 Neb. 854, 25 L. R. A. 774, 59 N. W. 755; *Boyes v. Summers*, 46 Neb. 308, 64 N. W. 1066.

For the purpose of maintaining the high school within its limits the district of Havlock is the proper unit for taxation. For the purpose of providing advanced education to qualified residents of the county outside high-school districts, the county is the proper unit for taxation.

State ex rel. Custer County Agri. Soc. & Live Stock Exchange v. Robinson, 35 Neb. 401, 17 L. R. A. 383, 53 N. W. 213.

Public funds may be expended in payment of expenses for maintaining education.

Cooley, Taxn. 106, 107.

The Constitution does not inhibit the passage of laws creating schools of a higher grade, but does no more than require that when established either by general or special law they shall constitute a uniform system.

Eichholtz v. Martin, 53 Kan. 486, 36 Pac. 1064; *Gordon v. Cornes*, 47 N. Y. 608; *People ex rel. Griffin v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Providence Bank v. Billings*, 4 Pet. 514, 7 L. ed. 939; *Thomas v. Leland*, 24 Wend. 65; *Guilford v. Chenango County Supers.* 13 N. Y. 143; *Bank of Rome v. Rome*, 18 N. Y. 38; *Brewster v. Syracuse*, 19 N. Y. 116.

To undertake to review the action of the legislature, and to enforce by judicial power absolute equality of taxation, or to declare a law unconstitutional on the ground that a locality is taxed for what might seem to

the court more than its just proportion of an expenditure for a public purpose, would be a usurpation of the province of the legislature.

Gordon v. Cornes, 47 N. Y. 608.

Messrs. Thomas C. Munger and J. L. Caldwell, for defendant in error:

The act of 1899 violates § 1, art. 9, and § 4, art. 9, and § 6, art. 9, of the Constitution, which require that taxes shall be levied by valuation, so that everyone shall pay a tax in proportion to the value of his property, and no one shall be exempt from taxation.

Taxes shall be levied with uniformity and equality, so that each individual in a district's boundaries shall pay his proportionate share of the public burden for that district.

Clother v. Mather, 15 Neb. 6, 16 N. W. 902; *Turner v. Althaus*, 6 Neb. 54; 25 Am. & Eng. Enc. Law, p. 60.

No exemption from taxation can be tolerated.

State ex rel. Cornell v. Poynter (Neb.) 81 N. W. 431; *State ex rel. Jones v. Graham*, 17 Neb. 43, 22 N. W. 114; *Union P. R. Co. v. Saunders County Comrs.* 7 Neb. 228.

Because the taxpayer in the city is required to pay more than his share of the high-school fund, the county taxpayer is exempt from taxation just that much.

A legislature is powerless to compel a part of the county to pay a tax for the benefit of the whole county.

Ramsey v. Hoeger, 76 Ill. 432; *People v. Parks*, 58 Cal. 624; *O'Kane v. Treat*, 25 Ill. 558; *Dyar v. Farmington*, 70 Me. 515; *Fletcher v. Oliver*, 25 Ark. 289; *Gunnison County Comrs. v. Owen*, 7 Colo. 467, 4 Pac. 795; *Sanborn v. Rice County Comrs.* 9 Minn. 273, Gil. 258; *Wells v. Weston*, 22 Mo. 384.

The Constitution of Nebraska, art. 9, § 6, allows municipal corporations to assess and collect taxes for corporate purposes. This is a restriction of the power of a municipal corporation, such as a county, to collect taxes for any other than corporate purposes.

Cooley, Taxn. 2d ed. pp. 689-692; *York v. Chicago, B. & Q. R. Co.* 56 Neb. 572, 76 N. W. 1065; *Magneau v. Fremont*, 30 Neb. 843, 9 L. R. A. 786, 47 N. W. 280; *Harvard v. St. Clair & M. Leves & Drainage Co.* 51 Ill. 130; *Primm v. Belleville*, 59 Ill. 142; *Sleight v. People use of Weller Twp.* 74 Ill. 47; *People ex rel. Cairo & St. L. R. Co. v. Trustees of Schools*, 78 Ill. 136.

That such a tax might increase the prosperity of the school district, or promote trade or values therein, or incidentally benefit the locality, is not a corporate purpose.

Weismer v. Douglas, 64 N. Y. 91, 21 Am. Rep. 586; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185; *Loan Asso. v. Topeka*, 20 Wall. 955, 22 L. ed. 455; *Opinion of the Justices*, 58 Me. 590.

The corporate purpose must be for the direct corporate benefit of the district taxed.

Cooley, Taxn. pp. 140-145; *Bellepoint v. Pence*, 13 Ky. L. Rep. 371, 17 S. W. 197; *Husbrouck v. Milwaukee*, 13 Wis. 37, 80 Am.

Dec. 718; *State ex rel. Oshkosh Bd. of Edu. v. Haben*, 22 Wis. 660; *People ex rel. McKenzie v. Ulster County Supers.* 94 N. Y. 203; *Re Assessment of Lands*, 60 N. Y. 398; *Sleight v. People use of Weller Twp.* 74 Ill. 47; *Simon v. Northrup*, 27 Or. 487, 30 L. R. A. 171, 40 Pac. 560; *Hubbard v. Fitzsimmons*, 57 Ohio St. 436, 49 N. E. 477; *Farris v. Vannier*, 6 Dak. 186, 3 L. R. A. 713, 42 N. W. 31; *Wells v. Weston*, 22 Mo. 384.

Norval, Ch. J., delivered the opinion of the court:

This suit was brought in the district court of Lancaster county to test the constitutionality of §§ 1 and 3 of an act of the legislature approved April 1, 1899, entitled "An Act to Provide Free Attendance at Public High Schools of Nonresident Pupils; to Provide for the Expense Thereof, and to Amend Section 3 of Subdivision 6, Sections 2 and 7 of Subdivision 14, and 2 of Subdivision 17, Chapter 79, Compiled Statutes of Nebraska for 1897; and to Repeal Said Original Sections now Existing." Laws 1899, chap. 62 (Comp. Stat. chap. 79, subd. 6). The sections mentioned are as follows:

"Sec. 1. That all regularly organized public high schools determined by the state superintendent of public instruction to be properly equipped as to teachers, appliances, and course of study, shall hereafter be open to attendance by any person of school age, residing outside of the district, resident of the state, whose education cannot profitably be carried further in the public school of the district of his residence: provided . . . that said pupil has completed the common-school course prescribed by the state superintendent for work below the high school: provided, further, such nonresident pupils shall be subject in all respects to the same rules and restrictions as those which govern resident pupils attending such high school, and attend the nearest high school of approved grade, or any high school of approved grade in the county of their residence: provided, further, when any high school shall be unable to furnish accommodations to non-residents without constructing or renting additional buildings, the board of education may refuse admission to such pupils."

"Sec. 3. The school board of each school district of the state whose high school is attended by pupils under the provisions of this act shall, at the close of each school year, report in such form as the state superintendent may prescribe, to the county board of each county in which such pupils are resident, the number of pupils attending such high school from said county and the length of time of attendance of each pupil in weeks as hereinafter specified, and said county board shall, at the first regular meeting after the filing of such report, allow said district the sum of seventy-five cents for each pupil reported for each week during any part of which said pupil shall have been in attendance, and order a warrant drawn on the general fund of said county in favor of said school board for such sum, and the teacher's register shall be prima facie evidence of attendance of pupils set forth in such claim." 49 L. R. A.

Under this act, high-school district No. 137, of Havelock, Nebraska, filed a petition in the district court of Lancaster county, on appeal from the disallowance of its claim against the county for tuition for pupils attending its high school, resident within said county, but outside said high-school district. To this petition a general demurrer was sustained, and, the plaintiff electing to stand on its petition, the action was dismissed, and it comes to this court on error.

It is argued that, inasmuch as a taxpayer inside the high-school district must, under this act, pay the difference, if any, between the cost of tuition of nonresident pupils and the 75 cents per week allowed by § 3 of the act to be paid out of the general fund of the county, and must also pay his proportionate share of the 75 cents per week, with the other taxpayers of the county, in addition to bearing the whole of the expense of educating those pupils resident within the limits of the high-school district, the law violates §§ 1, 4, and 6 of article 9 of the Constitution. Said sections are as follows:

"Sec. 1. The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises, the value to be ascertained in such manner as the legislature shall direct, and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, innkeepers, liquor dealers, toll bridges, ferries, insurance, telegraph, and express interests or business, venders of patents, in such manner as it shall direct by general law, uniform as to the class upon which it operates."

"Sec. 4. The legislature shall have no power to release or discharge any county, city, township, town or district whatever, or the inhabitants thereof, or any corporation or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever."

"Sec. 6. The legislature may vest the corporate authority of cities, towns, and villages with power to make local improvements by special assessments, or by special taxation of property benefited. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

Before entering at large upon the discussion of the questions presented by the record, we would say that it does not appear to the court that the constitutional objections urged against this act are in any wise mitigated by the provision in § 3 thereof which grants to the school district, as compensation for the tuition of such nonresident pupils, the fixed and arbitrary sum therein named. Such sum may fall below or exceed the cost of such tuition, and is therefore not a factor tending to mitigate or offset any

objections that are raised in the case. So far as it affects the question, the act may have as well provided that such tuition might be without cost to taxpayers resident outside such school districts. An act providing that nonresident pupils should be taught free of cost to taxpayers outside the limits of the district would, in our opinion, violate § 4 of article 9 of the Constitution; for it would, in effect, release from their proportionate share of the taxes necessary to pay the cost of tuition of such nonresident pupils all portions of the county lying outside the limits of such high-school district, and would be taxing one portion of a county for the benefit of another portion. *Bellepoint v. Pence*, 13 Ky. L. Rep. 371, 17 S. W. 197. We will now discuss the constitutional questions thus involved, keeping in view the oft-repeated principle of this court that the judiciary will not declare an act of the legislature unconstitutional unless it is clear that such act is inhibited by the fundamental law. *State ex rel. Cornell v. Poynter* (Neb.) 81 N. W. 431, and cases cited.

It will be observed that § 1 of the Constitution, quoted, prescribes, among other things, substantially, that the legislature shall provide such revenue as may be needed, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises, etc. Section 6 provides, substantially, that for all corporate purposes, except certain therein enumerated, all municipal corporations may be invested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same; and § 4 prohibits the legislature from releasing or discharging any county, city, township, town, or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of the taxes to be levied for state purposes, or due any municipal corporation, and from commuting any such taxes, in any form whatever. For the purposes of this case, assume that the 75 cents per week allowed to be collected by the act from the county generally be insufficient to meet the expenses of educating the nonresident pupils in a given high-school district; it is plain this difference must be made good by levying and collecting taxes on the property of the taxpayers resident in the school district, and this difference cannot be collected from taxpayers of the whole county. Then the taxpayers within the school district will pay a greater proportion of these taxes than would those residing within the county, but outside the school district; and, while the valuation of the property of those within the school district and those without it might be uniform, yet the rate of taxation, for the same purpose, would be higher on the property within, than upon that without, the school district. Again, assume that the 75 cents per week exceeds the cost of tuition of such nonresident pupils; then the excess would

accrue to the high-school districts, and the taxpayers thereof would profit at the expense of those outside of the limits of the high-school district, and in either case the rule of uniformity prescribed in § 6 of said article of the Constitution would be violated—indirectly, perhaps, but it would be violated.

It is argued that § 1 of the article of the Constitution under discussion relates to uniformity of valuation only, and not to uniformity of rate of taxation. If that be true, then the provisions confer a barren right only; for the legislature could, under such construction, authorize municipal corporations to levy a higher rate of tax for a given purpose upon one subdivision of the corporation, and a lower rate on other subdivisions, whereby some of the subdivisions, while their property might be uniform in valuation with all other subdivisions, would yet pay a much greater proportion of the taxes so levied. We are not disposed to so construe this section, but believe that it was intended, particularly when construed in connection with § 6, that for the same municipal purposes the rate, as well as the valuation, should be uniform, and that it was not within the province of the legislature to evade the inhibition, either directly or indirectly. *Cooley*, Taxn. 1st ed. 133. The high-school district and all other portions of the county are, for the purposes of this act, an integral whole,—such districts being a portion thereof; and, giving effect to either of the assumptions above made, we would say that it clearly comes within the constitutional inhibitions named. We quite agree with counsel for plaintiff that under this act the county is the proper limit of taxation; but we have already shown that, in the event the cost of tuition should exceed or fall below the amount provided by § 3 of the act to be raised by taxing the property of the whole county, it would indirectly violate the rule of uniformity prescribed in § 6 of the article of the Constitution named. It would also violate § 4 of said article, as an advantage would accrue to the taxpayers resident in the one or the other of the two portions of the county affected thereby, and it would clearly be a commutation of the taxes to be paid by the taxpayers resident in the one or the other of the two localities. It may be true that such commutation would be brought about indirectly; that is, in case the cost of tuition exceeded the amount provided to be paid by the general tax upon the whole county, the taxpayers resident within the school district would be compelled to supply the deficiency by another levy upon the property within such district, whence it would follow that the difference would be a commutation in favor of those portions of the county outside the district, or, in case the cost of tuition should fall below the specified amount, the taxpayers within the limits of the district would profit at the expense of those without its limits, and it is clear that in either event a commutation of taxes would result. The cases stated are, of course, only assumptions, but they are the natural result of the system sought to be in-

augured by the act in question. It would seem clear and convincing that the act violates the provisions of the Constitution cited, in the respects named, and that legislation of the character of the act in question cannot be upheld by the court. *Clother v. Maher*, 15 Neb. 3, 16 N. W. 902; *Turner v. Althaus*, 6 Neb. 54; *State ex rel. Cornell v. Poynter* (Neb.) 81 N. W. 431; *State ex rel. Jones v. Graham*, 17 Neb. 43, 22 N. W. 114; *Union P. R. Co. v. Saunders County Comrs.* 7 Neb. 228.

It is not deemed necessary to consider whether the fact that under this act the taxpayers of such districts are compelled to pay the whole of the expense of educating pupils resident in such district, and in addition

thereto the proportion of the expense of educating nonresident pupils, affects the question of the constitutionality of the act; for, in our view, the act contains sufficient objections outside of this to render it invalid, and a discussion of this question would seem unnecessary. It is not doubted that, in a proper case, double taxation may be constitutional, and that taxation of overlying districts may, also, in a proper case, be unobjectionable, so far as constitutional provisions are concerned; but it is not deemed necessary to enter into a discussion of this question at this time.

For the reasons named, the judgment of the lower court is right, and is affirmed.

NEW HAMPSHIRE SUPREME COURT.

JUDGE OF PROBATE

v.

A. W. SULLOWAY *et al.*

(68 N. H. 511.)

1. Sureties upon an executor's bond are liable for the payment of his personal debt to the testator, although he is insolvent, under a statute making such debt assets in his hands for which he must account in the same way and manner as for a debt against any other person.
2. A decree on the settlement of an executor's account is binding on his sureties.
3. An executor's sureties are not bound by a decree on the settlement of the account of an administrator *de bonis non* of testator's estate.
4. A party to a judgment is not bound by it as against strangers to it.
5. One who has the equitable and beneficial interest in a sum due, while another has the legal interest, may, by an amendment, be named as the party in interest and to the issue of an execution for her use, under Pub. Stat. chap. 199, §§ 5-8.
6. A decree of the judge of probate is not necessary to a suit on an executor's bond for a sum which is admitted to be due.

(Chase, J., dissents.)

(July 31, 1896.)

RESERVATION after judgment in plaintiff's favor by the Merrimack County Court for the opinion of the full bench of an action to enforce the liability of sureties on the bond of Daniel Barnard, executor, etc., of Eliza Bean, deceased, for the benefit of a creditor of the estate. *Case discharged.*

At the time of his appointment as executor Daniel Barnard was indebted to Eliza Bean's estate. He charged himself with this indebtedness in his account as executor.

NOTE.—As to liability of surety on executor's bond, see *Deobold v. Opperman* (N. Y.) 2 L. R. A. 644, and note; *Nanz v. Oakley* (N. Y.) 9 L. R. A. 223; and *Hodge v. Hodge* (Me.) 40 L. R. A. 33.
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He died before his account was settled. James E. Barnard was appointed administrator of his estate and settled the account filed by the executor. Upon that settlement the probate court found that the executor had in his hands to be accounted for the sum of \$17,751.70, in which was included \$565.42, the amount of the executor's indebtedness to the estate. James E. Barnard was also appointed administrator *de bonis non* of the Bean estate, and upon settlement of his account he was charged with the full amount found to be in the executor's hands at the time of his decease. Sarah E. Elliott, administratrix of Lydia Elliott, was entitled to \$5,447.48 of this amount. The administrator *de bonis non* paid to her \$4,867.83 and turned over to her the claim against Daniel's estate, amounting to \$579.55. Daniel was insolvent when appointed executor, and so continued until his death. This proceeding was instituted to compel the sureties on his bond to pay the amount of his indebtedness to the estate.

The further facts appear in the opinion. *Messrs. Sargent & Hollis*, for plaintiff:

The decree of the probate court, not having been appealed from, is conclusive upon the defendants that the notes were paid, and evidence cannot be introduced to contradict it.

Flanders v. Lane, 54 N. H. 390; *Jones v. Chase*, 55 N. H. 234; *Simmons v. Goodell*, 63 N. H. 458, 2 Atl. 897.

Treating the notes as paid, there was a balance due plaintiff not paid over by Daniel Barnard or his administrator, and she properly proved her claim as administratrix against the estate of Daniel Barnard, which was allowed by the commissioner and upon which she received \$174.07, leaving a balance due her of \$405.48. For this amount the bondsmen were clearly responsible.

Prescott v. Farmer, 59 N. H. 90.

Where, as in this case, the plaintiff is the only party who is entitled to the proceeds when recovered of the bondsmen, the unnecessary formality should not be required, of making James Barnard perform the un-

pleasant duty of suing his father's bondsmen, and then settle an account and turn over the balance to the plaintiff.

Neal v. Becknell, 85 N. C. 299.

If it is necessary the court will allow the plaintiff to amend by making James E. Barnard administrator *de bonis non* of the estate of Eliza Bean, the nominal plaintiff.

Prescott v. Farmer, 59 N. H. 90; *Hazen v. Quimby*, 61 N. H. 76.

A debt due from the administrator to the estate shall be assets, and accounted for as other debts.

N. H. Pub. Stat. chap. 189, § 12; *Norris v. Towle*, 54 N. H. 290; *Jones v. Chase*, 55 N. H. 236; *Preston v. Cutter*, 64 N. H. 468, 13 Atl. 874.

The fact stated in the reserved case, that "Daniel Barnard was insolvent when appointed executor and continued insolvent till his death," is not material.

If the insolvency of the administrator is to affect the question at all, they should at least be required to raise such question on the settlement of the account or on an appeal therefrom.

Simmons v. Goodell, 63 N. H. 458, 2 Atl. 897; 2 Woerner, American Law of Administration, pp 652, 653, 654.

The fact that the executor charges himself with his debt in the inventory or account is an important fact. It settles the question that he owes the estate, and the amount of his debts; and in those cases where the debt has been thus accounted for great stress has been laid upon the fact.

Tarbell v. Jewett, 129 Mass. 461; *Leland v. Felton*, 1 Allen, 531.

The sureties are not entitled to impeach the decree collaterally, and to show that the settlement of the accounts of the administrator as made by the probate court was erroneous.

Choate v. Jacobs, 136 Mass. 299; *White v. Weatherbee*, 126 Mass. 450.

McSarrs. Edward B. S. Sanborn and Frank N. Parsons, for defendants:

Technically, Sarah Elliott, administratrix, cannot maintain this suit because there has not been any decree or sentence of the probate court ordering the payment of any sum to her; the proper person to bring such suit being the administrator *de bonis non*.

Judge of Probate v. Heydock, 8 N. H. 491; *Judge of Probate v. Claggett*, 36 N. H. 381, 72 Am. Dec. 314; *Gookin v. Hoit*, 3 N. H. 392; *Judge of Probate v. Briggs*, 5 N. H. 66; *Judge of Probate v. Emery*, 6 N. H. 141; *Judge of Probate v. Locke*, 6 N. H. 396; *Judge of Probate v. Kimball*, 12 N. H. 165; *Judge of Probate v. Adams*, 49 N. H. 150; 2 Redf. Wills, ed. 1866, p. 82; *Adams v. Adams*, 16 Vt. 228.

The plaintiff rests her case upon the proposition that the decree of the probate court upon the account of Daniel Barnard, executor, finding \$17,751.70 in his hands due the estate, is a judgment binding the defendants in this suit. If this be so, then this sum was due the administrator *de bonis non*, and payment to him was a discharge of the defendants.

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Judge of Probate v. Heydock, 8 N. H. 491; *Judge of Probate v. Claggett*, 36 N. H. 381, 72 Am. Dec. 314.

The administrator *de bonis* filed an inventory of the property of the estate found, after Daniel Barnard died, and later settled an account wherein he charges himself with the full amount of the funds adjudged to be in Daniel Barnard's hands as executor. If the probate judgment in the first account conclusively establishes that Daniel Barnard, as executor, had in his hands \$17,751.70 in money of the estate, the second account as conclusively establishes that the administrator *de bonis non*, the proper party in the interest in this suit, received the whole sum, and on the record these defendants are discharged.

The defendants did not become guarantors for the payment of the executor's then existing debt to the estate; they did engage that he would not embezzle the property of the estate and for due care in the discharge of his official duty.

Unless the sureties were guarantors of Barnard's personal debt, the decree did not necessarily determine the part of his debt for which they are responsible.

At common law the appointment of a person as executor was a release of the debt owed by him to the testator. By Pub. Stat. chap. 189, § 12, "a debt due from the administrator to the estate shall be assets and accounted for as other debts."

Wheeler v. Emerson, 44 N. H. 182; *Norris v. Towle*, 54 N. H. 290; *Jones v. Chase*, 55 N. H. 234.

The sureties were not liable for his failure to pay his debt.

Baucus v. Barr, 45 Hun, 582, Affirmed in 107 N. Y. 624, 13 N. E. 930; *Kinney v. Knisign*, 18 Pick. 232; *Lyon v. Osgood*, 58 Vt. 707, 7 Atl. 5.

That Daniel Barnard marked the notes paid, or entered them as paid, does not affect this case, unless he had in his hands as executor the money therefor.

A surety is liable for the executor's debt only to the same extent as for the debts of third parties.

Spurlock v. Earles, 8 Baxt. 437.

Sureties on an administrator's bond are not liable for the debt of the administrator to the estate which he has failed to charge himself with and account for, where the administrator was insolvent at the time of his appointment, except in the amount which could have been saved to the estate after his appointment, by the exercise of due diligence.

State ex rel. McClamrock v. Gregory, 119 Ind. 503, 22 N. E. 1; 24 Am. & Eng. Enc. Law, p. 868.

Clark, J., delivered the opinion of the court:

One of the principal questions is whether the sureties upon an executor's bond are liable for the payment of his personal debt to the testator. Except as against creditors, an executor's indebtedness to the testator was by the common law released or extin-

guished. 2 Bl. Com. 512; Bacon, Abr. *Executors* (A), 10; 2 Wms. Exrs. 1310, and cases cited; Wentworth, Exrs. 1st Am. ed. 73-76; Co. Litt. 264b, note 1; *Gardner v. Miller*, 19 Johns. 188; *Marvin v. Stone*, 2 Cow. 781, 809. The purpose of § 7 of the act of July 2, 1822, was to abolish this rule. *Norris v. Towle*, 54 N. H. 290, 294. It provided that "all debts due from the executor or administrator to the testator or intestate shall be assets in his hands for which he shall account in the same way and manner, as for a debt against any other person; and the judge of probate is hereby authorized to ascertain and liquidate such debt and charge the executor or administrator therewith." Laws 1822, chap. 31, § 7. In the revision of 1842 it was condensed without alteration of the sense (Rev. Stat. chap. 159, § 9), and has ever since stood upon the statute book in exactly the same language (Id. chap. 189, § 12). The statute affords no ground for the inference that the debt is not to be treated as assets unless the executor is solvent. The inference, if any, is quite the other way. No legal fiction is involved. It is pure matter of fact. The executor has, as matter of fact, received from the testator so much money or money's worth, and is answerable for it. It is money in his hands precisely as if a debtor had paid him so much money. A like statute, to the same effect and for the same purpose, was enacted in New York. *Soverhill v. Suydam*, 59 N. Y. 140, 142; *Baucus v. Stover*, 89 N. Y. 1 (where the statute is recited); *Re Consalus*, 95 N. Y. 340. The statute was passed in consequence of the decisions of the courts in accordance with the common law. *Thomas v. Thompson*, 2 Johns. 471; *Gardner v. Miller*, 19 Johns. 188; *Marvin v. Stone* (1824) 2 Cow. 781. Without any special statute, the same result was reached in Massachusetts, Maine, Connecticut, and Vermont, either under general statutes providing for the settlement of estates and the distribution of property not devised or bequeathed (*Winship v. Bass*, 12 Mass. 198; *Probate Court v. Merriam*, 8 Vt. 234), or on the ground that the common-law doctrine had never been adopted (*Bacon v. Fairman*, 6 Conn. 121, 129; *Williams v. Morehouse*, 9 Conn. 470, 474; *Davenport v. Richards*, 16 Conn. 310; *Potter v. Titcomb*, 7 Me. 302).

An executor or administrator is required by the statute to give a bond, with sufficient sureties, on condition (1) to return to the judge a true and perfect inventory of the estate of the deceased, upon oath, within three months from the date of the bond; (2) to administer the estate according to law; (3) to render an account within a year; and (4) to pay and deliver the rest and residue of the estate which shall be found remaining upon the account to such person or persons as the judge, by his decree according to law, shall limit and appoint. Pub. Stat. chap. 188, § 12. The liability of the sureties is coextensive with that of the principal. *Wattles v. Hyde*, 9 Conn. 10, 15. They are his privies. By whatever decree of the probate court their principal is bound, they are 49 L. R. A.

bound. *Stovall v. Banks*, 10 Wall. 583, 19 L. ed. 1036; *Cason v. Jerome*, 58 N. Y. 315; *Gerould v. Wilson*, 81 N. Y. 573; *Scofield v. Churchill*, 72 N. Y. 565; *Deobold v. Oppermann*, 111 N. Y. 531, 2 L. R. A. 644, 19 N. E. 94; *Choate v. Arrington*, 116 Mass. 552, 556; *Towle v. Towle*, 46 N. H. 431, 434. This is because they have, in legal effect, so stipulated in the bond. It necessarily follows that they are bound to whatever in law their principal, the executor, is bound. That he is bound to account for his indebtedness to the testator is not questioned, nor is it claimed that he is relieved from this obligation by the fact that he is insolvent or unable to pay. The judge of probate cannot release him from his obligation on the mere ground that he is unable to perform it. He has authority to determine whether the indebtedness exists, and the extent of it (Pub. Stat. chap. 189, § 12), and there his authority ends. If the debt is admitted or found, the judge of probate has no choice. He must charge it to the executor as part of the assets belonging to the estate. This duty is imperative. He cannot authorize the executor to compromise with himself, nor has he any authority to negotiate and compromise with the executor. *Norris v. Towle*, 54 N. H. 290. It is wise that such should be the law. If it were otherwise, it would open a wide door to fraud. "On technical grounds, as well as on considerations of policy, an administrator is not permitted to show that he could not collect a debt due from himself." Shaw, Ch. J., in *Kinney v. Ensign*, 18 Pick. 232, 236.

Stevens v. Gaylord, 11 Mass. 256, decided in 1814, is the earliest case on the subject. The court there says (pages 269, 270): "As soon as the debtor is appointed administrator, if he acknowledges the debt, he has actually received so much money, and is answerable for it. This is the result with respect to an executor ([*Wankford v. Wankford*] 1 Salk. 306), and the same reason applies to an administrator, as the same hand is to receive and pay, and there is no ceremony to be performed in paying the debt, and no mode of doing it, but by considering the money to be now in the hands of the party in his character of administrator. . . . The consequence is that he and his sureties in the administration bond are liable for the amount of such a debt, in like manner as if he had received it from any other debtor of the deceased. It may be thought injurious to the sureties of the debtor that they should thus be made liable for a debt due from the administrator. To this it may be answered that, if such be the legal effect of the bond, it is presumed to have been contemplated by the parties at the time of executing it, and they cannot afterwards complain of the natural and legal consequence of their own voluntary act." Such is the settled law in Massachusetts. *Winship v. Bass* (1815) 12 Mass. 198; *Kinney v. Ensign* (1836) 18 Pick. 232; *Ipswich Mfg. Co. v. Story* (1842) 5 Met. 310; *Sigourney v. Wetherell* (1842) 6 Met. 553; *Brinchley v. Chapin* (1852) 10 Cush. 173; *Mattoon v. Cowing* (1859) 12

Gray, 387; *Leland v. Felton* (1861) 1 Allen, 531.

"The surety is liable for whatever is properly chargeable to his principal in the official capacity on account of which the bond was given." *Choate v. Arrington*, 116 Mass. 552, 556. There is in law or logic no escape from this conclusion. Such, in substance, was the decision in *Judge of Probate v. Claggett*, 36 N. H. 381, 72 Am. Dec. 314. It is no hardship on the surety. He executes the bond for the purpose—the sole purpose—of securing to those interested in the estate whatever by law belongs to them,—whatever money or property is in law a part of the assets. In a proper case, he might, no doubt, upon taking the appropriate steps, be relieved; as if, *e. g.*, he executed the bond in ignorance of the executor's insolvency, the executor might, on his application, be removed, and another appointed, or he might be discharged, under Pub. Stat. chap. 199, § 3, and a new bond required. See *Benchley v. Chapin*, 10 Cush. 173, 176. If a responsible party was bound with the executor for the debt, either as joint principal or as surety, equity would compel him to pay on the application of the surety on the bond.

In *Wheeler v. Emerson*, 44 N. H. 182, 188, it was held that where, by a decree of the probate court, the executor is charged with the amount of his indebtedness to the testator, the surety is liable. It is said (page 188): "By statute, a debt due the intestate from the administrator is assets in his hands, and must be accounted for as other debts, . . . and the decree of the probate court charges the principal debtor with the amount of such debts, and we must presume that he was rightfully charged. Under such circumstances, the sureties would be held." It was accordingly held that the trustee could not be charged for collaterals which he held for his security against his liability for the executor or administrator.

The decision in that case governs the present one. The executor here has been charged with his indebtedness to the testatrix by decree of the judge of probate. The liability of the surety cannot depend on the question whether he is secured against loss. The decree of the probate court charging Daniel Barnard, as executor, with the amount of his debt, is conclusive until reversed upon appeal, and cannot be attacked collaterally.

In *Lyon v. Osgood*, 58 Vt. 707, 7 Atl. 5, the executor's indebtedness to the testator was \$9,508.82, and all the other assets were only \$427. In a bill in equity brought by a surety to restrain an action against him on the bond, the court held that he was liable as surety for only such part of the debt as the executor, at the time he was appointed or afterwards, was able to pay. Among other things, the court says (pages 714, 715, 58 Vt., and page 7, 7 Atl.): "If, at the time the surety assumes responsibility, the executor is able to pay his debt to the estate, or afterwards, during the settlement of the estate, he becomes able to pay it, the surety is responsible for it as assets. The executor's failure to account for his debt, when he has 49 L. R. A.

the power and means to pay it, is a gross violation of his duty. It cannot be held to be a breach of trust for the executor not to do what is beyond his power and control to perform, when free from laches. . . . In the absence of laches, we think the surety is liable upon his bond for the executor's debt, only to the extent of the executor's ability to pay it." That is to say, the surety is liable in those cases only where no surety is needed.

In *Harker v. Irick*, 10 N. J. Eq. 269, 271, 272, the court says: "He [the surety] is only bound for the faithful performance of his duties as administrator. It could be no breach of trust or delinquency in duty for the administrator not to do what is beyond his power and control to perform. If, under such circumstances, the administrator should, in the settlement of his accounts with the court, charge himself with the debt, and the accounts should be passed in such a shape as to bind the surety for the debt, the surety would be relieved, upon application to the proper tribunal, from such responsibility. It would be a fraud upon the surety to exact the debt from him, whether the administrator did or did not, by his mode of accounting, contemplate a fraud. But if, at the time the surety assumes his responsibility, the administrator owes the estate, and is solvent and able to pay, the amount of the debt will be considered, in law and equity, as so much money in his hands as administrator at the time, and consequently the surety will be responsible for it. It is the duty of the administrator to collect the debts of the estate without delay, and certainly any delay which places the debt he himself owes the estate in jeopardy, and results in its loss, is a gross violation of his duty as administrator." In other words, in New Jersey as in Vermont, when the executor is solvent, and able to pay, and no surety is needed, the surety is responsible for his debt; but when the executor is unable to pay, and a surety's liability would be valuable, the surety is not liable.

The defendants, as sureties of Daniel Barnard, are concluded by the decree made on the settlement of his account. They are privies to that decree. *Heard v. Lodge*, 20 Pick. 53, 58, 32 Am. Dec. 197, and cases before cited; *Towle v. Towle*, 46 N. H. 431, 434. To the decree made on settlement of James E. Barnard's account, as administrator *de bonis non* of Eliza Bean's estate, they are not privies, but mere strangers. They are not bound by it, and, inasmuch as they are not, neither is James E. Barnard bound by it as against them. *Mahagan v. Mead*, 63 N. H. 130, 132, 3 Atl. 919; *Parker v. Moore*, 59 N. H. 454, 458; *Hale v. Woods*, 9 N. H. 103, 106.

Though the legal interest in the sum due is in James E. Barnard, the equitable and beneficial interest is in Sarah E. Elliott. If the money should come to the hands of Barnard, he would be bound to pay over the same exact sum to her. Under these circumstances, no objection is perceived to an amendment naming her as the party in interest and to the issue of an execution for her

use. Pub. Stat. chap. 199, §§ 5-8. The sum due to her is admitted, and, in such case, a decree of the judge of probate that the amount be paid is not necessary to a suit on the bond. *Gookin v. Hoyt*, 3 N. H. 392; *Judge of Probate v. Briggs*, 5 N. H. 66, 69, 70; *Judge of Probate v. Emery*, 6 N. H. 141;

Judge of Probate v. Locke, 6 N. H. 396; *Judge of Probate v. Adams*, 49 N. H. 150. Case discharged.

Blodgett and Parsons, JJ., did not sit. **Chase, J.**, dissents. The others concur.

RHODE ISLAND SUPREME COURT.

Joseph E. ALLEN

v.

Samuel J. GERARD.

(.....R. I.....)

A balance of the proceeds of a sale of attached perishable property remaining in the hands of the clerk of the court after payment of an execution in favor of the plaintiff cannot be garnished by a creditor of the defendant, as the clerk continues to be the legal custodian of the money in his official capacity under control of the court.

(November 6, 1899.)

EXCEPTION by plaintiff to rulings of the District Court for Providence County discharging the clerk of court as garnishee in proceedings to reach funds alleged to be in his hands belonging to defendant. *Overruled.*

The facts are stated in the opinion.

Mr. William A. Morgan, for plaintiff:

Money directed by the statute to be paid into the "registry of the court" must be intended to be paid into the hands of the person whose official duty it is to conduct or preside over such registry.

The money then having been actually paid by the officer after the said sale in the suit of Kimball, Colwell, & Co. against the defendant, into the hands of the clerk of the court, said Rueckert, and such clerk having satisfied out of such money so paid into his hands the execution issued in said suit of Kimball, Colwell, & Co. against the defendant, it was then the duty of the clerk to pay over the balance of such money to the defendant, and the defendant then became entitled to receive it, and if not then paid over to him by said clerk he could have maintained a suit against the clerk in his individual capacity for money had and received to the defendant's use. Such being the case, said Rueckert, after satisfying the said execution as clerk, was garnishable individually in a suit by another person against the defendant.

After the object for which such funds are held has been satisfied, then such officer holds the balance of such funds, not as an officer of the court (nor is such balance *in custodia legis*), but as trustee for the person entitled

NOTE.—For garnishment of property in custody of law, see *Dunsmoor v. Furstenfeldt* (Cal.) 12 L. R. A. 508, and *note*; *Ex parte Hurn* (Ala.) 13 L. R. A. 120; and *Holker v. Hennessey* (Mo.) 39 L. R. A. 165. 49 L. R. A.

to receive such balance, and in a suit against such person such trustee may be garnished.

Weaver v. Davis, 47 Ill. 235; *Pierce v. Carlton*, 12 Ill. 358, 54 Am. Dec. 405; *Dunlop v. Paterson F. Ins. Co.* 12 Hun, 627; *Tucker v. Atkinson*, 1 Humph. 300, 34 Am. Dec. 650; *Gaither v. Ballew*, 49 N. C. (4 Jones, L.) 488, 69 Am. Dec. 763; 2 Wade, Attachm. § 347.

Mr. Dexter B. Potter, for defendant:

It would require an order of the court for the defendant to get the money. Had there been no attachment the defendant could not have obtained the money by going to the clerk and telling him that he "wanted it."

Ross v. Clarke, 1 Dall. 354, 1 L. ed. 173; *Alston v. Clay*, 3 N. C. (2 Hayw.) 171; *Hunt v. Stevens*, 25 N. C. (3 Ired. L.) 365; *Drane v. McGavock*, 7 Humph. 132; *Mattingly v. Grimes*, 48 Md. 102.

Tillinghast, J., delivered the opinion of the court:

The only question raised by the exceptions in this case is whether the ruling of the district court of the sixth judicial district in discharging Frederick Rueckert, who is the clerk of said court, as garnishee in the above-entitled action, was correct. The facts, in so far as they are necessary for the determination of the case, are these: An action was brought in said court whereby certain personal property was attached. This property, being perishable, was subsequently sold by order of the court, under the provisions of R. I. Gen. Laws, chap. 254, §§ 2, 3, and the net proceeds of the sale, amounting to \$156.04, were paid into the registry of said court. Said § 3 reads as follows: "If, after reasonable notice, no person appear, or no sufficient cause to the contrary be shown, said justice may direct the officer to sell the same in such manner, on such notice, and at such time, as said justice may prescribe; and such officer shall immediately pay the proceeds of such sales, after deducting therefrom the necessary charges thereof, into the registry of such court, there to be held as security to satisfy such judgment or decree as the attaching creditor or complainant may recover." The plaintiff in the action referred to recovered judgment, and obtained execution thereon, for the sum of \$57.29, which sum was paid to him by said Rueckert, clerk, out of the fund in the registry of the court, leaving a balance therein of \$98.75. Thereupon the plaintiff commenced the present action,

and served his writ upon said Rueckert, for the purpose of attaching said balance in his hands.

The plaintiff's contention is that, the clerk of the court having paid and satisfied the execution in the original action, the defendant therein became entitled to have and receive from him the balance remaining in his hands, and hence that it was subject to the process of garnishment at the suit of the present plaintiff. While there is some conflict of authority upon the question of the liability of public officials to the process of garnishment (see 2 Wade, *Attachm.* § 347), we think the decided weight thereof, as well as the better reason, is against such liability, and that a public officer who has money in his hands to satisfy a claim or demand which one has upon him merely as a public officer cannot for this reason be adjudged a garnishee. The reason is obvious. Public officials are charged with certain well-defined duties, and the law prescribes the manner in which they shall be performed. If, while in the discharge of these duties, the officer is interfered with by some person who is a stranger to the proceedings, confusion and inconvenience will necessarily be the result, new complications will arise, and a multitude of suits be made possible where there should have been but one. And in order to avoid such inconvenience and confusion the principle has very generally been established that "no person deriving his authority from the law, and obliged to execute it according to the rules of law, can be holden by process of this kind." *Brooks v. Cook*, 8 Mass. 246; *Thayer v. Tyler*, 5 Allen, 94. See also cases collected in notes to *Curtis v. Ford* (Tex.) 10 L. R. A. 529, and *Tefft v. Sternberg* (C. C. W. D. S. D. Ga.) 5 L. R. A. 221; *Shewell v. Keen*, 2 Whart. 332, 30 Am. Dec. 266.

But plaintiff's counsel argues that although an officer of the court, having funds in his hands as such officer, is not liable to garnishment, such funds being then *in custodia legis*, yet, after the object for which such funds are held has been satisfied, such officer holds the balance thereof, not as an officer, but as trustee for the person entitled thereto, and hence, in a suit against such person, such trustee may be garnished. In support of this contention he cites, among other cases, *Pierce v. Carleton*, 12 Ill. 358, 64 Am. Dec. 405, which holds that sur-

plus money held on execution in the hands of an officer, belonging to the defendant, may be garnished in his hands; and *Weaver v. Davis*, 47 Ill. 235, which holds that, whenever an official holds money merely as the agent of the law, he cannot be charged on garnishee process in respect to such money, but that, whenever his liability becomes changed from an official to one personal, he is amenable to the process. Conceding that these cases state the law correctly, we do not think they control the decision in the case at bar. Here the money sought to be reached is in the registry of the court, and hence undoubtedly in the custody of the law. It was placed there in pursuance of the statute. The clerk of the court, as such, has no control over it, nor is he in any way liable for it, except as the custodian of the court. He holds the money in his official capacity only (*Curtis v. Ford*, 10 L. R. A. 529, 78 Tex. 262, 14 S. W. 614), and can only pay it out as ordered by the court. After satisfying the execution of the original action, Mr. Rueckert did not cease to be the legal custodian of the balance of the money, nor did he thereby withdraw such balance from the registry of the court, so as to hold it in a personal rather than in an official capacity, or become liable to any action therefor in favor of the defendant in said original action. And the general rule is that, in order to charge a person as garnishee, the principal debtor must have a cause of action against him. *Carpenter v. Gay*, 12 R. I. 306; *Waldron v. Wilcox*, 13 R. I. 518; *Tucker v. Pollock*, 21 R. I. 317, 43 Atl. 369. Money in the registry of the court is wholly under the control of that court, unless there is some supervisory jurisdiction over the same, and cannot be paid out until an order is duly made for that purpose. And, this being so, no argument is necessary to show that it is not liable to attachment by trustee process. The following cases, together with many others which might be cited, support the view which we have taken, *viz.*: *Hunt v. Stevens*, 25 N. C. (3 Ired. L.) 365; *Drane v. McGafook*, 7 Humph. 132; *Pace v. Smith*, 57 Tex. 555; *Ross v. Clarke*, 1 Dall. 354, 1 L. ed. 173; *Mattingly v. Grimes*, 48 Md. 102. See also *American Bank v. Snow*, 9 R. I. 11, 98 Am. Dec. 364.

Exceptions overruled, and cases remitted to the District Court for further proceedings.

ILLINOIS SUPREME COURT.

Thomas J. RYAN, *Appt.*,

v.

John CUDAHY *et al.*

(157 Ill. 108.)

1. Voluntary submission by a member of a board of trade to a trial of a dispute by a committee under rules of the board estops him from denying the jurisdiction of the committee, either in respect to person or subject-matter.
2. The committee of the Chicago Board of Trade, appointed under § 6 of rule 20 to determine the rights in a margin deposit, is a tribunal of limited jurisdiction, the judgment of which is not binding unless the proceedings are in accordance with the charter and by-laws of the board.
3. Courts have power to correct abuses resulting from the unwarranted procedure of a committee of a board of trade, where property rights are involved.
4. The refusal by a committee of the Chicago Board of Trade to hear evidence that the alleged market price on

which the right to a margin deposit depends was fictitious, is in violation of § 7 of rule 20, and renders its decision against the party offering such evidence invalid.

5. The fact that a call for margins might have been defeated by a party who made the deposit, under § 1 of rule 20 of the Chicago Board of Trade, by showing that an alleged rise in the market was fictitious, does not preclude him from showing on a hearing before a committee that the alleged rise in the market was fictitious.
6. Payment of deposited margins in accordance with the decision of a committee of a board of trade may be prevented by injunction when the committee practically denied a hearing to the defeated party by refusing to hear evidence which he was entitled to have considered under the rules of the board.

(October 15, 1895.)

A PPEAL by plaintiff from a judgment of the Appellate Court, First District, affirming a judgment of the Superior Court

NOTE.—*Conclusiveness of decisions of tribunals of associations or corporations.*

- I. Scope of note.
- II. Tribunals other than ecclesiastical.
 - a. In general; when civil courts have jurisdiction.
 - b. Discipline.
 1. Extent of review, generally.
 2. For insufficient or unauthorized cause.
 - (a) In general.
 - (b) When power conferred in general terms.
 3. Notice and opportunity to be heard.
 4. Miscellaneous defects; procedure.
 5. Waiver of defects.
 - c. Decisions directly on property rights; validity of agreement to abide by decision.
 - d. Miscellaneous decisions.
 - e. Duty to exhaust remedies within the organization.
- III. Ecclesiastical tribunals.
 - a. Basis of court's jurisdiction over ecclesiastical controversies.
 - b. Conclusiveness of decisions, generally.
 - c. Jurisdiction of ecclesiastical tribunals.
 - d. Regularity of procedure.
 - e. Fairness and validity of decisions as tested by church laws.
 - f. Duty to obtain decision by higher tribunal.
 - g. Congregational and independent churches.

I. Scope of note.

This note is confined to decisions made in the exercise of the judicial or quasi judicial functions of these tribunals, and does not include decisions which are referable to their legislative or administrative functions.

II. Tribunals other than ecclesiastical.

- a. In general; when civil courts have jurisdiction.

A distinction, applicable to division III., as well as to this division, is to be observed between L. R. A.

tween the power of civil courts to take jurisdiction of controversies arising out of the relations existing between corporations or associations and their members, and the power of such courts to go behind the decisions of the tribunals of such corporations or associations when they affect matters of which the civil courts have jurisdiction. The distinction is not always clearly defined in the opinions, and a disregard of it may lead to the citation of cases that were really decided on the point of want of jurisdiction over the subject-matter of the controversy, as authority for the position that the civil courts cannot, under any circumstances, go behind the decision of such tribunals.

It is apparent from the principal case and the following citations that the ground of interference by the civil courts, in case of unincorporated associations, is that property or civil rights are involved. In the case of corporations the civil courts, in some states at least, may take jurisdiction by virtue of their supervisory or visitatorial power over corporations.

As to voluntary organizations it is only in respect to civil or property rights in, or growing out of, them that an appeal to the courts of the country can be had. Upon questions of doctrine and policy the society is the sole and exclusive judge. *Grand Lodge K. of P. v. People ex rel. Waldeck Lodge No. 136, K. of P.* 60 Ill. App. 550.

The Code of California recognizes voluntary associations organized for intellectual intercourse and mutual aid and benevolence, and the courts have felt compelled to listen reluctantly to complaints of their members in certain cases, especially where ordinary property rights are involved. *Von Arx v. San Francisco Grueth Verein*, 113 Cal. 377, 45 Pac. 685.

LAWSON v. HSWELL was an action by a member of a chapter of Royal Arch Masons, an unincorporated association, to enjoin defendants from proceeding to try him on charges preferred against him. The court said with reference to voluntary fraternal organizations: "Organizations of this character are not recognized as legal bodies, or as entitled to recognition in courts for the enforcement of their rules, unless there is also involved the determination of

for Cook County in favor of defendants in a suit brought to enjoin the collection of certificates representing money deposited to secure payment of margins on transactions in provisions. *Reversed.*

Messrs. Barnum, Humphrey, & Barnum, for appellant:

This case is within the jurisdiction of the court.

Com. ex rel. Bryan v. Pike Beneficial Soc. 8 Watts & S. 250; *Com. ex rel. Fischer v. German Soc.* 15 Pa. 254; *Com. v. Pennsylvania Beneficial Inst.* 2 Serg. & R. 141; *Society for Visitation of Sick v. Com. ex rel. Meyer*, 52 Pa. 133, 91 Am. Dec. 139; *Labouchere v. Wharnccliffe*, L. R. 13 Ch. Div. 352; *Fisher v. Keane*, L. R. 11 Ch. Div. 353; *Wood v. Wood*, L. R. 9 Exch. 196; *Pitcher v. Chicago Bd. of Trade*, 121 Ill. 420, 13 N. E. 187; 2 High. Inj. 3d ed. § 1194; High, Extr. Legal Rem. §§ 292-295; *People ex rel. Doyle v. New York Benev. Soc. of O. M.* 3 Hun, 361; *Cooley*, Const. Lim. 431; *State ex rel. Waring v. Georgia Medical Soc.* 38 Ga. 608, 95 Am. Dec. 408; *People ex rel. Schmitt v. Saint Francisco Benev. Soc.* 24 How. Pr.

221; *People ex rel. Bartlett v. Medical Soc.* 32 N. Y. 187, 24 Barb. 577; *Evans v. Philadelphia Club*, 50 Pa. 107; *Barrows v. Massachusetts Medical Soc.* 12 Cush. 402; *Leech v. Harris*, 2 Brewst. (Pa.) 571; *White v. Brownell*, 4 Abb. Pr. N. S. 162; *People ex rel. Godwin v. American Inst.* 44 How. Pr. 468.

Messrs. W. J. Hynes, Francis A. Riddle, and James L. High, for appellees:

Equity has no jurisdiction to revise or control the action of the committee.

The jurisdiction of the committee as to the subject-matter in controversy is derived primarily from the act incorporating the Chicago Board of Trade,—Private Laws 1859, page 13.

Equity has no jurisdiction to interfere with the action of such corporations, or of their properly constituted tribunals or committees, in the determination of all controversies submitted to them under the rules or regulations of the corporate body.

People ex rel. Page v. Chicago Bd. of Trade, 45 Ill. 112; *Fisher v. Chicago Bd. of Trade*, 80 Ill. 85; *People ex rel. Rice v. Chicago Bd. of Trade*, 80 Ill. 134; *Baater v. Chi-*

some civil right, or some right of property; and in these cases courts are limited to inquiring whether the rules prescribed by the organization for the determination of the right have been followed."

The court, in *Lyttleton v. Blackburne*, 45 L. J. Ch. N. S. 219, 33 L. T. N. S. 641, after denying relief to an expelled member of an unincorporated club upon the ground that he had not established his contention that the committee did not act bona fide, questioned whether it would have had jurisdiction even if he had established his contention, in view of the fact that the club was a proprietary one *i. e.*, one in which the members have no right of property.

And *Baird v. Wells*, L. R. 44 Ch. Div. 661, after holding that there had been irregularities in the proceedings resulting in the expulsion of a member of a club which would have justified interference by injunction if any property rights had been involved, further held that inasmuch as the club was a proprietary one, in which the members had no right of property, the court could not interfere by injunction, and that the plaintiff's remedy, if he had any (which the court doubted), was an action for damages.

Rigby v. Connol, 28 Week. Rep. 650, L. R. 14 Ch. Div. 482, 49 L. J. Ch. N. S. 328, 42 L. T. N. S. 139, held that an action for damages and an injunction would not lie at the instance of a member of an unincorporated trade union claiming to be wrongfully expelled, where there was no allegation that the union was possessed of any property. The court said that there is no jurisdiction in the courts to decide upon the rights of persons to associate together when the association possesses no property.

The court in *State ex rel. Cappel v. Milwaukee Chamber of Commerce*, 47 Wis. 670, 3 N. W. 830, asserted its jurisdiction, in the exercise of its visitatorial or superintending power over corporations, to confine them within the limits of their lawful powers, and to correct and punish abuses of their franchises.

The distinction between incorporated and unincorporated associations, with respect to the ground of the civil court's interference, is well brought out in the following case.

While an association remains a voluntary 49 L. R. A.

society, the courts have no jurisdiction over it, if it has violated no law of the state, and its members have no property in their membership which the law can protect; but its acceptance of a charter subjects it to the supervision of the proper legal authorities having jurisdiction in such cases. *State ex rel. Waring v. Georgia Medical Soc.* 38 Ga. 608, 95 Am. Dec. 408.

The Illinois supreme court, in *People ex rel. Rice v. Chicago Bd. of Trade*, 80 Ill. 134, denied a writ of mandamus to compel an incorporated board of trade to reinstate members who had been expelled by the board of directors.

Although there are expressions in the opinion intimating that the court regarded the decision of the board of directors as conclusive, the decision seems to rest upon the ground that the relator had no such interest in, or right to, membership as would be regarded by a court of justice. In that view, the decision is opposed to the weight of authority and has not been followed by the later cases in the same court.

b. Discipline.

1. Extent of review, generally.

The general principles which should control the courts in reviewing decisions of these tribunals in disciplining members are well settled. They have been variously stated, but seem to come to this: That the decisions are conclusive upon the merits, and that the civil courts will only inquire into the jurisdiction of the tribunals and the regularity of their proceedings.

If not involved in the foregoing, it should be added that the civil courts will examine far enough to ascertain whether the proceeding was in good faith, and will correct an abuse of power by such a tribunal. These principles seem to be the same whether the organization is incorporated or unincorporated, although, as already shown, the fact in that respect may be important in determining the jurisdiction of the court, that is, its right to interfere at all in the controversy; and as shown under subdivisions 2, 3, and 4, it may also be important in applying the principles—that is, in determining whether the tribunal has acted within its jurisdiction, and has proceeded regularly.

icago Bd. of Trade, 83 Ill. 146; *Sturges v. Chicago Bd. of Trade*, 86 Ill. 441; *Pitcher v. Chicago Bd. of Trade*, 121 Ill. 412, 13 N. E. 187; *Wright v. Board of Trade*, 15 Chicago Legal News, 239.

The action of the committee was not only authorized by the express letter of the rules by which Ryan was bound, but was conducted in strict compliance with such rules; and the finding of such committee was and is conclusive upon appellant.

Ball v. Chadwick, 46 Ill. 28; *Davis v. Haydon*, 4 Ill. 35; *Thompson v. Bulson*, 78 Ill. 277; *Mechanics' Soc. Inst. v. Givens*, 82 Ill. 157.

Mr. A. W. Green also for appellees.

Craig, J., delivered the opinion of the court:

By an act of the legislature approved February 18, 1859 (Private Laws 1859, p. 13), the persons composing the Board of Trade of the city of Chicago were created a body politic and corporate, under the name and style of the "Board of Trade of the City of Chicago," and by that name they were au-

thorized to sue and be sued, receive and hold property, real and personal, adopt a common seal, and "make such rules, regulations, and by-laws, from time to time, as they may think proper or necessary for the government of the corporation hereby created, not contrary to the laws of the land." Section 4 of the act provides as follows:

"The said corporation is hereby authorized to establish such rules, regulations, and by-laws for the management of their business and the mode in which it shall be transacted, as they may think proper." Section 7 provides: "Said corporation may constitute and appoint committees of reference and arbitration, and committees of appeals, who shall be governed by such rules and regulations as may be prescribed in the rules, regulations, or by-laws for the settlement of such matters of difference as may be voluntarily submitted for arbitration by members of the association or other persons not members thereof. The acting chairman of either of said committees, when sitting as arbitrators, may administer oaths to the parties and witnesses, and issue subpoenas and attachments

The courts in cases involving the determination of some civil right or property right, affected by the expulsion or threatened expulsion of a member of an unincorporated fraternal society, are limited to inquiring whether the rules prescribed by the organization have been followed. Whether a member of an unincorporated fraternal association has been guilty of conduct which authorizes an investigation by the association, or the imposition of the penalty prescribed by it, is for the association itself to determine, and if the investigation is in accordance with its rules, the party charged has no ground of complaint, since it is but carrying into effect the agreement he made when he became a member of the association. *LAWSON V. HEWELL*.

An unincorporated society acts in a quasi judicial character in expelling a member, and so far as it confines itself to the exercise of the powers vested in it, and in good faith pursues the methods prescribed by its laws, such laws not being in violation of the laws of the land or any inalienable right of the member, its sentence is conclusive; and civil courts will not interfere therewith, in the exercise of their jurisdiction to protect the property rights of members of such associations. *Otto v. Journeymen Tailors' Protective & Benev. Union*, 75 Cal. 308, 17 Pac. 217.

The decision of any kind of a voluntary society or association in admitting members, and in disciplining, suspending, or expelling them, are of a quasi judicial character. In such cases the courts never interfere except to ascertain whether or not the proceeding was pursuant to the rules and laws of the society, whether or not it was in good faith, and whether or not there was anything in it in violation of the laws of the land. If it is found that the proceeding was had fairly, in good faith and pursuant to the laws of the society, and that there was nothing in it in violation of the law of the land, then the sentence is conclusive like that of a judicial tribunal. *Connelly v. Masonic Mut. Ben. Assn.* 58 Conn. 552, 9 L. R. A. 428, 20 Atl. 671.

In every case of the disfranchisement of a corporator, the courts will entertain jurisdiction to restore him by mandamus, where the cause or ground of disfranchisement is legal—49 L. R. A.

ly insufficient, or where the proceedings by which it has been attempted are irregular according to, or as tested by, the charter or by-laws of the corporation. But no inquiry will be made into the merits of what has been regularly done by due course of proceeding. *Medical & Surgical Soc. v. Weatherly*, 75 Ala. 248.

Where a member of an incorporated association is tried agreeably to the by-laws for an offense of which the association has a right by its constitution and by-laws to take cognizance, the court will not in any form of proceeding retry the merits of the controversy, for the reason that in such a case the corporator has been tried by a tribunal of its own choice, which judgment, like an award of arbitrators, concludes him. He is bound by the decision of his own forum. While it is true that the courts possess a general equity jurisdiction for the supervision and control of private corporations, they will, nevertheless, in such a case look at the proceedings only so far as to see that they are regular, that the corporate body had jurisdiction of the case, and that there has been no abuse of power. The only function of the court in such case is to keep such tribunals in the line of order, and prevent abuses. If the proceeding is open to impeachment upon these grounds, it will interfere. *Hassler v. Philadelphia Musical Asso.* 14 Phila. 233.

Where the charter of a society provides for an offense, directs the mode of proceeding, and authorizes the society on conviction of a member to expel him, the expulsion, if the proceedings are not irregular, is conclusive, and cannot be inquired into collaterally by mandamus, action, or any other mode. *Leech v. Harris*, 2 Brewst. (Pa.) 571. The society in this case was unincorporated, but was one of the class over which the courts of chancery had been given jurisdiction by statute, and the court held that so far as concerned the control of them they were governed by the same rules as apply to corporations.

The court, in *Barrows v. Massachusetts Medical Soc.* 12 Cush. 402, without saying that it would in no case afford its authority by writ of mandamus to restore a member wrongfully expelled from an incorporated medical society, said that it did not perceive, upon examination of the proceedings, any evidence of haste or

compelling the attendance of witnesses, the same as justice of the peace, and in like manner directed to any constable to execute."

In pursuance of the act under which the Board of Trade became an incorporated body, the board adopted rules and by-laws, which were in force when complainant became a member, and still remain in force. Section 1 of rule 10 provides that each person, before becoming a member of said board, shall sign "an agreement to abide by the rules, regulations, and by-laws of the association, and all amendments that may be made thereto." Section 1 of rule 20, among other things, provides that "on time contracts purchasers shall have the right to require of sellers, as security, a deposit of ten (10) per cent, based upon the contract price of the property bought, and further security, from time to time, to the extent of any advance in the market value above said price. Sellers shall have the right to require as security from buyers a deposit of ten (10) per cent on the contract price of the property sold, and, in addition, any difference that may exist or occur between the estimated legitimate value

of any such property and the price of sale. All securities shall be deposited with the treasurer of the association, or with some bank duly authorized by the board of directors to receive such deposits." By § 6 of rule 20 of the board it is provided that in case of failure between the contracting parties to adjust their respective claims upon margin deposits within three business days after the maturity of all contracts upon which the deposits are applicable, "the matter in dispute shall, upon the application of either party to such contracts, be submitted to a select committee of three disinterested persons, members of the association, to be appointed by the president, which committee shall, without unnecessary delay, summon the parties before them, and hear such evidence, under oath, as either may wish to submit touching their claims to the deposit, and shall by a majority vote decide, and report to the president of the board, in writing, in what manner and to whom the deposit is payable, either wholly or in part; whereupon the president shall indorse on either the original or duplicate certificate an order for

prejudice against the petitioner, or that the society came to a wrong decision or acted in violation of the petitioner's rights, and, therefore, denied the writ.

The decisions of the tribunals of a voluntary association or an incorporated society, not formed principally for commercial gain, when organized under the constitution and lawfully exercising their powers, though they involve the expulsion of a member, are no more subject to collateral attack for mere error than are the judgments of a court of law. But if the tribunal act illegally—if it declare a sentence of expulsion for an offense for which that penalty is not provided by the constitution and laws of the association; and if there be no right of appeal, within the association, reserved for the redress of the injury,—the courts will review the proceedings, and, if found illegal, will treat them as null, and restore the member to his privileges as such. *Screwmen's Benev. Asso. v. Benson*, 76 Tex. 552, 13 S. W. 379.

The suspension of a member by a benevolent association acting within its jurisdiction and substantially in accordance with the procedure prescribed by the constitution and "rules of conduct" of the association is conclusive upon a civil court. *Peyre v. Mutual Relief Soc. of French Zouaves*, 90 Cal. 240, 27 Pac. 191.

The good standing of a member in a fraternal order, which by the terms of his certificate is made a condition of the association's liability for a benefit upon his death, must be left to the determination of the order itself, and when the order proceeds to determine that question in accordance with its rules and regulations, it will bind the member; and, in the absence of fraud or such irregularity as goes to the jurisdiction of the society in the particular case, the determination will be treated as final and conclusive in courts of justice. *High Court, I. O. of F. v. Zak*, 35 Ill. App. 613.

Where the tribunal of a voluntary society proceeds regularly, *i. e.*, in accordance with its own rules, they being not contrary to public policy or the law of the land, and the procedure not being *mala fides* or repugnant to natural justice, the merits of the judgment thus rendered will not be inquired into collaterally. *Croak v. High Court, I. O. of F.* 62 Ill. App. 47.

The proceeding of a beneficial association re- 49 L. R. A.

sulting in the expulsion of a member is quasi judicial in its character, and if the tribunal acquired jurisdiction, and its judgment was pronounced in good faith, it is binding and conclusive upon the beneficiary named in the certificate of the expelled member. *Noel v. Modern Woodmen of America*, 61 Ill. App. 597.

The decision of a board of directors of a mutual benefit association expelling a member under a by-law providing that if any member shall, in his application for membership, have falsely stated that he was a temperate and sober man, he may, upon notice and after hearing, be dropped from membership, is, in the absence of fraud, conclusive, and cannot be assailed collaterally. *Jones v. National Mut. Ben. Asso. (Ky.)* 2 S. W. 447.

The *Anacosta Tribe No. 12, I. O. of R. M. v. Murbach*, 13 Md. 91, 71 Am. Dec. 625, was an action by an expelled member of a mutual benefit society for a benefit. His expulsion had been affirmed on an appeal to a grand council of the society, whose decision, the by-laws provided, should be final. The court held that he was concluded by the decree of expulsion and by the refusal to allow his claim.

The decision of a tribunal of a mutual benefit society, acting within its jurisdiction, and fairly, after proper notice, expelling a member, cannot be collaterally reviewed, on the ground that facts existed which, if brought to the notice of the tribunal, would have warranted or required a different decision, in an action at law brought by his beneficiary after his death to recover a benefit from the society. *Karcher v. Supreme Lodge K. of H.* 137 Mass. 368.

In a proceeding for mandamus by a member of a mutual benefit association to compel his restoration to membership, after expulsion, the court has only to inquire whether his expulsion was regular and in accordance with the laws, rules, and usages of the order. *Spilman v. Supreme Council of Home Circle*, 157 Mass. 128, 31 N. E. 776.

In regard to matters of discipline, the court will not interfere against the decisions of the members of a mutual benefit association professing to act under its rules, unless it can be shown, either that the rules are contrary to natural justice, or that what has been done is contrary to the rules, or that there has been *mala*

the payment of such deposits in accordance with the decision of said committee, and such order shall be a sufficient warrant to the party holding the deposit to pay the same in accordance with such order." Section 1 of rule 23 provides: In case any property contracted for future delivery is not delivered at maturity of contract, the purchaser may, if he shall so elect, consider the contract forfeited, or he may purchase the property on the market for account of the seller by 1:15 o'clock of the next business day, notifying him at once of such purchase, or he may require a settlement with the seller at the average market price on the day of maturity of contract, and any damages or loss due to the purchaser by reason of such purchase or declared settlement shall be due and payable by the seller immediately."

It appears from the allegations of the bill that the complainant, Ryan, sold Roloson & Co. 600,000 pounds of short ribs for delivery in October, 1892, at \$7.60 per hundred pounds. After Ryan had sold the ribs for delivery in October, during the months of September and October, 1892, in compliance

with the demands or calls for margins to secure the performance of his contracts for the sale and delivery of the quantities of short ribs sold by him, he deposited certain amounts of money with the Merchants' Loan & Trust Company of Chicago. The sums deposited for the purpose of securing the performance of his contracts for the sale and delivery of the short ribs sold to R. W. Roloson & Co. amounted to \$26,500. It is charged in the bill that Roloson & Co. and others entered into a combination to corner the market of short ribs for October delivery, and that they did corner the market, and established, or pretended to establish, the price of short ribs on October 31 at 12 cents per pound, which price was not real, but fictitious. It is also alleged in the bill that "a fair, legitimate, and natural market price and value of short ribs in Chicago on October 31, 1892, irrespective of the fictitious price aforesaid, did not exceed 7½ cents per pound. On the next day, November 1, 1892, the same ribs sold at \$7.75 per hundred pounds, which were sold or pretendedly sold, on said board the day before, in pursuance of

fraud or malice in arriving at the decision or a refusal to give the member a hearing. State, Zelliff, Prosecutor, v. Grand Lodge K. of P. 53 N. J. L. 336, 22 Atl. 63.

The courts will not interfere with the action of an incorporated charitable benefit society in expelling a member, unless it is contrary to natural justice, or in violation of the rules of the society, or done *mala fide*, and then only after the party complaining has gone as far as he can go, and done as much as he can do, to obtain what he seeks in the domestic forum. Essery v. Court Pride of the Dominion, 2 Ont. Rep. 596.

A motion for an order to show cause why mandamus should not issue to compel the reinstatement of a relator in a Masonic lodge from which he had been expelled was refused where he had previously appealed for redress to the tribunal established by the society for hearing such complaints, and the expulsion had been confirmed. Burt v. Grand Lodge, F. & A. M. 44 Mich. 208.

In Hall v. Supreme Lodge K. of H. 24 Fed. Rep. 450, an entire lodge had been suspended by the supreme reporter, who had no such power. The court said that if he had been invested with jurisdiction to try and suspend lodges, and had given the lodge in question due notice of the proceedings, the fact that he erred in judgment in the application of the law to the case, or in his findings of facts, would have been a mere irregularity which might have been corrected on appeal, or in such manner as the constitution of the order provided; but until his judgment was reversed by the proper supervisory power it would be conclusive on the parties, and not subject to collateral attack in any tribunal.

The court will not review the action of the grand master of the fraternal order in dissolving a lodge where he had the power to act. State *ex rel.* Poulson v. Grand Lodge I. O. of O. F. 8 Mo. App. 148.

The attempted suspension of a subordinate lodge of a fraternal order by the supreme reporter, who is not authorized to do so either by the constitution or by-laws, is void. Hall v. Supreme Lodge K. of H. 24 Fed. Rep. 450.

The sufficiency of the evidence and the propriety of the expulsion of a member of a benevolent society cannot be inquired into by the 49 L. R. A.

courts. *Sassenscheldt v. Fresco Painters' Benev. & Protective Union*, 1 N. Y. City Ct. Rep. 8.

In all questions of policy, discipline, and internal government, the decisions of a voluntary society should govern, at least unless fraud or bad faith is made out. *Levy v. United States Grand Lodge I. O. S. of B.* 9 Misc. 633, 30 N. Y. Supp. 885.

Proceedings for the expulsion of members from a mutual benefit society are conclusive upon members, and the courts of equity have no revisionary powers over the adjudications provided they are conducted fairly according to the rules of the society. Every presumption is in favor of the fairness. *Fritz v. Muck*, 62 How. Pr. 70.

A civil court cannot pass upon the merits of a defense which a member of a benevolent society made to the charges on which he was expelled, but if the case came properly before the society, they were the judges of the sufficiency of the charges. *People ex rel. Corrigan v. Young Men's Father Matthew Benev. Soc.* 65 Barb. 337.

The sentence of an incorporated beneficial society expelling a member is not to be questioned collaterally while it remains unreversed by a superior authority, where the society acted in a judicial capacity and with undoubted jurisdiction of the subject-matter. *Black & White-Smiths Soc. v. Vandyke*, 2 Whart. 309, 30 Am. Dec. 263.

Where the charter of a society provides for an offense, directs the mode of proceeding, and authorizes the society on conviction of the member to expel him, a sentence of expulsion is conclusive on the merits, and cannot be inquired into collaterally where the member was given a hearing and trial according to the mode prescribed, and there was no irregularity in the proceedings. *Com. ex rel. Bryan v. Pike Beneficial Soc.* 8 Watts & S. 247.

When a member of an incorporated beneficial society has been regularly tried and expelled the sentence of the society acting in a judicial capacity is not to be questioned collaterally while unreversed by superior authority. If he has been expelled irregularly he has his remedy by mandamus to restore him, but neither by mandamus nor action can the merits of his expulsion be re-examined. *Society for Visitation*

said conspiracy and combination, at 12 cents a pound, in order to establish that as a market price and to swell the damages as against your orator and other sellers from whom deliveries were due on October 31, 1892. The fair, legitimate, and natural price of said ribs in Chicago throughout the entire months of September and October, 1892, did not exceed \$7.85 per hundred pounds; that all during and through said months cash ribs sales of such ribs were made in the Chicago market at from \$7.50 to \$7.85 per hundred pounds, and that while the advance of prices on such sales during said two months did not exceed 20 cents on 100 pounds, the advance on option sales during the same period, ending October 31, 1892, was \$4.50 per hundred pounds, under the manipulation of said prices by the parties engaged and interested in said corner. Such sales of short ribs on said board as purported to be made by parties thereto on October 31, 1892, at 12 cents per pound, were insignificant in number and quantity, and were purely colorable, and were made for

the purpose of establishing a fictitious price to govern the measure of damages on contracts unfulfilled by "short" sellers, and were in some instances sales for that purpose by one broker to another broker of the same principal engaged and interested in, or taking advantage of, and thereby becoming a party to, said corner." It is further alleged that "disputes, differences, and disagreements have arisen, and exist, between your orator and Roloson & Roloson, touching and relating to the respective claims of your orator and Roloson & Roloson to the margins deposited as aforesaid, and the margin certificates of such deposits, and to whom said deposits are payable, either wholly or in part, and relating also to the true market price and value on October 31, 1892, of the respective amounts of short ribs covered by the respective contracts between your orator and R. W. Roloson & Co., the performance of which contracts by your orator was recited in said certificates of deposit to be thereby secured;" that a committee was appointed by

of Sick v. Com. *ex rel.* Meyer, 52 Pa. 125, 91 Am. Dec. 139.

Where the member of an incorporated beneficial society complains of the action of the society expelling him, the court must confine itself to those questions which involve some infraction of the organic law of the society, in other words, to some material irregularity in the proceedings, and cannot pass upon the merits. *Sperry's Appeal*, 116 Pa. 391, 9 Atl. 478.

See also *infra*, *Albers v. Merchants' Exchange*, 39 Mo. App. 583, and *Hutchinson v. Lawrence*, 67 How. Pr. 38, *supra*.

The Kentucky supreme court in *Schmidt v. Abraham Lincoln Lodge*, 84 Ky. 490, 2 S. W. 156, stated, *arguendo*, that where a benefit society has provided a method for the expulsion of its members the court will not undertake to supervise its action by determining that its judgment was not in accordance with its by-laws or for causes that had no foundation in fact; but the tribunal existing within the organization must alone determine such question.

This statement, as is apparent from the foregoing citations, concedes a degree of conclusiveness to the decisions of these tribunals that is denied by the weight of authority.

Exchange; board of trade; chamber of commerce.

The only question for the court in mandamus proceedings to compel an incorporated stock exchange to reinstate an expelled member is as to the jurisdiction of the tribunal to entertain the proceedings resulting in his expulsion, and, upon the evidence presented to it, adjudge his disfranchisement, and the question of the regularity of the proceedings. *People ex rel. Johnson v. New York Produce Exchange*, 149 N. Y. 401, 44 N. E. 84.

Where the tribunal provided by an incorporated board of trade for the disciplining of members proceeds regularly, *i. e.*, in accordance with its own rules, they being not contrary to public policy or the law of the land, and the procedure not being *mala fides* or repugnant to natural justice, the merits of a judgment thus rendered will not be inquired into collaterally. *Nelson v. Board of Trade*, 58 Ill. App. 399.

An expulsion of a member of a board of trade, by competent authority, for an offense for which expulsion is imposed as a penalty, and in the course of proceedings which were regular and

in accordance with the rules and provisions of the charter of the corporation, is conclusive against him, and the merits of the expulsion cannot be re-examined by the court. *Pitcher v. Board of Trade*, 121 Ill. 420, 13 N. E. 187.

But an unincorporated voluntary association, *e. g.*, a board of trade, cannot violate its own rules or the mutual contract of the parties, and put an end to a member's membership merely at the caprice of the directory, or without notice to him, or by fraudulent devices and pretenses. *Farmer v. Kansas City Bd. of Trade*, 78 Mo. App. 557.

The expulsion of a member by a voluntary unincorporated association conducting a mercantile exchange is conclusive upon the court in mandamus proceedings to compel his restoration to membership, where the association conducted the investigation bona fide upon notice to the member, and afforded him an opportunity to be heard, and the decision was within its jurisdiction. *Lewis v. Wilson*, 121 N. Y. 284, 24 N. E. 474.

An unincorporated voluntary body, *e. g.*, a broker's exchange, will be held to be fair and honest administration of the rules which are in force when any proceeding is instituted against a member; but where a member is expelled in conformity with the rules, and the proceedings are regular and in good faith, it is final, and no judicial tribunal can interfere. *White v. Brownell*, 2 Daly, 329, 4 Abb. Pr. N. S. 162. *Affirming 3 Abb. Pr. N. S. 318.*

A civil court has no jurisdiction to supervise the action of a board of directors in the trial of a member of a chamber of commerce upon a charge of unmercantile conduct. *Bishop v. Cincinnati Chamber of Commerce*, 5 Ohio N. P. 365.

The court in *Powell v. Abbott*, 9 W. N. C. 231, in upholding the power of the court in the exercise of its statutory jurisdiction over unincorporated associations, to restrain the unlawful suspension of a member by an unincorporated mining and stock exchange, said that the courts had power to keep such associations and their tribunals in the line of order, and to correct abuses, but that they did not inquire into the merits of what has passed in *rem adjudicata* in a regular course of proceeding.

Ryan v. Lamson, 44 Ill. App. 204; *Fisher v. Chicago Bd. of Trade*, 80 Ill. 85; *Baxter v. Chicago Bd. of Trade*, 83 Ill. 146; and *Sturges*

the president of the board to adjust the differences; that the following notice was served on complainant:

Board of Trade of City of Chicago,
Secretary's Office, Chicago, Nov. 9, 1892.
Messrs. T. J. Ryan & Co.

Gentlemen:—You are hereby notified to meet a committee of this board, appointed under the provisions of section 6 of rule 20 of the rules of the board, in the directors' room on Monday next, the 14th instant, at eleven o'clock in the forenoon.

Respectfully,
George F. Stone, Sec.

A postponement was had from the 14th to November 16, when the parties met before the committee for a hearing.

It is also alleged in the bill that on the hearing before the committee complainant "offered to prove, and could have proved, by the sworn testimony of said witnesses, in answer to said questions, all and singular, the

matters and allegations of fact hereinbefore in this bill contained and set forth, and particularly offered to prove, and could have proved, by said witnesses, the fair, natural, and legitimate market value of the quantities of short ribs deliverable on October 31, 1892, by your orator upon his contracts of sale of 600,000 pounds to R. W. Roloson & Co., and further offered to prove, and could have proved, by said witnesses, the value of short ribs on October 31, 1892, in other markets, and their value for consumptive purposes in the Chicago market, and other facts that might and should and do justly enter into a determination of the real market value of such short ribs in Chicago, irrespective of any fictitious price such ribs might have sold for in the Chicago market on the 31st day of October, 1892; but each and all of said offered evidence the committee rejected, and refused to allow the complainant to introduce any of the same."

Under the act of incorporation the legislature, in clear terms, conferred the authority

v. Chicago Bd. of Trade, 88 Ill. 441,—merely hold that injunction to restrain a board of trade from expelling a member, or from interfering with his enjoyment of its privileges, is not the proper remedy where a member is wrongfully expelled. They do not deny the right of the courts to interfere, within the rule previously stated, if the proper remedy is invoked.

Clubs.

An offense by a member of an incorporated social club against his corporate duty as a member of the club can only be tried by the constituted corporate authorities, and if such trial is regularly conducted, and a judgment of expulsion arrived at in good faith, there is no power or jurisdiction in the courts to interfere with, reverse, or vacate that judgment. *United States ex rel. de Yturbe v. Metropolitan Club*, 11 App. D. C. 180.

In proceedings by mandamus to try the relator's right to membership in a club from which she has been expelled, the court need only look so far into the case as to satisfy itself that the society had jurisdiction, and that the by-law under which it acted was valid; for if it finds there was jurisdiction and a valid by-law, and no arbitrary or capricious exercise of power, the legal remedy of the person expelled is at an end. *Ostrom v. Greene*, 20 Misc. 177, 45 N. Y. Supp. 852.

The court cannot review, upon the merits, the proceedings by which a member of an incorporated club was suspended, but the judgment of the tribunal of the club is conclusive where the offense charged was such as brought the relator within the jurisdiction, the trial was conducted in good faith and in due form, and the member was convicted and sentenced in accordance with the law of the club, and with its charter. *Com. ex rel. Burt v. Union League*, 135 Pa. 301, 8 L. R. A. 195, 19 Atl. 1030.

Where the rules of a club authorize the committee to call a general meeting "in case any circumstances should occur likely to endanger the welfare and good order of the club," and provide that any member may be removed by the votes of two thirds of the persons present, a decision expelling a member, arrived at bona fide and not through caprice, is final, and the court cannot interfere. *Hopkinson v. Exeter*, L. R. 5 Eq. 63, 37 L. J. Ch. N. S. 173, 16 Week. Rep. 266.

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2. For insufficient or unauthorized cause.

(a) In general.

One of the questions affecting the jurisdiction of these tribunals is whether the charges made, if established, justify the infliction of any penalty, or the particular penalty inflicted.

If the answer to either branch of the question is in the negative the action of the tribunal is beyond its jurisdiction, and under the general principle heretofore stated, is invalid, and will be so held by the courts, if the latter can take jurisdiction at all within the rule stated in subdivision II. a, *supra*.

The following cases so hold with respect to benefit societies: *Otto v. Journeymen Tailors' Protective & Benev. Union*, 75 Cal. 308, 17 Pac. 217; *Allnutt v. Subsidiary High Court of U. S. A. O. of F.* 62 Mich. 110, 28 N. W. 802; *Erd v. Bavarian Nat. Aid & Relief Asso.* 67 Mich. 283, 34 N. W. 555; *Fawcett v. Charles*, 13 Wend. 473; *Oleary v. Brown*, 51 How. Pr. 92; *People ex rel. Meads v. McDonough*, 8 App. Div. 591, 35 N. Y. Supp. 214, 40 N. Y. Supp. 1147, Affirming 13 Misc. 677, 35 N. Y. Supp. 214; *Holomany v. National Slavonic Soc.* 39 App. Div. 573, 57 N. Y. Supp. 720; *Franklin Beneficial Asso. v. Com.* 10 Pa. 357; *People ex rel. Schmitt v. Saint Francis Benev. Soc.* 24 How. Pr. 216; *Com. v. St. Patrick Benev. Soc.* 2 Binn. 448, 4 Am. Dec. 453; *Grand Lodge, A. O. U. W. v. Stepp*, 3 Pennyp. 45; *Sweeney v. Rev. Hugh McLaughlin Beneficial Soc.* 14 W. N. C. 466.

The courts will entertain jurisdiction to restore by mandamus a corporator who has been disfranchised for a cause that is legally insufficient. *Medical & Surgical Soc. v. Weatherly*, 75 Ala. 243.

The expulsion of a member by an incorporated society is not binding upon the court in a mandamus proceeding to compel his restoration to membership, where the expulsion was on a charge which did not justify expulsion even if established. *People ex rel. Godwin v. American Institute*, 44 How. Pr. 468.

In *Savannah Cotton Exchange v. State ex rel. Warfield*, 54 Ga. 668, the expulsion of a member by a cotton exchange was held invalid on the ground that the charge made against him did not authorize the expulsion.

State ex rel. Kennedy v. Union Merchants' Exchange, 2 Mo. App. 96, held that the expul-

on the board to establish such regulations and adopt such rules or by-laws as it might deem proper for the transaction of the business of its members, and under the authority conferred § 6 of rule 20 provides for the appointment of a committee clothed with authority to determine in what manner and to whom a margin deposit is payable. The language of the rule, as respects the duty of the committee to hear the evidence of the respective parties, is plain and unambiguous. It declares: "Which committee shall, without unnecessary delay, summon the parties before them and hear such evidence, under oath, as either may wish to submit touching their claims to the deposit." The complainant, when he became a member of the board, agreed, in writing, to abide by the rules, regulations, and by-laws of the association. He voluntarily submitted to a trial of the matter referred to the committee, without in any manner calling in question the jurisdiction of the committee of the person or subject-matter. Under such circumstances, having selected his tribunal, he is estopped from denying the jurisdiction of the committee of the person and subject-matter. But the

committee appointed under § 6 of rule 20 to determine to whom the margin deposit belonged or should be paid, may be regarded as a tribunal of limited jurisdiction, and they are bound to proceed in conformity to the rules under which they were selected, and if they failed to conduct the investigation in accordance with the charter and by-laws of the Board of Trade, under which they were appointed, the complainant ought not to be bound by their judgment. It seems plain that where property rights are involved, as in the case here, the courts have the power to so far supervise the action of a tribunal like the one in question as to determine whether they have proceeded according to the rules and regulations provided for their action, and if they have failed in a substantial manner, correct abuses which may result from their unwarranted procedure. *Com. ex rel. Bryan v. Pike Beneficial Soc.* 8 Watts & S. 250; *Com. ex rel. Fischer v. German Soc.* 15 Pa. 254; *Society for Visitation of Sick v. Com. ex rel. Meyer*, 52 Pa. 133, 91 Am. Dec. 139; *Com. v. Pennsylvania Beneficial Inst.* 2 Serg. & R. 141; *Wood v. Wood*, L. R. 9 Exch. 196.

sion of a member by an incorporated merchants' exchange was invalid, and the member should be restored by mandamus upon the ground that the by-law prescribing the cause for expulsion was unreasonable and void.

In *Fuller v. Academic School Trustees*, 6 Conn. 532, a writ of mandamus was issued to restore the relator to the office of trustee in a school corporation from which he had been removed on charges insufficient to justify removal.

Evans v. Philadelphia Club, 50 Pa. 107, passed upon the decision of an incorporated club expelling a member, and held it invalid upon the ground that there was neither express nor implied power authorizing expulsion for the offense charged against the member.

The court may judge of the cause of expulsion of a member of an incorporated club and of the form of the proceedings. *Com. ex rel. Burt v. Union League*, 135 Pa. 301, 8 L. R. A. 195, 19 Atl. 1030.

To justify the expulsion of a member by an incorporated voluntary society under a by-law authorizing expulsion if a member is found guilty of slander against the society, the records of the corporation must show upon their face the exact cause of the expulsion, so that the court may decide whether the society had jurisdiction to make the inquiry. *People ex rel. Roehler v. Mechanics' Aid Soc.* 22 Mich. 86. See also *Screwmen's Benev. Assn. v. Benson*, 76 Tex. 552, 13 S. W. 379.

The distinction between incorporated and unincorporated organizations is not important so far as concerns the power of the court to inquire into the charges upon which the tribunal acted, for the purpose of determining its jurisdiction; but may be important in determining the specific question whether the charges in question supported the jurisdiction.

(b) When power conferred in general terms.

This note does not go into the question last suggested, *viz.*, the causes for which these tribunals may exercise their disciplinary power, except the phase of it presented when the cause for which a particular penalty may be inflicted is described in general terms only, without an enumeration of specific acts or omissions, leaving it to the tribunal to determine what acts and omissions fall within those general terms. In such a case the tribunal has, not only to determine the facts, but also to characterize them when found. Its determination of the facts pertains to the merits, and, as already shown, is beyond the reviewing power of the court; but the conclusiveness of its characterization of the facts presents a somewhat different question.

The cases cited under this subdivision include only those that have expressly passed upon the question how far the court may review the tribunal's characterization of the facts, and those which by holding the decision of the tribunal invalid have in effect decided that such characterization is not necessarily conclusive. Where the court, without discussing the question, merely upholds the decision of the tribunal, it is impossible to determine whether it takes the view that it must accept the tribunal's characterization of the facts, or that the particular facts of the case justified such characterization; and consequently cases of that kind are omitted.

The by-law of an incorporated medical society providing for the expulsion of any member guilty of "ungentlemanly conduct" during the session of the society, or who shall conduct himself out of the society in such a manner as would render him ineligible to membership, is a proper one in view of the objects of the society, but the society has not an uncontrollable discretion in its construction and enforcement, and cannot, under pretext of enforcing the rule, take personal or private revenge, or make it the instrument of religious intolerance or political proscription. *State ex rel. Waring v. Georgia Medical Soc.* 38 Ga. 608, 95 Am. Dec. 408. In that case the specific charge was that the member became a surety on the official bond of a colored person and the court held that an expulsion for that reason was not authorized by the by-law.

The question as to what is an offense against a Masonic lodge is a question for the masonic courts to decide, and is not open to inquiry in a civil court. *Kopp v. White*, 85 N. Y. Supp. 1017. Nor can the civil court decide whether or not the punishment inflicted was too severe for the offense. *Ibid*

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The rule, as its language declared, required the committee to "hear such evidence, under oath, as either party may wish to submit touching their claims to the deposit." It may be conceded that the committee was not required to hear evidence that had no bearing whatever on the question involved, but any evidence bearing on the claim of either party to the deposit was proper for their consideration. There may be various grounds upon which the claims of the respective parties may be predicated or opposed. The seller might prove that he had delivered the short ribs sold according to the contract; that he had paid the damages of the purchaser; that the contract had been rescinded by agreement of the parties; that the claim had been arbitrated and thus adjusted; that there was no difference between the contract price and the real market price on the day of delivery; that the market price claimed by the buyer was not the correct market price of short ribs, but was a false and fictitious price,—one established by fraud and corruption. So, too, the purchaser might controvert, by his evidence, each one of the claims made by the seller. Other grounds

might be relied upon and evidence introduced in their support. The committee, organized, as it was, to determine a question between the two parties, involving, as it did, over \$20,000, had no right to confine their investigation to the mere difference between the contract price of the short ribs and the price at which sales were made on the Board of Trade on the day of delivery, closing their eyes to the fact that those sales may have been false, fraudulent, and fictitious,—sales brought about by a fraudulent combination, and in violation of a statute of the state. If the committee is to be confined to a mere calculation of the difference between the contract price and a figure established by a combination on the Board of Trade on the day of delivery, regardless of the fact whether such figure is real, fictitious, or manipulated by a corner, then a tribunal of that character is but a device for legalizing acts prohibited by the criminal laws of the state.

It will be observed that the complainant offered to prove the fair, natural, and legitimate market value of short ribs deliverable on October 31, 1892, and offered to prove their market value in other markets, and

In *Weiss v. Musical Mut. Protective Union*, 189 Pa. 446, 42 Atl. 118, the right of an incorporated association organized for the protection of musicians to expel members for acts tending to the destruction of the society was conceded, although the charter contained no express power of expulsion; but it held that such general power did not authorize an expulsion because the member had issued a manifesto criticising the management of the association, and inviting members to participate in a meeting at which matters affecting its interests were to be discussed.

Manning v. Klein, 1 Pa. Super. Ct. 210, Affirming 4 Pa. Dist. R. 590, held that an expulsion of a member by a Master Barber's Protective Association, an unincorporated organization, under a provision of the constitution authorizing expulsion for conduct tending to the injury of any of the fellow members or the association, was invalid where it was merely shown that the member had, as an officer of a Sunday Closing Society, informed against the members of the association for keeping open on Sunday, it appearing that he entertained no malice toward them, and acted in good faith.

Whether it is unmasonic conduct within the rules of a masonic lodge providing for the expulsion of members, for a member to become a member of Cerneau bodies of the Ancient Accepted Scottish Rights, is a question that is purely masonic, and one into the merits of which a civil court will not enter. *Hershiser v. Williams*, 24 Ohio L. J. 314.

"Reasonable cause" within a deed of settlement of a company providing that a meeting of the company regularly convened may remove any director "for negligence, misconduct in office, or any other reasonable cause," does not refer to such a cause as in a court of justice would be held reasonable, but only to such a cause as should be deemed reasonable by the shareholders; and the court is not empowered, where no case of direct fraud is proved, to determine whether the decision of the meeting was or was not unduly influenced by unfounded statements made by persons taking an active part in the proceedings. *Inderwick v. Snell*, 2 Macn. & G. 216, 2 Hall & Tw. 412, 19 L. J. Ch. N. S. 542, 14 Jur. 727.

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Willis v. Childs, 13 Beav. 117, held that a provision of a scheme of the court for the regulation of a grammar school authorizing the trustees upon such grounds as they shall, at their discretion, in the due exercise and execution of the powers and trusts reposed in them, deem just," to remove the master, did not confer upon them an arbitrary power to dismiss the master upon any grounds that they might deem just; and, furthermore, that the master was entitled to notice and an opportunity to explain.

Re Fremington School, 10 Jur. 512, held that the power conferred upon trustees of a school to displace the master "upon any neglect or misbehavior . . . or other just cause for which they or the greater number of them agree upon and think fit," did not authorize them to dismiss him arbitrarily, but only for just cause.

Exchange; board of trade; chamber of commerce.

Nelson v. Board of Trade, 58 Ill. App. 390, was a proceeding by mandamus to compel an incorporated board of trade to reinstate an expelled member. The court held that a judgment of expulsion by the tribunal of the corporation was not conclusive because the tribunal exceeded its powers in declaring that "bad faith and dishonorable conduct" which was nothing of the kind.

In *Albers v. Merchants' Exchange*, 39 Mo. App. 583, the court held that the power conferred upon the directors of a merchant's exchange to expel a member for "misconduct" did not authorize an expulsion for refusal to pay a pecuniary fine where the member in good faith took the position that the directors had no power to impose the fine.

An expulsion of a member of an incorporated cotton exchange under a by-law authorizing expulsion for "improper conduct" is not justified because the member resorted to a court of law to prevent the corporation from disposing of a seat on the exchange claimed by him, there being nothing in the corporation or by-laws conferring power upon the corporation to determine the matter in dispute. *People ex rel. Elliott v. New York Cotton Exchange*, 8 Hun. 216.

their value for consumptive purposes in Chicago, but the committee refused to hear this or other evidence offered by the complainant. This is not a case that has any analogy to one where, during the progress of the trial, a party may offer to prove some particular fact, and the court excludes the offered evidence, and may err in that one particular, but is one where the complainant was allowed no evidence touching his claim to the deposit. He was, in effect, turned away without a hearing. A proceeding of that character cannot be sustained. It may be conceded, to the fullest extent, that Ryan, when he became a member of the board, agreed to abide by all its lawful rules and regulations, and that he is bound by the agreement; but the Rolosons, who are contending for this deposit margin, did the same, and the three members of the board composing the committee are in the same position. No reason is perceived why he should be concluded by the rules, and they should not. If the committee and the Rolosons conform to the rules, then it may be insisted that complainant shall also abide thereby; but when they violate the rules, it cannot, in justice, be claimed that he shall be bound by a de-

cision resulting from a violation of the rules on their part.

But it is said Ryan should have made a defense under § 7 of rule 20, when he was called upon to put up margins. That section is as follows: "In determining the value of property under this rule, its value in other markets, or for manufacturing or consumptive purposes in this market, together with such other facts which may justly enter in the determination of its value, shall be considered, irrespective of any fictitious price it may, at the time, be selling for in this market. Such value, for the purposes of this rule, in case of disagreement, shall be determined by the board of directors, and communicated to the parties in interest through the president or secretary." It is true that this rule provides that the value of property may be determined by the board of directors, and, it may be, when Ryan was called upon for margins he might have resisted the call by presenting the question to the board whether there was actually a rise in the market of the article sold. But conceding that to be true, it does not follow that this was his only remedy. The fact that Ryan may have been able to defeat the call for margins does not deprive

The general term of the New York superior court in *People ex rel. Johnson v. New York Produce Exchange*, 8 Misc. 552, 29 N. Y. Supp. 307, and *Re Haebler*, 15 Misc. 42, 36 N. Y. Supp. 427, held that a by-law of a produce exchange authorizing the expulsion of a member guilty of a "fraudulent breach of contract or of any proceedings inconsistent with just and equitable principles of trade," did not authorize the suspension of a member upon a complaint involving a mere breach of contract, and granted writs of mandamus to reinstate the expelled members. These decisions were reversed by the court of appeals in 149 N. Y. 401, 44 N. E. 84, 140 N. Y. 414, 44 N. E. 87. The opinion of the latter court, however, says that if the evidence simply established a breach of contract without more, the expulsion could not be sustained, but held that there was evidence of circumstances which supported the decision of the board of managers that the members' conduct was inconsistent with just and equitable principles of trade. The opinion further says that the question for the court is not whether, passing upon the evidence as *res novae*, it would have reached the same conclusion as that of the board of managers, or whether the conclusion was reasonable or unreasonable, but simply and wholly whether the case was so bare of evidence to sustain the decision that no honest mind could reach the conclusion that the relator's conduct was "inconsistent with just and equitable principles of trade."

State ex rel. Graham v. Chamber of Commerce, 20 Wis. 63, held that the power conferred upon a chamber of commerce by the provision in its charter that it "shall have the right to . . . expel any member as they may see fit," merely authorizes expulsion for an offense of an infamous character indictable at common law, or for an offense against the corporation's duty to the corporation as a member of it, or for an offense compounded of the two. The court further held that the expulsion of a member could not be justified on the second ground where the specific charge against him was that he refused to submit a claim against a fellow member to arbitration, it appearing that an action was pending on the claim.

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Club.

The power conferred upon a committee of a club by its rules, to expel any member whose conduct they think injurious to the character and interests of the club, makes the committee the sole judges of how the rule shall be exercised, with the exception that it must not be exercised capriciously, but bona fide according to their discretion, and when in their opinion there is a proper occasion to do so. *Lytleton v. Blackburne*, 45 L. J. Ch. N. S. 219, 33 L. T. N. S. 641; *Dawkins v. Antrobus*, L. R. 17 Ch. Div. 615, 44 L. T. N. S. 557, 29 Week. Rep. 511; *Richardson-Gardner v. Fremantle*, 24 L. T. N. S. 81, 19 Week. Rep. 250; *Lambert v. Addison*, 46 L. T. N. S. 25; *Hopkinson v. Exeter*, 37 L. J. Ch. N. S. 173, L. R. 5 Eq. 63, 16 Week. Rep. 260.

In *Com. ex rel. Burt v. Union League*, 135 Pa. 301, 8 L. R. A. 195, 19 Atl. 1030, the expulsion which was sustained by the court was based on a by-law of the club authorizing a majority of the board of directors to suspend members "for acts or conduct which they may deem disorderly or injurious to the interests, or hostile to the objects, of the" club. The court said the power conferred implied that the conduct shall be in spirit and substance disorderly, shall be directed against the corporation, and injurious to it. It does not give the directors the right to say that any conduct, however trivial, is deemed by them disorderly.

The fact that a decision by a committee of a club expelling a member is unreasonable may be strong evidence of malice, but is not conclusive, and may be rebutted by evidence of bona fides. *Dawkins v. Antrobus*, L. R. 17 Ch. Div. 615, 44 L. T. N. S. 557, 29 Week. Rep. 511.

Whether the conduct of a member of a club has been unbecoming a gentleman, within a by-law authorizing expulsion for such conduct, is a question for the authorities of the club, and is not reviewable by the civil courts unless it clearly appears that their determination was *ultra vires* or made in bad faith; and the presumption is that it was made bona fide. *United States ex rel. de Yturblide v. Metropolitan Club*, 11 App. D. C. 180.

him of the right, when the title to the margins is put in issue, to prove, if he can, that the market value of the article sold was no higher on the day of delivery than it was when sold.

But while we do not think this section of rule 20 lends any aid to the defendants, it has an important bearing in favor of the complainant. The committee appointed to settle the dispute in question was appointed under § 6 of rule 20. This is section 7 of the same rule, and in giving a construction to rule 20 it is proper to consider all of the section. No intelligent construction can be arrived at in any other manner. While a dispute as to a margin deposit is to be settled by a committee under § 6 of rule 20, and the market value of the article sold becomes a material question, yet that section is silent as to the nature or character of the evidence which may be introduced before the committee. But § 7 says: "In determining the value of property under this rule,"—that is, under rule 20, which was the identical rule under which the value of the property arose in this proceeding,—"its value in other markets, or for manufacturing or consumptive

purposes in this market, shall be considered, irrespective of any fictitious price it may, at the time, be selling for in this market." The evidence offered by the complainant was not only within the spirit, but within the letter, of this section of the rule.

But it is insisted that a court of equity has no jurisdiction to interfere with the action of the Board of Trade, or the action of committees appointed to settle controversies submitted to them under the rules and regulations of the board, and in support of this position reliance is placed on the following cases:

People ex rel. Page v. Chicago Bd. of Trade, 45 Ill. 112; *Fisher v. Chicago Bd. of Trade*, 80 Ill. 85; *People ex rel. Rice v. Chicago Bd. of Trade*, 80 Ill. 134; *Baxter v. Chicago Bd. of Trade*, 83 Ill. 146; *Sturges v. Chicago Bd. of Trade*, 86 Ill. 441, and *Pitcher v. Chicago Bd. of Trade*, 121 Ill. 412, 13 N. E. 187. Language may have been used in some of the cases cited which might, without a close examination of the questions involved in the cases, lead to the conclusion reached by counsel. But upon a careful consideration of the questions involved and de-

3. Notice and opportunity to be heard.

Unless the discretion of the tribunal is absolute and uncontrolled, it seems that notice and an opportunity to be heard are essential to the validity of a disciplinary decision. As the note is confined to judicial or quasi judicial decisions, the effect of provisions to make certain acts or omissions operative *ipso facto* to forfeit a member's rights is not considered.

Benefit societies.

Where a mutual benefit society has no by-laws, reasonable in character, governing procedure for the expulsion of members, the civil court will inquire whether or not an expelled member had a reasonable notice and a fair opportunity of presenting his defense in accordance with general principles of law and justice. *Von Arx v. San Francisco Gruetli Verein*, 113 Cal. 377, 45 Pac. 685.

The expulsion of a member of a benefit society is invalid where he was not given notice as prescribed by the rules of the society. *Slater v. Supreme Lodge, K. & L. of H.* 76 Mo. App. 387; *Supreme Lodge, A. O. U. W. v. Zuhlke*, 120 Ill. 298, 21 N. E. 789, Affirming 30 Ill. App. 98; *Downing v. St. Columbia's R. C. T. A. B. Soc.* 10 Daly. 262; *Washington Beneficial Soc. v. Bacher*, 20 Pa. 425.

A judgment of expulsion by a tribunal of a benefit association which had no jurisdiction for want of notice is void. *People ex rel. Keefe v. Women's Catholic O. of F.* 162 Ill. 78, 44 N. E. 701; *Women's Catholic O. of F. v. Haley*, 86 Ill. App. 330.

The expulsion of a member by a beneficial society is void where he was not shown a copy of the charges preferred against him, and no opportunity was afforded him to be present at the trial. *Erd v. Bavarian Nat. Aid & Relief Asso.* 67 Mich. 233, 34 N. W. 555.

A mutual benefit society cannot expel a member or deprive him of his rights in the society without giving him notice and a full opportunity to be heard in defense of the charges against him, and the proceedings for the expulsion must be conducted fairly and in good faith. *State ex rel. Young v. Temperance Benev. Asso.* 42 Mo. App. 485.
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The expulsion of a member by a mutual benefit society without notice and without trial is invalid, even if a by-law purports to authorize an expulsion without notice or trial, as such by-law is invalid. *Ludowski v. Polish Roman Catholic St. S. K. Benev. Soc.* 29 Mo. App. 337.

A member of a benevolent society against whom proceedings are pending, which have his expulsion for their object, is entitled to make such defense as he may have to the charges upon which the proceedings are based, and if he is expelled without being afforded an opportunity to submit his defense he is deprived of a substantial right which the ordinary principles of justice require that he shall be permitted to enjoy. In this case the by-law under which the judgment of expulsion was rendered expressly provided for expulsion upon the report of an inquiry committee, without the usual trial. *Berkhout v. Supreme Council Royal Arcanum*, 62 N. J. L. 103, 43 Atl. 1. See also *State, Zeff, Prosecutor, v. Grand Lodge K. of P.* 53 N. J. L. 536, 22 Atl. 63, *supra*, II. b. 1.

It is well settled that an association whose members become entitled to privileges or rights of property therein cannot exercise its power of expulsion without notice to the person charged, or without giving him an opportunity to be heard. *Wachtel v. Noah Widows & O. Benev. Soc.* 84 N. Y. 28, 38 Am. Rep. 478. In this case the general rule of law was recognized by the by-law, but it was claimed that the member had lost his right to notice by failing to notify the association of his change of residence. The court decided against the contention.

The service of a notice upon a member of an incorporated benevolent society directing him to appear and pay a fine or show cause is not sufficient to give the society jurisdiction to expel him for nonpayment of the fine, either on general principles or under a by-law providing that no member shall be expelled until he has been notified to appear and show cause. *People ex rel. Doyle v. New York Benev. Soc. of O. M.* 3 Hun, 361.

Members of an incorporated benevolent society cannot be expelled upon charges made against them until they have an opportunity to be heard in their defense, even if the by-laws provide for expulsion of members in their ab-

cided in each case it will be found that the question presented by this record did not arise in those cases, and was not decided. In the first case cited (*People ex rel. Page v. Chicago Bd. of Trade*), it appears from an examination of the case that Page had been suspended from the board for a failure to pay a certain note given by him to another member of the board, and he filed a petition for mandamus to compel the board to restore him to membership. The court, on the case presented, held that the charter gave the board the power of expulsion, and under the power conferred the corporation adopted a by-law providing that if a member fails to comply with a business contract made with another member he shall be expelled. In *Fisher v. Chicago Bd. of Trade* it appeared that Fisher, a former member of the board, had been expelled. After the expulsion he filed a bill for an injunction, which, in effect, prayed that complainant should be restored to his position as a member of the board. The court held that if a member was improperly expelled, contrary to the constitution and by-laws, a court of equity cannot restore him. *People ex rel. Rice v. Chicago Bd. of Trade* is also a case where a member had been expelled, and sought to be re-

stored to membership by petition for mandamus, and the relief claimed was denied. Expressions may be found in the opinion of the court which may bear the construction that a court would not interfere, in any case, with the action of an organization like the Board of Trade; but those expressions were not necessary to a decision of the case, and cannot be regarded as authority. There the petitioner had been expelled after he had been offered a full opportunity to make defense in the board, but refused, and the court properly held that he could not be restored by mandamus. *Baxter v. Chicago Bd. of Trade* was also a case where a member had been expelled, and, following the *Fisher Case*, it was held that a court of equity would not interfere by injunction. *Sturges v. Chicago Bd. of Trade* merely followed the rule laid down in the *Baxter Case*, that a court of equity will not entertain a bill,—that the remedy, if any, is in the court of law. *Pitcher v. Chicago Bd. of Trade* was also a case where a member had been expelled, and a bill was filed to enjoin the board from preventing the complainant from transacting business on the board. The relief was denied in the circuit court, and the judgment was affirmed in this court. But upon looking into that case

presence and without notice. *People ex rel. Schmitt v. Saint Franciscus Benev. Soc.* 24 How. Pr. 218.

Rules of an incorporated mutual benefit association which provide for the expulsion of members without providing for any notice to be given are unreasonable, and an expulsion without notice is not binding upon the court. *Fritz v. Muck*, 62 How. Pr. 70.

To make the expulsion of a member of a fraternal and beneficial society conclusive upon the court, he must have had a fair trial after due notice before an impartial tribunal; and if the method was not regulated by the laws of the association it must have been analogous to ordinary judicial proceedings, so far, at least, as to promote substantial justice. *People ex rel. Meads v. McDonough*, 8 App. Div. 591, 35 N. Y. Supp. 214, 40 N. Y. Supp. 1147, *Affirming* 13 Misc. 677, 35 N. Y. Supp. 214.

The expulsion of a member from a benefit society is invalid where the expelled member was not served with notice to appear, or given an opportunity to be heard, as provided by the constitution of the society. *Zangen v. Kraukauer Young Men's Asso.* No. 1, 28 Misc. 332, 56 N. Y. Supp. 1052.

Expulsion from a mutual benefit society must always be on notice, and if no other method of notice is prescribed by the by-laws it must be served personally. *People ex rel. Grunwald v. Independent Order Ahavas Israel*, 13 Misc. 426, 34 N. Y. Supp. 675.

A three days' notice by mail is insufficient when the constitution requires an eight days' notice. *Ibid.*

An expulsion of a member of a benevolent society is invalid where he had no notice, although the rules of the society did not provide for notice. *Simmons v. Syracuse, B. & N. Y. & O. S. Benev. Soc.* 32 N. Y. S. R. 428, 10 N. Y. Supp. 293.

The expulsion of a member of an incorporated beneficial society without notice is not authorized by a provision of the charter that if any member neglect to pay his arrearsages for three months he shall be expelled. *Com. v. Pennsylvania Beneficial Inst.* 2 Serg. & R. 141. 49 L. R. A.

The contributing members of a beneficial society have rights of property which cannot be violated by a resolution adopted without notice to them, expelling them for nonpayment of dues. *Dubree v. Reliance Engine Co.* 1 W. N. C. 524.

A committee of a mutual insurance company is bound, upon the principles of general justice, to give the member notice and an opportunity to be heard before proceeding to expel him, in the exercise of the power conferred upon them to expel members if they deem his conduct suspicious, or that he is for any other reason unworthy of remaining in the society; and an expulsion without such notice is void. *Wood v. Woad*, L. R. 9 Exch. 198, 10 Moak, Eng. Rep. 372, 43 L. J. Exch. N. S. 190, 30 L. T. N. S. 815, 22 Week. Rep. 709.

The suspension of a subordinate grove of a benevolent association without any written charges having been preferred against it, or any notice that a complaint had been made against it, or any opportunity to be heard, is not conclusive upon the court in an action by the grand supreme tribunal of the order to obtain possession of funds in the hands of the treasurer of the subordinate grove. *Grand Grove, U. A. O. of D. v. Garibaldi Grove, No. 71, U. A. O. of D.* 105 Cal. 219, 38 Pac. 947.

Supreme Sitting, O. of I. H. v. Moore, 47 Ill. App. 251, held that a demurrer to a plea in action against a benefit society for a benefit which averred that the charter of the subordinate society to which the member belonged had been forfeited was properly sustained because there was no averment as to notice which would give jurisdiction to the tribunal of the society to declare a forfeiture.

Exchange; chamber of commerce.

A decision by a committee of a stock exchange is not binding where the real parties in interest had no notice of the hearing, and no opportunity to be heard. *Morris v. Grant*, 34 Hun, 377.

A member of an incorporated produce exchange cannot be expelled for any cause without notice and an opportunity to be heard. *People ex rel. Johnson v. New York Produce Exchange*,

it will be found that the judgment was predicated, in part, at least, on the fact that the proceedings resulting in the expulsion had been regular, and conformed to the rules of the board. It is there said: "The proceedings against him appear to have been regular, and in accordance with the rules and the provisions of the charter. The expulsion is therefore conclusive. . . . The merits of appellant's expulsion cannot be re-examined by us in this proceeding. The minor irregularities of which he complains were waived by his appearance before the board of directors, and the submission of his case for trial by them without objection, either to the manner in which that body was constituted, or to the mode of its proceeding."

We have no intention, by anything herein said, to interfere with the disciplinary power of the board over its members.

If the allegations of complainant's bill are true,—and they are admitted to be true by the demurrer,—we are inclined to the opinion that he made a case by his bill which entitled him to relief.

The judgment of the Appellate Court and the decree of the Circuit Court will be reversed, and the cause remanded.

149 N. Y. 401, 44 N. E. 84. See also *Lewis v. Wilson*, 121 N. Y. 284, 24 N. E. 474, *supra*, II. b.

The expulsion of a member by an incorporated chamber of commerce without notice, formal complaint, or trial, and in his absence, is irregular and void. *State ex rel. Cappel v. Milwaukee Chamber of Commerce*, 47 Wis. 670, 3 N. W. 760.

Cannon v. Toronto Corn Exchange, 27 Grant Ch. (U. C.) 23, held that the attempted expulsion of a member by an incorporated merchants' exchange was invalid because of the insufficiency of the notice served on him.

But a by-law of a board of trade providing for a preliminary investigation by the board of directors, without notice to the member, to determine whether or not formal charges shall be preferred against him, is not invalid, although the charges, if preferred, are to be tried by the directors. *GREEN v. CHICAGO Bd. OF TRADE*.

And a member of a stock exchange may be suspended without notice under a provision of the constitution authorizing suspension of members upon their insolvency where by going into bankruptcy he in effect admitted his insolvency. *Moxey's Appeal*, 9 W. N. C. 441. See also *Farmer v. Kansas City Bd. of Trade*, 78 Mo. App. 557, *supra*, II. b, 1.

Club.

The expulsion of a member of an incorporated social club for failure to pay dues, without notice or a determination of the fact of nonpayment as provided by the constitution and by-laws of the club, is invalid, and mandamus will lie to compel his restoration to membership. *State ex rel. Sibley v. Carteret Club Bd. of Management*, 40 N. J. L. 295.

The right, upon general principles, of a member of an unincorporated club to notice and an opportunity to be heard before his expulsion is not respected where the only notice was to appear before a subcommittee appointed to investigate the facts, and there was no notice to appear before the committee which received the report of the subcommittee and pronounced the 49 L. R. A.

Harry M. GREEN, *Appt.*,

v.

BOARD OF TRADE OF THE CITY OF CHICAGO.

(174 Ill. 585.)

1. Rules enacted by a voluntary association for the government of its members must be conformed to by it in all matters relating to disciplining them.
2. The by-laws to which a member of a voluntary association agrees to submit are such as are authorized by the nature of the association and the laws of the country, and must not be contrary to the policy of the law, nor unreasonable.
3. Denial of guilt does not affect the right of a voluntary association to proceed to try one of its members for an alleged offense which is clearly in violation of its by-laws.
4. A by-law of a board of trade is not unreasonable or in contravention of public policy, which provides a committee of the directors to investigate charges of grave offenses or dishonesty against a member to determine whether or not formal charges shall be preferred against him, although the investigation is to be made without his knowledge, and the charges, if preferred, are to be tried by the directors.

judgment of expulsion. *Loubat v. LeRoy*, 40 Hun, 546.

The expulsion of a member of a literary corporation is void where the member was not given the notice required by the by-laws. *Sleeper v. Franklin Lyceum*, 7 R. I. 523.

In *People ex rel. Decker v. Hoboken Turtle Club*, 38 N. Y. S. R. 4, 14 N. Y. Supp. 76, the court held that mandamus was properly issued to compel a social club to restore the relator to membership upon the ground that he did not have the notice of the proceedings required by the constitution of the club.

The committee of a club empowered to suspend a member in case his conduct in its opinion shall be injurious to the character and interest of the club has no right to exercise its power without giving the accused member notice and affording him an opportunity of defending himself; and a resolution passed by the committee without previous notice upon *ex parte* evidence, purporting to expel him, is null and void. *Fisher v. Keane*, 27 Moak, Eng. Rep. 596.

So, also, where the rules of a club provided that in case the conduct of any member should, in the opinion of the committee "after inquiry," be injurious to the welfare and interest of the club, it should call upon him to resign, and upon his failure to do so he might be expelled at a meeting of the club, it was held that a member's expulsion was invalid, among other reasons, because he was not given notice and opportunity to be heard before the committee. *Labouchere v. Wharnciffe*, L. R. 13 Ch. Div. 346, 41 L. T. N. S. 638, 28 Week. Rep. 367.

That a member of an incorporated social club having no capital stock or property except the furniture of its rooms, was expelled without notice, no provision being made in the by-laws for notice, does not entitle him to relief from the civil courts. *Manning v. San Antonio Club*, 63 Tex. 166, 51 Am. Rep. 639. This decision seems to proceed upon the theory that the rights and privileges of membership do not come within the provision of the bill of rights providing that no citizen shall be deprived of property, privileges, or immunities, or in any manner disfranchised, except by due course of

5. The directors of a voluntary association are not deprived of jurisdiction to try a member of the association by the fact that the charges are preferred by some of their number.
6. A by-law of a board of trade is not made unreasonable or against public policy by the fact that it deprives members on trial before the directors for violation of its rules of the aid of professional counsel.
7. Courts will not interfere to control the enforcement of by-laws of voluntary associations for the discipline of members who have assented to them where they infringe no public policy or rule of law, and are not unreasonable.
8. The existence of contracts on the part of customers for the future purchase or sale of commodities at a stock exchange does not prevent the trial of the member through whom the contracts were made for violation of the rules of the exchange, although the result may be to expel him and prevent the customers from carrying out their contracts as made, since they must be presumed to have dealt with him with reference to the rules which provide for his suspension or expulsion for misconduct.

(October 24, 1898.)

law, he having assented to the by-laws by becoming a member.

Miscellaneous instances.

The power conferred upon the trustees of a school to displace the master "upon any neglect or misbehavior, or other just cause for which they, or the greater number of them, agree upon and think fit," does not authorize the trustees to dismiss the master arbitrarily, but only for just cause; and they are bound to exercise the power in a mode of proceeding according to principles of right, and to general principles applicable to the administration of justice. *Re Fremington School*, 10 Jur. 512.

The foregoing case held, that the trustees were bound to exercise the power conferred upon them in a mode of proceeding according to principles of right, and to general principles applicable to administration of justice, and that the removal in question was invalid, among other reasons, because the trustees made a sufficient investigation of the charges to convince them that they were true, before giving the master any notice.

Medical & Surgical Soc. v. Weatherly, 75 Ala. 248, while admitting that it is competent for a member of an incorporated society to bind himself by agreement to forfeit his membership upon a specified condition, *e. g.*, failure to pay annual dues, and that such forfeiture may be made to take effect at a time fixed without special or personal notice to the party in default, construed the constitution of the society in question to make nonpayment of dues merely a ground of forfeiture, and held that the action of the society at a time of which the delinquent had no notice, actual or constructive, declaring a forfeiture of his membership for nonpayment of dues, was irregular and not binding upon him.

The expulsion of an inmate of a charitable home by the board of trustees without reasonable notice or opportunity of being heard on the charges made against him, is invalid, and the inmate may be restored by mandamus. *People ex rel. Newman v. Sailors' Snug Harbor*, 54 Barb. 532.

People ex rel. Merschelm v. Musical Mut. Protective Union, 47 Hun, 273, held that an at-49 L. R. A.

A PPEAL by plaintiff from a judgment of the Appellate Court, First District, affirming a decree of the Superior Court for Cook County in favor of defendant in a proceeding to enjoin defendant from trying plaintiff for a violation of its by-laws. *Affirmed*.

The facts are stated in the opinion.

Messrs. Monroe & Thornton for appellant.

Messrs. Green, Robbins, & Honore, for appellee:

A court of chancery has no jurisdiction to enjoin a trial by the board of trade for the purpose of disciplining one of its members.

Sturges v. Chicago Bd. of Trade, 86 Ill. 441; *Fisher v. Chicago Bd. of Trade*, 80 Ill. 85; *Baxter v. Chicago Bd. of Trade*, 83 Ill. 146; *Pitcher v. Chicago Bd. of Trade*, 121 Ill. 412, 13 N. E. 187; *People ex rel. Rice v. Chicago Bd. of Trade*, 80 Ill. 134; *Chicago Bd. of Trade v. Nelson*, 162 Ill. 431, 44 N. E. 743; *Harlow v. Dehon*, 111 Mass. 195; 1 *Thomp. Corp.* § 913; *Delahanty v. Warner*, 75 Ill. 185, 20 Am. Rep. 237.

Even if this court has jurisdiction of a bill to enjoin a hearing, this bill makes no case.

tempted expulsion of a member by an incorporated society was invalid, because the copy of the charges with which he was served was not sufficiently specific.

Any unincorporated society may make rules by which the admission and expulsion of its members are to be regulated; and the members must conform to, and cannot question, them; but where there are no directions on the subject contained in the rules, a party expelled may lawfully complain that his expulsion has been effected contrary to the general principles of law. A member is not to be expelled by vote unless there be regular notice given to him and an opportunity of his being heard. *Innes v. Wylie*, 1 Car. & K. 257.

A member of a corporation cannot be disfranchised without notice for nonpayment of his arrearages. *Diligent Fire Co. v. Com.* 75 Pa. 291.

The failure to serve a member of an incorporated society with the charges made against him, as required by the by-laws of the society, is a substantial jurisdictional defect in proceedings taken for his expulsion, and renders his expulsion void, unless the omission was in some manner obviated. *People ex rel. Deverell v. Musical Mut. Protective Union*, 118 N. Y. 101, 23 N. E. 129.

Com. v. Guardians of Poor, 6 Serg. & R. 469, held that the expulsion of a member by an incorporated society was invalid where the charter provided that no member should be expelled by a less number than two thirds of the members present, and that no expulsion shall take place without giving the accused notice in writing to attend the board and answer the charges preferred against him, it appearing that at the meeting of which notice was given less than two thirds voted for expulsion, and that the attempted expulsion was, at another meeting, without any new accusation or further hearing.

The power of motion or disfranchisement in a corporation is judicial in its character, and it is essential in every case that charges be made, a trial be had, and that the accused be notified and have a full opportunity for defense. The matter must be decided judicially and fairly, and if against the accused he then may apply to the courts for redress. If it is

Pitcher v. Chicago Bd. of Trade, 121 Ill. 412, 13 N. E. 187; *Ryan v. Cudahy*, 157 Ill. 108, 41 N. E. 760, *ante*, 353.

Phillips, J., delivered the opinion of the court:

Appellant filed his bill against appellee to enjoin it from trying him for a violation of its by-laws. The bill avers that the appellee is a public corporation owning property of the value of \$1,500,000, and is carried on for the pecuniary profit of its members; that appellant is a member in good standing, and is innocent of the charges made against him; that the eighteen directors are the judges who must pass on the charges against appellant; that a committee of three of these directors was appointed, under a by-law, to investigate charges against appellant, and without his knowledge, and without notice to him, examined sworn witnesses, whose testimony was reported, and preferred charges against him for a violation of the rules of the board. The bill then alleges there is no warrant in the by-laws for such committee proceeding in the way it did; that, if such course was to be pursued,

he had a right to notice of such examination, and to be present and defend himself, and should be allowed the assistance of counsel; that a by-law deprived him of that right, and that such by-law was illegal and void; that appellant has pending contracts with clients and customers for the future delivery and purchase of grain amounting to \$75,000, upon which he received \$20,000 margins, and paid out to others \$10,000, and, if expelled, he cannot fulfil his contracts; that he was summoned to appear and stand trial on three days' notice, when he was sick and unable to attend, and, if expelled, the injury to him will be irreparable. The bill prayed for an injunction restraining the Board of Trade from trying or attempting to try him for dealing in differences on fluctuations in the market price of commodities without a bona fide purchase or sale of property for actual delivery, or from trying him for making or reporting false and fictitious purchases and sales, and from disciplining, suspending, or expelling him. Appellee filed an answer, which admits that it is a corporation; avers that it is not organized for pecuniary profit, but is a voluntary association, and states its

there found that the corporator or officer had a fair opportunity for being heard in his society, and that the charges against him were sufficient and fairly proved, he can have no further relief; but otherwise he will be restored to all his rights. *State ex rel. Pittman v. Adams*, 44 Mo. 570.

King v. University of Cambridge, 1 Strange, 557, 2 Ld. Raym. 1334, held that an officer of a corporation cannot by the common law be suspended or degraded from his office unless he is either summoned to make a defense or actually makes one.

The power conferred upon a corporation by its charter to strike from the books the names of stockholders who fail to pay for their stock cannot be exercised without giving the stockholder notice and opportunity to be heard. *Delacy v. Neuse River Nav. Co.* (1 Hawks) 274, 9 Am. Dec. 636.

But it has been held that a person chosen to office in an unincorporated association for no definite term is not entitled to notice and an opportunity to be heard with reference to a removal from office or to the election of a successor. *Ostrom v. Greene*, 20 Misc. 177, 45 N. Y. Supp. 852.

Queen v. Governors, 14 L. J. Q. B. N. S. 67, held that under a charter giving the governors of a school power to remove the school master according to their sound discretion, they are at liberty to remove him at discretion, and that their action could not be challenged upon the ground that the master was not given an opportunity to be heard.

But see *Willis v. Childs*, 13 Beav. 117, 20 L. J. Ch. N. S. 113, 15 Jur. 303, *supra*, II. b. 1.

4. Miscellaneous defects; procedure.

The tribunal of a private corporation created by the agreement of its members is a quasi-judicial body, but it is not, even in respect to the matters by consent committed to its charge, a court of superior jurisdiction, and it is bound to proceed in conformity with the rules under which it exists and acts. *Nelson v. Board of Trade*, 58 Ill. App. 399.

The courts will restore by mandamus a corporator who has been disfranchised by proceed-

ings which were irregular according to, or as tested by, the charter or by-laws of the corporation. *Medical & Surgical Soc. v. Weatherly*, 75 Ala. 248.

Corporate bodies and voluntary societies are not bound, in the proceedings taken for the suspension or expulsion of members, to act with the strict regularity which obtains in judicial proceedings, but the courts will limit themselves to inquiring whether they have acted within their powers after giving notice to the accused and affording him an opportunity of making his defense, and whether they have exercised their powers fairly and in good faith. All questions beyond that are questions of which the courts have no cognizance. *Albers v. Merchants' Exchange*, 39 Mo. App. 583; *Hutchinson v. Lawrence*, 67 How. Pr. 38.

While the court in mandamus proceedings to compel an incorporated voluntary society to restore to membership one who has been expelled will not regard matters of form too closely in the proceedings by which the relator was expelled, yet he is entitled to claim that nothing important shall be disregarded to his prejudice. *People ex rel. Roehler v. Mechanics' Aid Soc.* 22 Mich. 86.

The question for the court in a mandamus proceeding to compel a labor union to reinstate an expelled member is whether the procedure resorted to was an honest, fair, and reasonable one, where no by-laws regulating the method of disciplining or expelling members appear in the record. *Beesley v. Chicago Journeymen Plumbers' Protective & Benev. Asso.* 44 Ill. App. 278.

Proceedings for the expulsion of members, provided by the articles of a voluntary society, are to be considered by the courts in reviewing a decision expelling a member without too much regard to technicalities and substantial justice; and the court will not interfere because of a departure in a matter of form if substantial justice has been observed. *People ex rel. Burton v. St. George's Soc.* 28 Mich. 261; *Levy v. Magnolia Lodge*, No. 29, I. O. O. F. 110 Cal. 297, 42 Pac. 887.

To make an expulsion of a member by a mutual benefit society a bar to an action for the recovery of a death benefit after his decease,

object substantially as alleged in the bill; avers it was authorized by its charter to make rules, regulations, and by-laws for its government, and to admit to membership or expel therefrom such persons as it may see fit, in the manner prescribed by its rules, regulations, and by-laws, by which it is shown that the board of directors of appellee consists of eighteen members, one of whom is its president, and two are its vice presidents; that when any member shall violate any of the rules, regulations, or by-laws of the association, or when any member shall be guilty of making or reporting false or fictitious purchases or sales, he shall be censured, suspended, or expelled by the board of directors, as they may determine from the nature and gravity of the offense committed; that a majority of a quorum sitting at a regular or adjourned meeting of the board of directors shall be necessary to censure or suspend, and an affirmative vote of at least twelve members of the board of directors shall be necessary to expel; that all charges shall be in writing, and be signed by one or more members of the association, by business firms, one or more of whose members shall

be members of the association, or by the chairman of the committee of the association; that it is made the duty of the board of directors to refer all charges made against a member, or any public report concerning an act of a member, charging him with an offense against its by-laws, to a committee of their own number, for a preliminary or informal investigation; who must inquire into the truth or falsity of such complaint or report, and after investigation, if they shall deem any member guilty of such offense, they shall so report to the board of directors, with specific charges; that, upon such a report being made, the member implicated is notified to appear before the board of directors for trial; that the rule does not prescribe what means the committee appointed to investigate shall take to determine the truth of the accusations against a member; avers that these rules were in force at the time appellant became a member, and that he assented to the same; denies all conspiracy or prejudging of the case; admits the preferring of charges by the committee after they heard evidence, and the purposed trial; admits the rule as set forth

there must have been a substantial compliance with the rules of the society governing the matter of expulsion. *Hoeffner v. Grand Lodge G. O. of H.* 41 Mo. App. 359.

Where there is no provision as to the mode of procedure to be adopted by the trustees of an incorporated society in removing an officer, reference must be had to the nature of the case to determine what course justice requires the removing power to pursue in exercising their jurisdiction. *People ex rel. Stevenson v. Higgins*, 15 Ill. 110.

Where no mode of procedure is specified in the laws of a mutual benefit association regulating expulsion of members, it may adopt such mode of trial as it pleases, subject only to the implied limitation that it must be fair. *Spilman v. Supreme Council of Home Circle*, 157 Mass. 128, 31 N. E. 776.

It is not essential to the validity of the proceedings of a tribunal of an incorporated club resulting in the suspension of a member that they shall be expressed with absolute technical accuracy, and if they are regular and conducted in good faith, and the accused has been accorded a full and fair hearing, and a proper finding and judgment has been entered upon the facts, and the whole proceeding is stated with substantial accuracy, it is sufficient. *Com. ex rel. Burt v. Union League*, 135 Pa. 801, 8 L. R. A. 195, 19 Atl. 1030.

See also *Medical & Surgical Soc. v. Weatherly*, 75 Ala. 248; *State ex rel. Pittman v. Adams*, 44 Mo. 570; *White v. Brownell*, 2 Daly, 329, 4 Abb. Pr. N. S. 102,—*supra*; and *People ex rel. Meads v. McDonough*, 8 App. Div. 591, 35 N. Y. Supp. 214, 40 N. Y. Supp. 1147, Affirming 13 Misc. 677, 35 N. Y. Supp. 214, *infra*.

Notice of meeting; vote; authority.

The expulsion of a member of an incorporated social club by the trustees is invalid where one of them did not have the notice of the meeting at which the action was taken, required by the by-laws. *People ex rel. Stephens v. Greenwood Lake Asso.* 44 N. Y. S. R. 914, 18 N. Y. Supp. 401.

A notice of a meeting to take action on the proposed expulsion of a member of a benefit society should state distinctly what the object

of the meeting is, and should be served on all the members of the body before the power of expulsion is vested. *People ex rel. Meads v. McDonough*, 8 App. Div. 591, 35 N. Y. Supp. 214, 40 N. Y. Supp. 1147, Affirming 13 Misc. 677, 35 N. Y. Supp. 214.

Marsh v. Huron College, 27 Grant Ch. (U. C.) 605, granted relief to a member of an incorporated college council who had been expelled from the council, upon the ground that the notice of the meeting at which he was expelled was insufficient.

Labouchere v. Wharcliffe, L. R. 18 Ch. Div. 346, 41 L. T. N. S. 638, 28 Week. Rep. 367, held that the expulsion of a member by a club was invalid, among other reasons, because the general meeting was summoned without proper notice, and the resolution of expulsion was carried by an insufficient majority.

The court in *Lowry v. Stotzer*, 7 Phila. 397, in the exercise of the jurisdiction conferred upon it by statute over unincorporated societies granted relief from the action of the grand chancellor of a benefit order suspending an officer without trial and judgment, upon the ground that the grand chancellor had no such authority.

State ex rel. Graham v. Chamber of Commerce, 20 Wis. 63, held that the expulsion was invalid, among other reasons, because the corporation could not lawfully delegate its power of motion to the board of directors as power to disfranchise.

An intended expulsion of a member of a voluntary club is not binding where the majority in favor of expulsion was less than that required by the constitution of the club. *Loubat v. LeRoy*, 40 Hun, 546.

An expulsion of a member of a fraternal and beneficial society is not conclusive on the courts where it was upon a vote of the society in which the officers joined as members, and not by a vote of the officers by recommendation of the society, as provided by the by-laws. *People ex rel. Meads v. McDonough*, 8 App. Div. 591, 35 N. Y. Supp. 214, 40 N. Y. Supp. 1147, Affirming 13 Misc. 677, 35 N. Y. Supp. 214.

Mode of trial; adjournment.

Where the by-laws of a benefit association prescribe the method for expulsion of members,

in the bill, that the right to professional counsel is denied. Affidavits were filed by appellee and appellant. The temporary injunction granted at the time of filing the bill was dissolved, and the bill dismissed, on a hearing upon bill, answer, and affidavits. The complainant excepted, and prosecuted an appeal to the appellate court for the first district, where the decree was affirmed, and this appeal is taken.

The appellant insists that the rule denying to him the right to have professional counsel is unreasonable and void; that the appointment of a committee to investigate and determine whether charges shall be preferred against him, from the members of the board of directors, who are to constitute the body to try him, would make his judges his prosecutors, who had prejudged his case, and therefore the rule is unreasonable, illegal, and void; that the procedure by the committee in hearing and reporting the evidence against him without notice and without his being present was a violation of the rules of the board, and was an illegal and oppressive procedure. The Board of Trade of the City of Chicago maintains an exchange hall, upon

the floors of which, between certain prescribed hours of each business day, the business of its members in buying and selling grain and provisions is transacted. The greater part of the products of the territory tributary to Chicago is dealt with on its floors, and to a great extent the prices of grain and provisions throughout the civilized world are there fixed and determined. It is a corporation organized under an act of the general assembly of this state, and has the power to enact rules and by-laws for its own government and the government of its members. When such rules are enacted by such an association or corporation, they must be conformed to by it in all matters relating to its members, with reference to their actions, and in disciplining them. One becoming a member of such a corporation or association, and subscribing to the by-laws, agrees to submit to its rules and regulations. *Bauer v. Samson Lodge, K. of P.* 102 Ind. 262, 1 N. E. 571; *Presbyterian Mut. Assur. Fund v. Allen*, 106 Ind. 593, 7 N. E. 317; *Coles v. Iowa State Mut. Ins. Co.* 18 Iowa, 425. The by-laws to which such member agrees to submit are such as are authorized by the nature

and provide that charges in writing shall be preferred and served on accused, an expulsion by a vote of the order on a motion merely is void, and is not conclusive upon the court in an action by the beneficiary named in the expelled member's certificate, since the association can expel a member only as the by-laws prescribe. *Byram v. Sovereign Camp of Woodmen*, 108 Iowa, 430, 79 N. W. 144.

The provisions of the constitution relative to the right of a jury trial do not apply to proceedings taken by corporations for the removal of members for offenses against the corporation. *People ex rel. Thacher v. New York Commercial Asso.* 18 Abb. Pr. 271.

Sonneborn v. Lavarrello, 2 Hun, 201, held that an award as between members by the arbitration committee of a produce exchange was not binding because the committee abused its discretion in refusing an adjournment of the hearing.

Evidence; witnesses.

A total absence of evidence to support a sentence of expulsion pronounced by the tribunal of an incorporated produce exchange has the same effect for the purpose of the review of the decision by the civil court as lack of jurisdiction in the tribunal of the association to make any inquiry at all. *People ex rel. Johnson v. New York Produce Exchange*, 149 N. Y. 401, 44 N. E. 84.

Society for Visitation of Sick v. Com. ex rel. Meyer, 52 Pa. 125, 91 Am. Dec. 139, held that a return to a writ of mandamus to compel an incorporated beneficial society to reinstate an expelled member must show that proofs were taken which were deemed to establish the grounds of expulsion, where the by-law provides that the expulsion must be on "sufficient evidence."

An expulsion of a member of a benevolent society upon his failure to appear in response to a notice of the hearing is invalid where no evidence was taken to establish the offense with which he was charged. *People ex rel. Corrigan v. Young Men's Father Matthew Benev. Soc.* 65 Barb. 357.

The removal of an officer of an unincorporated society in his absence is invalid where no

proof was offered of any of the charges made against him. *Strempel v. Rubing*, 21 N. Y. S. R. 483, 4 N. Y. Supp. 534.

A corporation cannot lawfully disfranchise a member without receiving evidence to establish the charge made against him, even if he was present when the charge was made, and did not deny it. *Rex v. Faversham*, 8 T. R. 356.

People ex rel. Stevenson v. Higgins, 15 Ill. 110, held that the board of trustees of a hospital for the insane, when acting upon the question of the removal of the superintendent whom they are authorized to remove for "incompetency," are not bound, in the absence of any provision as to the procedure to be adopted, by any legal rule of evidence, but may act upon their own observation as well as upon facts detailed by others, or upon the opinions of witnesses; and the superintendent is not entitled to be presented with the copy of specific charges.

The court cannot notice or review objections to the proceedings of a beneficial society resulting in the suspension of a member, based on a mistake by a trial committee in excluding certain evidence, and the failure to have the evidence taken by the committee read before the lodge at the time it passed the sentence of suspension. *Sperry's Appeal*, 116 Pa. 391, 9 Atl. 478.

One of the defects which were held by *Strempel v. Rubing*, 21 N. Y. S. R. 483, 4 N. Y. Supp. 534, to invalidate the removal of an officer by a lodge of a fraternal order was the failure to summon witnesses to attend as provided by the constitution.

An expulsion of a member by an unincorporated stock exchange is unfair, and is not binding upon the courts, where some of the witnesses against him were examined in his absence, and he was refused permission to cross-examine them. *Hutchinson v. Lawrence*, 67 How. Pr. 38.

Re Fremington School, 10 Jur. 512, held that the removal of the master of a school by the trustees was invalid, among other reasons, because he was not permitted to cross-examine the witnesses against him.

The admission of hearsay testimony upon the trial of a member of a voluntary association

of the corporation and the laws of the country, and hence must not be contrary to the policy of the law, nor unreasonable. *Sayre v. Louisville Union Benev. Assn.* 1 Duv. 143, 85 Am. Dec. 613; 1 Thomp. Corp. §§ 1014, 1015; *People ex rel. Muir v. Throop*, 12 Wend. 183. The offense charged against appellant is one that is clearly in violation of the by-laws, and, although it is averred that the defendant is not guilty of the charge, that cannot affect the right of procedure. By § 15 of rule 4 of appellee it is provided that where any grave offense, or act of dishonesty involving the good name or dignity of the association, or any act of dishonesty, by complaint or public report concerning a member, shall come to the knowledge of the board of directors, they shall cause a preliminary investigation to be made by a committee, to determine whether charges shall be preferred. The appellant insists that such appointment of the committee, and its hearing testimony and investigating, without notice to him, are unreasonable, unjust, and a violation of his rights. The object and purpose of this rule were evidently to avoid the annoyance and harassment to members

which would arise from hearing every charge that might be made against a member based on mere rumor, or by operators on the wrong side of the market who might be dealing through the member as their agent or commission man. A mere inquiry to determine whether mere complaints or rumors shall be investigated and tried before the board of directors on charges preferred against a member is in no sense a trial. Neither is it an unreasonable by-law, in contravention of public policy. It is not requisite that notice be given of such inquiry. When charges are preferred against a member to be tried before the board of directors, the by-laws then require that he shall have notice before being placed on trial. No right given him under the by-laws of the corporation, to which he has assented, is infringed. The fact that the charges are preferred by a member of the board of directors which is to try the accused would not be cause for interference by a court of equity to prevent a trial. To assume in advance that such a board would not give a member a fair trial is to deny to such a body the reputation for justice and fair dealing which commercial and mercantile as-

does not invalidate his expulsion. *Kopp v. White*, 65 N. Y. Supp. 1017.

Charges; report; findings; manner of voting.

Levy v. Magnolia Lodge, No. 29, I. O. O. F. 110 Cal. 297, 42 Pac. 887, was an application for mandamus for reinstatement of a member of an unincorporated fraternal and beneficial association, who, pursuant to the by-laws, had been adjudged guilty of contempt and expelled for failure to appear at the time set for the trial of charges made against him. It was objected for the first time in the mandamus proceedings that the charges were not sufficiently specific, but the court held that they were sufficiently specific to apprise the relator "of the nature thereof, and to enable him to prepare for his defense," and that that was all that was required.

Strempel v. Rubing, 21 N. Y. S. R. 483, 4 N. Y. Supp. 534, held that the removal of an officer by a lodge of a fraternal order was invalid, among other reasons, because the charges were not reduced to writing and referred to the board of trustees as provided by the constitution.

Vivar v. Supreme Lodge, K. of P. 52 N. J. L. 455, 20 Atl. 36, held that a vote of a lodge of a beneficial society suspending a member was unauthorized and void, where the report of the examining committee, on which they assumed to act, was merely to the effect that the member gave a false age upon entrance, but that in the belief of a majority of the committee there was no malicious intent, or intent to defraud.

Schweiger v. Society, 13 Phila. 113, held that the expulsion of a member by an incorporated beneficial association upon a charge "of illegally drawing aid as granted in cases of sickness" was invalid and not binding, the specific fact upon which the charge was based not having been found.

The court, in *Hoeffner v. Grand Lodge, G. O.* of H. 41 Mo. App. 359, held that the provisions of the rules of a mutual benefit society requiring a vote on the expulsion of a member to be taken in writing, was jurisdictional in view of another law of the order providing that a judgment shall be rendered only in the manner prescribed by laws of the order; and voting

by casting white and black balls was held to invalidate the expulsion.

An informal ballot upon the question of expelling a member of a chamber of commerce neither acquits nor convicts. *State ex rel. Bishop v. Cincinnati Chamber of Commerce, & M. Exchange*, 4 Ohio N. P. 244.

One of the reasons which induced the court in *Re Fremington School*, 10 Jur. 512, to hold the removal of the master of a school by the trustees under the power conferred upon them to remove him "upon any neglect or misbehavior . . . or other just cause for which they, or the greater number of them, agree upon and think fit" was that the order of dismissal did not contain any specific charges, but merely stated that the removal was for divers good causes.

Prejudice of member of tribunal.

The directors of a voluntary association are not deprived of jurisdiction to try a member of the association by the fact that the charges are preferred by some of their number. *GREEN v. CHICAGO Bd. of TRADE*.

In *People ex rel. Meads v. McDonough*, 8 App. Div. 591, 35 N. Y. Supp. 214, 40 N. Y. Supp. 1147, affirming 18 Misc. 677, 35 N. Y. Supp. 214, it was held that the trial of a member of an incorporated fraternal and benevolent society was not fair, and his expulsion was therefore not conclusive upon the court, where one of the committee before whom the trial was had was a brother of the member who made the complaint.

That one of the directors of an incorporated live-stock exchange which pronounced a judgment of expulsion against a member sustained an incidental loss by reason of the misconduct with which the member was charged, does not, in the absence of an objection to him on that ground, invalidate the proceedings so as to deprive them of their conclusive effect in the civil courts. *Jackson v. South Omaha Live Stock Exchange*, 49 Neb. 687, 68 N. W. 1051.

Strempel v. Rubing, 21 N. Y. S. R. 483, 4 N. Y. Supp. 534, held that the removal of an officer by a lodge of a fraternal order was invalid, among other reasons, because he was de-

sociations have always enjoyed. It is to assume that men will not deal fairly with one of themselves. Such presumption cannot be entertained. If the fact that charges were preferred by a member of a board of directors would prevent a hearing by them on charges, it would also apply in case the power of trial was lodged in the body of the members, as it frequently is. If the board of eighteen directors would be disqualified from trying a member because one or two had prejudged his case, and a court of equity would on that ground interfere by injunction to prevent a trial, then one or two members of the board who might have prejudged the case favorably to the member to be tried could prevent a trial by announcing the fact that they had prejudged the case.

It is urged that a court of equity should interfere and enjoin a trial, under the rules of appellee, because one of its rules prevents appellate from being represented by professional counsel. That provision of the by-law is, "In investigations before the board of directors, or any committee of the association, no party shall be allowed to be represented by professional counsel." When it

is considered that, as a rule, the body of the board of directors is composed of men not conversant with forms of procedure and technical rules of law, but who are organized into a corporation or association for business purposes, and the governing body before whom trials are to be had is circumscribed by no technical rules of law, and that the purpose is to investigate whether there has been a violation of the rules of that body,—rules with which they as well as the accused are familiar,—it will be seen the employment of professional counsel would not be calculated to expedite business or advance the interest of the accused, because the judges are unacquainted with technical rules of law. With such a body to try the accused under its own rules, subscribed to by the accused, the exclusion of professional counsel does not violate our sense of right, and is not against public policy or unreasonable. The manner of investigation to determine whether charges shall be preferred, the manner of trial, the body before whom the trial is to take place, and the exclusion of professional counsel, are all provided for by the by-laws, and are methods of discipline. They infringe no

nied his right of challenge under the constitution.

The commissioners of a masonic society are entirely regular in demanding that the accused shall state the ground of his challenge to the members of the commission before questioning them with respect to their qualifications. *Kopp v. White*, 65 N. Y. Supp. 1017.

That the tribunals of a masonic order are subject to some extent to the direction of the grand master does not disqualify them to entertain a proceeding for the expulsion of a member for an offense against the grand master. *Ibid.*

Insanity of expelled member; absence.

A masonic lodge is not ousted of its jurisdiction to expel a member by the fact that the latter notifies his presiding officers that his duties as a county surveyor will prevent his being present at the time appointed for his trial by the lodge. *Robinson v. Yates City Lodge*, 86 Ill. 598.

Pfeiffer v. Weishaupt, 13 Daly, 161, held that the expulsion of a member of a benevolent association upon his failure to appear and answer charges made against him is not invalid because he was insane at the time.

The trial of a member of a fraternal order before his lodge, resulting in his expulsion, is conclusive upon all questions, and the decision cannot be impeached in an action by his beneficiary after his death upon the ground that he was insane at the time of the expulsion. *Dodd v. Armstrong*, 18 Phila. 399.

The provision of the rules of a voluntary association that when the accused fails to appear or answer some competent brother shall be designated and required to appear for him, and to see that he has a fair and impartial trial, does not apply where the accused appeared at the day set for the trial, but failed to appear upon the adjourned day. *Kopp v. White*, 65 N. Y. Supp. 1017.

Effect of former proceedings.

Otto v. Journeymen Tailors' Protective & Benev. Union, 75 Cal. 308, 17 Pac. 217, denied the conclusiveness of an expulsion because the penalty imposed by the by-laws for an offense 49 L. R. A.

originally charged against the member was a fine merely, and the subsequent charge made against him was in bad faith and merely to give effect to the member's prior expulsion.

State ex rel. Cuppel v. Milwaukee Chamber of Commerce, 47 Wis. 670, held that a proceeding resulting in the suspension of a member of an incorporated chamber of commerce, which was void because it was without notice, formal complaint, or trial, and was conducted in the member's absence, was not a bar to a subsequent proceeding for the expulsion of the member after the board of directors had annulled the first proceeding and restored the accused to membership.

Denial of guilt; aid of counsel.

A by-law of a board of trade is not rendered unreasonable or against public policy by the fact that it deprives members on trial before the directors for violation of its rules of the aid of professional counsel. *GREEN V. CHICAGO Bd. OF TRADE*.

Denial of guilt does not affect the right of a voluntary association to proceed to try one of its members for an alleged offense which is clearly in violation of its by-laws. *Ibid.*

5. Waiver of defects.

A member of a benefit association does not waive jurisdictional defects in the proceedings of the association by which he was expelled by appealing to a higher tribunal within the order as prescribed by the by-laws, even if it would not have been necessary for him to have exhausted such remedy within the order before resorting to an action at law. *Byram v. Sovereign Camp of Woodmen*, 108 Iowa, 430, 79 N. W. 144.

The failure on the part of a member of an unincorporated club to request the privilege of being present when the report of the subcommittee as to the matter of his proposed expulsion was received and acted upon by the committee does not waive his right to be present or remove the objection to the proceeding based on his exclusion. *Loubat v. LeRoy*, 40 Hun, 546.

Failure to serve a member of a benevolent

rule of law, and are not unreasonable. They provide a tribunal and procedure voluntarily chosen to determine questions arising between the association and its members, according to rules to which the members assented on being admitted. As heretofore said, where such by-laws infringe no public policy or rule of law, and are not unreasonable, courts will never interfere to control their enforcement, but such corporations or associations will be left to enforce their rules and regulations in the manner they have adopted for their own government and methods of discipline. *Fisher v. Chicago Bd. of Trade*, 80 Ill. 85; *Baxter v. Chicago Bd. of Trade*, 83 Ill. 146; *Sturges v. Chicago Bd. of Trade*, 86 Ill. 441; *People ex rel. Rice v. Chicago Bd. of Trade*, 80 Ill. 134; *Pitchoer v. Chicago Bd. of Trade*, 121 Ill. 412, 13 N. E. 187; *Ryan v. Cudahy*, 157 Ill. 108, 41 N. E. 760, ante, 353; *Chicago Bd. of Trade v. Nelson*, 162 Ill. 431, 44 N. E. 743.

It is insisted the Board of Trade, by holding out to the public that a broker is a member, encourages and invites the public to buy produce on its exchange through that member, and, when the public have acted on such invitation, by the expulsion of such member

the board would prevent the carrying out of contracts which customers of the expelled member have made in good faith, and such customers would be remediless. Contracts contemplating actual delivery can be enforced against the other parties thereto in the name of such customer, although the name of the principal with whom he has dealt is not disclosed by the broker at the time of making the contract. Such contracts could have been provided for by counter sales or purchases on the floor of the exchange within an hour. The existence of such contracts affords no ground for interference to prevent a trial under the rules of the Board of Trade. If it could be held it did, then a member could always have outstanding contracts, and effectually prevent being tried for a violation of the rules of the Board of Trade. Aside from this, customers of a member of the Board of Trade, dealing with him as such member, must be conclusively presumed to have dealt with him with reference to the rules of the board, which provide that their broker could be suspended or expelled for misconduct. *Bailey v. Bensley*, 87 Ill. 556.

society with notice of proceedings for his expulsion is not waived by his appearance and admission of the truth of the charges against him, where he was insane at the time. *Supreme Lodge, A. O. U. W. v. Zuhlke*, 129 Ill. 298, 21 N. E. 789.

Objections by a member of an incorporated board of trade that two of the board of directors before whom proceedings for his expulsion were brought were not naturalized citizens, that two of them were prejudiced against him, and that some of them did not hear portions of the evidence but read it after it had been written out, and that the prosecuting witness was improperly sworn before a notary public, are waived by his appearance before the board and submission of his case for trial by them without objection either to the manner in which that body was constituted or to the mode of its proceeding. *Pitcher v. Chicago Bd. of Trade*, 121 Ill. 420, 13 N. E. 187.

Irregularities in the proceedings of a beneficial society by which a member was suspended will not afford a ground of relief in equity where they were waived by the member's appearance and failure to raise them before the tribunals of the society. *Sperry's Appeal*, 116 Pa. 391, 9 Atl. 478.

A member of a mutual benevolent association, though entitled to be served with a notice and copy of charges before expulsion, may waive such right by appearing and proceeding to trial without objecting for want of such service. *People ex rel. Baker v. Coachman's Union Benev. Asso.* 4 Misc. 424, 24 N. Y. Supp. 114.

The presence of a member of a benefit association at the time of his expulsion on motion and his failure to object in any manner to the proceedings do not constitute a waiver of the failure of the association to prefer charges against him and to give him notice thereof as prescribed by the by-laws. *Byram v. Sovereign Camp of Woodmen*, 108 Iowa, 430, 79 N. W. 144.

Objections to an award of an arbitration committee of a produce exchange, an incorporated body, based upon their omission to observe the strict form of taking the oath, and their failure to take the proofs according to legal for-

mula, are waived, where the party complaining appeared before the committee, made his statement, discussed the case, and interposed no objection to the proceedings in any respect. *Sonneborn v. Lavarello*, 2 Hun, 201.

c. Decisions directly on property rights; validity of agreement to abide by decision.

State, Zeff, Prosecutor, v. Grand Lodge, K. of P. 53 N. J. L. 536, 22 Atl. 63, which denied the right of a civil court to pass upon the merits of a decision of a tribunal of a mutual benefit association, in disciplining a member, said that there was a distinction between cases in which a mutual benefit association subjects its members to discipline and those in which the members appeal to the courts to secure property rights or to enforce money demands.

There is a sharp conflict of opinion upon the question whether it is competent for a beneficial association absolutely to prevent the bringing of an action at law upon a claim for benefits, by a provision in its constitution, or by-laws, or in the certificates issued to members, requiring the submission of such claims to the tribunals of the order, and making their decisions final.

A mutual benefit society may provide methods for redressing grievances and deciding controversies, and may compel members to resort to the prescribed method of procedure before invoking the powers of the courts, but it may not entirely prohibit members from suing to recover benefits accruing to them under the by-laws of the organization. *Bauer v. Samson Lodge, K. of P.* 102 Ind. 262, 1 N. E. 571; *Supreme Council O. of C. F. v. Garrigus*, 104 Ind. 133, 54 Am. Rep. 208, 3 N. E. 818.

It is not competent for parties in advance of any dispute to oust the jurisdiction of the courts by providing that the decisions of persons named in the contract shall be final and conclusive; and therefore a by-law providing that the decision of a subordinate officer upon a claim for benefits shall be final and conclusive unless reversed upon an appeal by the supreme council is invalid so far as it attempts to prevent resort to the courts, but is valid and

To allow an injunction in cases of this character would result in transferring offenses against the rules of clubs, societies, churches, corporations, and associations of this character to courts of chancery for trial, where it was alleged the membership was of pecuniary value, and that the complaining member could not have a fair trial under the

rules of the organization to which he belonged.

It was not error to dissolve the injunction and dismiss the bill.

The judgment of the Appellate Court for the First District, affirming the decree of the Superior Court of Cook County, is affirmed.

KANSAS SUPREME COURT.

SUPREME LODGE OF THE ORDER OF SELECT FRIENDS, *Piff. in Err.*,

v.

Charles RAYMOND.

(57 Kan. 647.)

*1. It is competent for a fraternal organization which provides for the payment of benefits, to make reasonable rules or laws requiring those claiming benefits to submit their claims to designated officers or tribunals

*Headnotes by JOHNSTON, J.

effective so far as it requires an appeal to be taken before suit may be brought on the membership certificate. Supreme Council, O. of C. F. v. Forsinger, 125 Ind. 52, 9 L. R. A. 501, 25 N. E. 129.

Whitney v. National Masonic Accl. Asso. 52 Minn. 378, 54 N. W. 184, held that a rule of a mutual benefit association requiring the submission of all claims to an arbitration committee, prohibiting suits upon disputed claims before they shall have been arbitrated, and making the award of the committee final, did not preclude a member from bringing an action at law to recover an indemnity. It appears in that case that the committee had failed to arbitrate the claim; but the decision rests upon the principle that a provision in a contract creating a definite legal obligation (e. g., to pay a certain sum on a specified contingency), to the effect that the rights and obligations of the parties shall be determined by arbitration, and that no action shall be maintained on the contract, is not effectual to bar such an action.

The Nebraska supreme court in Burlington Voluntary Relief Dept. v. White, 41 Neb. 547, 59 N. W. 747, while intimating that the members of mutual benefit associations had no power under any circumstances to make the decisions of tribunals of the association with respect to claims for benefits conclusive, seems to authoritatively decide only that the decisions of such tribunals cannot be made conclusive as against a beneficiary, not a member, claiming a benefit after the death of the member.

The rejection of a claim by the highest tribunal of a mutual benefit association does not prevent an action to recover the benefit, notwithstanding that the rule of the association provides that the decision of such tribunal shall be final and conclusive upon all parties without appeal or exception. BALTIMORE & O. R. Co. v. STANKARD.

In some of the cases the question was not whether the association had the power to preclude resort to a court of law, but whether it had attempted to do so, and that question having been answered in the negative, the decision of the question as to the existence of the power was not necessary, though in some instances the courts expressed their opinion upon it. 49 L. R. A.

of the organization for investigation and allowance before the claims are made the subject of litigation in the courts; but a requirement of this kind does not abridge the right of members to resort to the courts when their claims have been submitted to, and finally rejected by, such officers and tribunals.

2. The right of resort to the courts will not be deemed to have been taken away by mere inference; and, if it can be done at all, it will only be where the restriction is stated in the clearest and most explicit terms.

(January 8, 1897.)

The right to resort to the courts for the purpose of enforcing the property rights of the beneficiary of a member of a fraternal order will not be deemed to have been taken away by mere inference, and if it can be done at all it will only be where the restriction is stated in the clearest and most explicit terms. SUPREME LODGE, O. OF S. F. v. RAYMOND.

In the last case the court held that the provision of the constitution of a fraternal order that the supreme lodge shall have original and exclusive jurisdiction over subjects pertaining to the welfare of the order, and that the decisions of the supreme lodge upon questions and appeals shall be the supreme law of the order, do not make the decisions of the supreme lodge against a claim for a benefit conclusive, even if such an order has the power to confer upon its own tribunals plenary power to decide finally and conclusively upon the property rights of insured members. *Ibid.*

It is competent for the members of a mutual benefit association to so contract that their rights as members shall depend upon the determination of some tribunal of their own choice which shall be conclusive; but where the designated tribunal is the society itself or the board of directors, the courts will hesitate, and even refuse, to treat its decisions as final and conclusive, unless the language of the contract is such as to preclude any other construction. The judicial mind is so strongly against the propriety of allowing one of the parties or its special representative to be judge or arbitrator in its own case, that even a strained interpretation will be resorted to if necessary to avoid that result. RAILWAY PASS. & FREIGHT CONDUCTORS' MUT. AID & BEN. ASSO. v. ROBINSON, 147 Ill. 138, 35 N. E. 168.

The last case held that no power to determine conclusively the rights of the beneficiary of a deceased member to a benefit was conferred upon the board of directors of a mutual benefit association by the provisions of the constitution that all claims should be referred to the board, and, upon approval by a majority of the board and the president, should be paid by the secretary. A further provision to the effect that the board shall decide all points of dispute

ERROR to the District Court for Anderson County to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a mutual benefit certificate. *Affirmed.*

The facts are stated in the opinion.

Mr. J. L. Denison, with **Mr. L. C. Boyle**, for plaintiff in error:

The plaintiff having submitted his case to the tribunals of the defendant order, if those tribunals granted to him a fair and impartial trial, he had no standing in the court.

Beach, Priv. Corp. § 321; *Venable v. Ebenezer Baptist Church*, 25 Kan. 182; *Berry v. Carter*, 19 Kan. 135; *Paola Bd. of Edu. v. Shaw*, 15 Kan. 33.

Where a party makes a contract of this kind with himself and other persons, providing certain conditions on which he shall receive benefits from one of these organizations, he can only recover according to the terms which he has provided for in the by-laws.

Van Poucke v. Netherland St. Vincent De Paul Soc. 63 Mich. 378, 29 N. W. 863; *Canfield v. Great Camp, K. of M.* 87 Mich. 626, 13 L. R. A. 625, 49 N. W. 875; *Harrison v.*

questions of doubt that may arise, and their decision shall be final, immediately following a provision requiring the board to examine the books, papers, and accounts of the association, was construed to refer only to disputes and questions in connection with the books, papers, or accounts. The court said that, even if that were the less natural and obvious construction, it should be adopted to avoid a construction which would vest the board of directors with power to determine conclusively the liability of the association upon a membership certificate. *Railway Pass. & Freight Conductors' Mut. Aid & Ben. Asso. v. Tucker*, 157 Ill. 194, 42 N. E. 398, 44 N. E. 286, is to the same effect.

It may be that among the members of a mutual aid association the decisions of the board of directors upon questions affecting them is final, and an organization may be such that the obligations to the beneficiaries of a deceased member shall be purely moral without redress by law; but the language by which that result is effected must be explicit. *Railway Pass. & Freight Conductors' Mut. Aid & Ben. Asso. v. Loomis*, 43 Ill. App. 599, Reversed on another point in 142 Ill. 560, 32 N. E. 424.

Some of the cases, however, uphold the validity of the provisions of the constitution and by-laws of mutual benefit associations, making the decisions of their tribunals with respect to claims for benefits final and conclusive, and hold that they preclude an action at law.

A provision of the constitution of a beneficial society that "all claims against the association shall be referred to the board of directors, whose decision shall be final," and that "assessments shall not be made except on its authority," vests the sole power of determining whether the association shall or shall not pay a claim and order an assessment to pay it, in the board of directors, and no court can review or re-examine their decisions in that regard. *Rood v. Railway Pass. & Freight Conductors' Mut. Ben. Asso.* 31 Fed. Rep. 62.

A by-law of a mutual benefit society, which makes the decisions of a committee conclusive as to the right of a member to a sick benefit, is not oppressive or opposed to the policy of the law, and the decision of such a committee, if 49 L. R. A.

Hoyle, 24 Ohio St. 254; *Sabin v. Senate of National Union*, 90 Mich. 177, 51 N. W. 202; *Austin v. Searing*, 16 N. Y. 112, 69 Am. Dec. 672, and note; *Otto v. Journeymen Tailors' Protective & Benev. Union*, 75 Cal. 308, 17 Pac. 217; *Rood v. Railway Pass. & Freight Conductors' Mut. Ben. Asso.* 31 Fed. Rep. 62; *Robinson v. Templar Lodge*, No. 17, I. O. O. F. 97 Cal. 62, 31 Pac. 609; *Conn. ex rel. Bryan v. Pike Beneficial Soc.* 8 Watts & S. 250; *Burt v. Grand Lodge, F. & A. M.* 44 Mich. 208; *Oliver v. Hopkins*, 144 Mass. 175, 10 N. E. 776; *Chamberlain v. Lincoln*, 129 Mass. 70; *Thompson v. White*, 4 Serg. & R. 135; *Com. v. LaFitte*, 2 Serg. & R. 106; *Walls v. Wilson*, 28 Pa. 514; *Wynn v. Bellas*, 34 Pa. 160; *Wells v. Scott*, 1 Miles (Pa.) 125; *Williams v. Danziger*, 91 Pa. 232; *Lewis's Appeal*, 91 Pa. 359; *People v. St. George's Soc.* 28 Mich. 261; *White v. Brownell*, 4 Abb. Pr. N. S. 162; *Woolsey v. Independent Order of O. F. Lodge No. 23*, 61 Iowa, 492, 16 N. W. 576; *Anacosta Tribe No. 12*, I. O. of R. M. v. *Murbach*, 13 Md. 91, 71 Am. Dec. 625; *Osceola Tribe, No. 11*, I. O. R. M. v. *Schmidt*, 57 Md. 98; *Karcher v. Supreme Lodge, K. of H.* 138 Mass. 368; *Hembeau v. Great Camp, K. of*

made in good faith, will be held conclusive by the courts. *Van Poucke v. Netherland St. Vincent De Paul Soc.* 63 Mich. 378, 29 N. W. 863.

Canfield v. Great Camp, K. of M. 87 Mich. 626, 13 L. R. A. 625, 49 N. W. 875, applied the doctrine of *Van Poucke v. Netherland St. Vincent De Paul Soc.* 63 Mich. 378, 29 N. W. 863, to a death benefit, holding that no distinction could be based upon the fact that in the earlier case the plaintiff was a member claiming for sick benefits, while the plaintiff in the present case was not a member, and had no voice in the selection of the members of the tribunal.

Fillmore v. Great Camp, K. of M. 103 Mich. 437, 61 N. W. 785, and *Hembeau v. Great Camp, K. of M.* 101 Mich. 161, 59 N. W. 417, actions against mutual benefit associations for death benefits, adhere to *Canfield v. Great Camp, K. of M.* 87 Mich. 626, 13 L. R. A. 625, 49 N. W. 475.

The Montana supreme court, in *Cotter v. Grand Lodge, A. O. U. W.* 23 Mont. 82, 57 Pac. 650, expressed its opinion that the better reasoning was with those courts that uphold the validity of by-laws of voluntary mutual benefit societies making the decisions of a tribunal of the society conclusive upon members and those claiming benefits. The court, however, did not authoritatively so decide, as it was not necessary.

The California supreme court in *Robinson v. Templar Lodge, No. 17, I. O. O. F.* 97 Cal. 62, 31 Pac. 609, which was an action against a mutual benefit association to recover "a sick benefit," held that the voluntary submission of his claim to a tribunal established by the association was in the nature of a submission to arbitration, and that the decision of the tribunal adverse to his claim was in the nature of an award, and should be considered equally conclusive. The court emphasized the fact that under the by-laws of the society the plaintiff was not obliged to submit his claim to the tribunals, but that, on the contrary, he was not even obliged to make any demand upon the association before commencing an action in a court of law.

The provision of the constitution of a voluntary unincorporated fraternal and beneficial association, that the decisions of the authorities

M. 101 Mich. 161, 59 N. W. 417; Supreme Lodge, K. of P. v. Wilson, 30 U. S. App. 234, 66 Fed. Rep. 785, 14 C. C. A. 264; Supreme Lodge, K. of P. v. Kalinski, 13 U. S. App. 574, 67 Fed. Rep. 348, 6 C. C. A. 379.

Members of a benevolent association, feeling themselves aggrieved, must exhaust their remedy in the order before resorting to the courts for redress.

Reno Lodge, No. 99, I. O. O. F. v. Grand Lodge, I. O. of O. F. 54 Kan. 73, 26 L. R. A. 98, 37 Pac. 1003.

Messrs. Oscar Foust & Son, for defendant in error:

Any contract seeking to oust the courts of their usual and ordinary jurisdiction would be void as contravening public policy.

Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. ed. 365; Story, Eq. Jur. § 670; Stephenson v. Piscataqua F. & M. Ins. Co. 54 Me. 70; Mentz v. Armenia F. Ins. Co. 79 Pa. 478, 21 Am. Rep. 80; Davis v. Mayo, 82 Va. 97.

An arrangement by which members of such an association undertake to confer judicial powers, in respect to the property in which they have a common interest, upon officers to be from time to time selected out of the

association at large, as a tribunal having general authority to adjudicate an alleged violation of the rules of the association, and to decree the property rights of the parties adjudged to be guilty of such violation,—is void.

Wicks v. Menihan, 54 Hun, 614, 8 N. Y. Supp. 121; Austin v. Searing, 16 N. Y. 112, 69 Am. Dec. 672.

These authorities deny the right to oust the jurisdiction of courts.

Bauer v. Samson Lodge, K. of P. 102 Ind. 262, 1 N. E. 571; Supreme Council, O. of C. F. v. Garrigus, 104 Ind. 133, 54 Am. Rep. 298, 3 N. E. 818; Bacon, Ben. Soc. § 107; Parsons v. Trask, 7 Gray, 473, 66 Am. Dec. 502, and note p. 514; White v. Middlesex R. Co. 135 Mass. 216; Otto v. Journeymen Tailors' Protective & Benev. Union, 75 Cal. 308, 17 Pac. 217.

Johnston, J., delivered the opinion of the court:

This was an action by Charles Raymond to recover \$3,000 on an insurance or benefit certificate issued to him by the Supreme Lodge of the Order of Select Friends. The order is

of the order shall be conclusive in respect to any claim for benefits, is not effectual for the purpose of depriving the courts of jurisdiction, but the member is bound to exhaust his remedies within the order before resorting to a court of law. *Levy v. Magnolia Lodge, No. 29, I. O. O. F. 110 Cal. 297, 42 Pac. 887.*

That was a mandamus proceeding to compel a benefit association to reinstate a member who had been expelled upon the charge that he had abandoned his proceeding before the lodge to test his alleged right to benefits, and commenced an action at law to recover a benefit; and it was with reference to that action that the statement was made, and it was therefore *arguendo*.

The same court, however, in *Robinson v. Templar Lodge, No. 17, I. O. O. F. 117 Cal. 370, 49 Pac. 170*, expressed an opinion, in line with *Rood v. Railway Pass. & Freight Conductors' Mut. Asso. 31 Fed. Rep. 62*, and the Michigan cases above cited, to the effect that a provision of the constitution of such an association making the decisions of its tribunals conclusive was valid, and would prevent an action at law after a decision adverse to a claim of a member for sick benefits. The case, however, seems to have been decided upon the point that, even if that view were not correct, the member was at least bound to exhaust his remedies within the order before maintaining an action at law.

Grimbley v. Harrold, 125 Cal. 24, 57 Pac. 558, held that a provision of the constitution of a fraternal order to the effect that a tribunal of the order shall determine who are entitled as beneficiaries when conflicting claims are set up, and that the decision of such tribunal shall be conclusive, subject to appeal to the grand lodge or supreme lodge," it being the purpose of this provision that all these rights shall be thus determined without recourse to the courts of law," did not prevent the original beneficiary named by the insured from resorting to the courts after a decision by the tribunal of the order adverse to her and in favor of a subsequent beneficiary. The opinion distinguishes the case from *Robinson v. Templar Lodge No. 17, I. O. O. F. 117 Cal. 370, 49 Pac. 170, supra*, upon the ground that in that case there was a dispute between a member and the organization concerning rights founded immediately on the 49 L. R. A.

contract of membership, and which the member had, by assenting to its rules, agreed to submit to its tribunals. In the present case the question was as to whether the original beneficiary acquired a right which could not be extinguished by the subsequent designation of another beneficiary.

As already shown, the Illinois supreme court in *Railway Pass. & Freight Conductors' Mut. Aid & Ben. Asso. v. Robinson, 147 Ill. 138, 35 N. E. 168, supra*, while construing the provisions of the constitution of a mutual benefit association not to make the decisions of its tribunals against a claim for benefits final and conclusive, took the view that it was competent for such an association to so provide.

A member of a beneficial society must resort, for the correction of an alleged wrong, to the tribunals of his order, and the judgment of such tribunals against a claim for sick benefits, when resulting fairly from the application of the rules of the society, is final and conclusive, where the laws of the order so provide. *McAlees v. Supreme Sitting, O. of I. H. (Pa.) 12 Cent. Rep. 415, 13 Atl. 755.*

The decision of a tribunal of a mutual benefit society upon a claim for benefits is conclusive upon the merits, if it had jurisdiction and proceeded regularly. *Brubaker v. Denlinger, 17 Lanc. L. Rev. 212.*

Black & White-Smiths' Soc. v. Vandyke, 2 Whart. 309, 30 Am. Dec. 263, after holding that the court in an action by a member for sick benefits could not inquire into the merits of his expulsion, said that, even if there were not a sentence of expulsion in the way, payment could not be enforced by action, since the society had decided against the claim.

It would seem that there is a clear distinction between holding that the decisions of tribunals of benefit societies directly upon claims for benefits are conclusive upon the merits, and holding that in determining the right of a claimant to a benefit a previous decision by such a tribunal expelling a member conclusively established his status and thus removed all foundation for the claim.

Some of the cases previously cited as holding that disciplinary decisions were conclusive on the merits applied the rule in actions for bene-

a fraternal one, and its objects are to advance the principles of friendship, hope, and protection among those who are eligible to and do become members, and to aid members in business and in obtaining employment. A relief fund has been established, from which benefits not exceeding \$3,000, are to be paid, upon the death or total disability of members who have complied with the rules and regulations of the order. In the matter of benefits a claim by a member on account of accident or disability is first made to the supreme medical director, and, if he refuses to recommend payment, an appeal may be taken to the supreme executive committee, and, if the decision of that committee is adverse, the claimant may appeal to the supreme lodge, where the claim will be determined by a majority vote of all present and entitled to vote thereon. Raymond, a member of the order, to whom a certificate had been issued, presented a claim under a certificate upon the ground that he had become totally and permanently disabled. His application for a benefit was regularly presented to the supreme medical director, who rejected it. Appeal was taken from his de-

cision to the supreme executive committee, which also refused to allow his claim. He thereupon appealed to the supreme lodge, and that tribunal decided adversely to his claim. He then instituted the present action, and a trial having been had before the court and a jury, a verdict was rendered in his favor for the sum of \$2,983.16. Raymond appears to have been a member of the order in good standing, whose assessments had been paid, and the disability of which he complained was organic disease of the heart and muscular rheumatism. There was testimony tending to sustain the claim of disability, and that the claim was properly presented and the appeals regularly taken is conceded; but it is contended that the claim having been rejected by the tribunals created by the order, and the decision of the supreme lodge of the order being adverse, and standing unreversed and unmodified, it was a full and final adjudication of the plaintiff's claim, and no resort to the courts can be had. It is argued that, provisions having been made by the laws of the order for the investigation and allowance of benefits, a member who subscribes to those provisions is bound

its, but it is not perceived that they furnish any authority for the position that the decisions of these tribunals directly upon claims for benefits are conclusive, although the distinction is evidently disregarded in the two cases next cited.

Anacosta Tribe No. 12, I. O. of R. M. v. Murbach, 13 Md. 91, 71 Am. Dec. 625, was an action for "sick benefits." The plaintiff had been expelled, and his expulsion had been affirmed on appeal by the grand council of the order, whose decision according to the laws was final. The claim for benefits had also been rejected. The court decided against the plaintiff on the ground that the decision of the tribunals of the order was final. It is not entirely clear whether the court refers to the decision expelling the member or that rejecting the claim, but the case is relied upon by *Osceola Tribe No. 11, I. O. R. M. v. Schmidt*, 57 Md. 98, as authority for the position taken by it, that a member of a fraternal order cannot maintain an action in a civil court to recover sick benefits where his claim has been rejected by the tribunals within the order, to which he applied pursuant to a by-law requiring that whenever a member has cause of complaint on questions relating to his enjoyment of benefits, he must first apply to a specified tribunal, and, if its decision does not satisfy him, to another tribunal, and providing that if he neglects to pursue that course and bring suit, he shall be subject to expulsion.

The decision by the appellate tribunal of a benefit society, affirming an expulsion of a member for making a false claim, is conclusive against his right to a benefit under such claim, although he had obtained a decision in his favor upon that claim by an intermediate tribunal, from whose decision the subordinate lodge had taken an appeal, which was pending at the time of the decision of the other appeal. *Woolsey v. Independent Order of O. F. Lodge No. 23, 61 Iowa, 492, 16 N. W. 578.*

The court of common pleas, in *Sweeney v. Rev. Hugh McLaughlin Beneficial Soc.* 14 W. N. C. 466, 486, which held that the expulsion of a member by a mutual benefit society, because, in violation of a by-law, he had instituted legal proceedings to recover a sick benefit, was invalid, said that a by-law cannot oust

the jurisdiction of the court, or make an appeal to the court a cause of expulsion.

The New Jersey supreme court, in *State ex rel. Vannatta v. Smith*, 61 N. J. L. 188, 38 Atl. 811, merely denied a writ of mandamus to compel a relief association to restore petitioner to the roll of those entitled to relief, where the trustees had refused, after consideration, to extend further relief to him. It did not pass upon the question whether their decision would be conclusive if the petitioner had not mistaken his remedy.

Harrington v. Workmen's Benev. Asso. 70 Ga. 340, and Poulitney v. Bachman, 31 Hun, 49, raise a query whether the decision of the highest appellate tribunals of a mutual benefit association upon a claim for benefits would entirely preclude resort to a court of law, but do not decide the question.

Vaughn v. Herndon, 91 Tenn. 64, 17 S. W. 793, held that a decision of the tribunal of a tobacco board of trade upon a claim made by one member against another was conclusive and precluded an action at law, where the by-laws adopted pursuant to the charter so provided.

The provision of the constitution of a board of brokers, an unincorporated association, that the decision of the arbitration committee upon any claim or matter of difference between members of a board shall be final, is valid, and the agreement of a member to abide by the arbitration clause is not revoked by his death, but is binding upon his representatives. *Singerly v. Johnson, 3 W. N. C. 541.*

The common-law rule that condemns agreements, in advance of any dispute, to arbitrate the entire question of liability, does not seem to apply to an agreement which provides for the determination by arbitration of some particular fact or facts. The two cases next cited may perhaps be brought within that exception to the rule.

A decision by an association of persons jointly liable on a policy of insurance to one of its members, which provides that the association shall finally determine the amount due on any loss, although not strictly an award, but subject to the power of equity to give relief against it, will be binding on the member except for cause shown to the contrary. *Phar v. Coxa.*

by them, and by the decisions of the tribunals which he himself has helped to create. One article of the constitution of the order is that "no claim for any benefit from the relief fund shall be paid until all the laws or rules of the order have been fully complied with, and the requisite proof of the justness of the claims has been made in accordance with the general laws of this order." For the purpose of sustaining the position that a resort to the courts is not permissible, attention is called to the laws of the order already mentioned, and also to the following provision of the constitution: "The supreme lodge, when convened agreeable to the provisions of the constitution and laws of the order, shall have original and exclusive jurisdiction over all subjects pertaining to the welfare of the order, and absolute control of all appeals from the grand or subordinate lodges and members; and its decisions upon all questions and appeals, when properly presented and heard, are the supreme law of the order." Instructions were asked to the effect that, in the absence of fraud, the decisions of the tribunals of the order were final and conclusive; but these were refused, and instead

the court charged the jury as follows: "If you find from a preponderance of the evidence that the plaintiff has paid all dues and assessments as provided by the by-laws, and was in good standing in the order, and that he duly presented his claim, and took the various appeals as provided by the constitution and laws of the order, and that the defendant order, through its grand lodge, finally acted upon and rejected the said claim, then he may maintain an action thereon in this court, and may recover thereon, provided he proves by a preponderance of the evidence the existence of the total disability as claimed."

Fraternal organizations like this one may doubtless adopt rules and by-laws which will be controlling as to all questions of discipline, doctrine, or internal policy. Persons who voluntarily become members are bound by all reasonable rules and regulations, and with the determination of questions of the character named the courts will ordinarily not interfere. It does not follow, however, that the contract or property rights of members are beyond the reach of the courts or the protection of the law. In a

The determination by the president of a beneficial association that it is not in funds is conclusive upon a member in an action for benefits, where the charter provides that an allowance to a sick member is to be made from the time of his application in writing to the president while so much remains in the funds. *Toram v. Howard Beneficial Assn.* 4 Pa. 519.

Another exception to the rule is where the contract expresses no obligation to pay any definite sum, or to do any particular thing, but only to pay such sum, or to do such thing, as shall be determined by arbitration. The following cases seem to come within that exception.

The refusal of the board of directors of an insurance company, in the bona fide exercise of their discretion, to reduce the premium under a provision of the prospectus of the society that the life might from time to time be re-examined and the "society, being satisfied" of the removal of the cause for charging the extra premium, would reduce it, is conclusive on the court. *Manby v. Gresham Life Assur. Soc.* 29 Beav. 439, 31 L. J. Ch. N. S. 94.

Torrey v. Baker, 1 Allen, 120, held that, under the articles of a voluntary association providing that if any member be reduced in his circumstances by fire the society shall consider his case and grant him such relief from its funds as to its members shall appear just and reasonable, it belonged exclusively to the society to determine, in the first instance, whether any member has in fact been reduced in his circumstances by fire, and what should be the amount of relief which in such case shall be afforded him.

The court of Queen's bench, in *Edwards v. Aberayron Mut. Ship Ins. Soc. L. R. 1 Q. B. Div. 563*, 34 L. T. N. S. 457, upheld the validity of the rules of a mutual insurance company which provided that "the directors shall have full power to determine all disputes arising between the society and members concerning insurances or claims upon the society; and the decision of the directors shall be final and conclusive; . . . and no member shall be allowed to bring an action or suit against the society for any claim upon the society, except

as is provided by these presents." The exchequer chamber reversed the decision, but *Amphlett, B., Archibald, J., and Pollock, B.*, agreed with the Queen's bench that the rules were valid, and held that, if the investigation by the directors had been fairly conducted, their decision would have been conclusive. *Kelly, C. B., and Brett, J.*, took a contrary view, holding that the rules were invalid, and did not come within the exception established by *Scott v. Avery*, 5 H. L. Cas. 811, 25 L. J. Exch. N. S. 303, 2 Jur. N. S. 815 (upon which all the opinions in the case seem to rely), to the general rule that condemns agreements in advance to submit all controversies that may arise to arbitration.

Robinson v. Templar Lodge No. 17, I. O. O. F. 97 Cal. 62, 31 Pac. 609, *supra*, held that plaintiff by voluntarily submitting his claim for a benefit to the tribunal of the association agreed to abide by its decision.

Quinlan v. St. Francis Xavier Mut. Ben. Soc. 2 N. Y. City Ct. Rep. 356, held that an agreement by a member of a benevolent society to submit all questions of the society's liability to the "reverend director," whose decision shall be conclusive, did not oust the court of jurisdiction, where the member did not submit to the director's jurisdiction. The opinion says that if the plaintiff had submitted to his jurisdiction his decision would have been conclusive.

A provision of the constitution of a mutual benefit society vesting a board of arbitration with jurisdiction to hear and determine all controversies as to the liability of the order for benefits, and as to who are entitled as the beneficiaries, and making a decision of a majority of the board final and conclusive unless reversed by the grand lodge or supreme lodge, does not preclude a claimant from resorting to his legal remedies; nor is a submission to arbitration under such provision a condition precedent to the bringing of an action. The decision rests upon the ground that the provision constitutes merely a revocable agreement to arbitrate. *Danlher v. Grand Lodge A. O. U. W.* 10 Utah, 110, 37 Pac. 245.

In the last case the claim was not submitted to the board of arbitration, and the court does not express an opinion whether, if it had been

recent case it was held that, while courts will not undertake to direct or control such societies in the matter of discipline or internal policy, they are nevertheless subject to the laws of the state and the jurisdiction of the courts in proper cases, and that the courts will not hesitate, where property rights are involved, to entertain jurisdiction, and afford relief. *Reno Lodge No. 99, I. O. O. F., v. Grand Lodge I. O. O. F.* 54 Kan. 73, 26 L. R. A. 98, 31 Pac. 1003. In some cases it has been held that, in the absence of fraud, the decision of the organization, or one of its tribunals, as to the right of a member to benefits, is final, and no resort to the courts can be had. *Van Poucke v. Netherland St. Vincent De Paul Soc.* 63 Mich. 378, 29 N. W. 863; *Canfield v. Great Camp, K. of M.* 87 Mich. 628, 49 N. W. 875; *Fillmore v. Great Camp, K. of M.* 103 Mich. 437, 61 N. W. 785; *Anacosta Tribe, No. 12, I. O. of R. M. v. Murbach*, 13 Md. 94, 71 Am. Dec. 625; *Osceola Tribe, No. 11, I. O. of R. M. v. Schmidt*, 57 Md. 98; *Van Dyke's Case*, 2 Whart. 312, 30 Am. Dec. 263; *McAlces v. Supreme Sitting, Order of I. H. (Pa.)* 12 Cent. Rep. 415, 13 Atl. 755; *Rood v. Railway Pass. & Freight*

Conductors' Mut. Ben. Asso. 31 Fed. Rep. 63. While other cases are to the effect that it is not competent for societies, in advance of a dispute, to make a by-law or stipulation which will deprive a member of the right to resort to the ordinary legal remedies for the protection or enforcement of his contract or property rights, nor to oust the jurisdiction of the courts by a provision that the decision of the organization itself or one of its tribunals shall be final as to such rights. *Bauer v. Samson Lodge, K. of P.* 102 Ind. 262, 1 N. E. 571; *Supreme Council, O. of C. F. v. Garrigus*, 104 Ind. 133, 54 Am. Rep. 298, 3 N. E. 818; *Supreme Council, O. of C. F. v. Forsinger*, 125 Ind. 52, 9 L. R. A. 501, 25 N. E. 129; *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 305; *Scott v. Avery*, 5 H. L. Cas. 811; *Stephenson v. Piscataqua F. & M. Ins. Co.* 54 Me. 55; *Burlington Voluntary Relief Dept. v. White*, 41 Neb. 547, 59 N. W. 751; *Daniher v. Grand Lodge A. O. of U. W.* 10 Utah, 110, 37 Pac. 245; *Austin v. Searing*, 16 N. Y. 112, 69 Am. Dec. 665; *Bacon, Ben. Soc.* §§ 400, 450; *Niblack, Ben. Soc.* § 317. Courts are created by the sovereign power, and, when established, should be

submitted, the decision of the board would have been conclusive.

In *Burlington Voluntary Relief Dept. v. White*, 41 Neb. 547, 59 N. W. 747, *supra*, and *BALTIMORE & O. R. Co. v. STANKEARD*, the claims had been submitted to the tribunals, and the decisions were held not to be conclusive. In *Bauer v. Samson Lodge, K. of P.* 102 Ind. 262, 1 N. E. 571, and *Supreme Council, O. of C. F. v. Garrigus* 104 Ind. 133, 54 Am. Rep. 298, 3 N. E. 818, the claim had not been submitted, and the court held that the rules of the orders did not make their submission a condition precedent of an action; but did hold that it would have been competent for the society to have made submission a condition precedent; and thus those cases necessarily hold that submission of a claim, at least if compulsory, does not oust the jurisdiction of the court. In *Supreme Council, O. of C. F. v. Forsinger*, 125 Ind. 52, 9 L. R. A. 501, 25 N. E. 129, the court defeated the action, not because the claim had been submitted, but because it had not. The two earlier Indiana cases, perhaps, leave open the question whether submission under the circumstances existing in those cases would have ousted the court of jurisdiction, it having been held that submission was not compulsory.

A provision of the constitution of an exchange that the arbitration committee shall take cognizance of, and exercise jurisdiction over, all claims and matters of difference between the members of the board, and their decision shall be final, has only the same force and effect as an agreement in writing made by persons to submit to the decision of one or more arbitrators in a controversy existing between them, and therefore a member has a right to revoke and annul any power to arbitrate he may have previously conferred upon the exchange or the arbitration committee. *Heath v. New York Gold Exchange*, 38 How. Pr. 168.

The decision of the directors of a mutual fire insurance company that a policy had been canceled is not binding on the insured, where the constitution merely provided that if the officers are not satisfied that a fire was accidental the liability of the company shall be finally decided by a majority of its members. *Soorholtz v.* 49 L. R. A.

Marshall County Farmers' Mut. F. Ins. Co. 109 Iowa, 522, 80 N. W. 542.

It is evidently not the intention of the cases which hold that the decisions of these tribunals, even when directly on property rights, are conclusive, to establish any broader rule with respect to decisions of that kind than obtains with respect to disciplinary decisions, and they undoubtedly leave it open for the courts to exercise the same measure of reviewing power over such decisions as over disciplinary decisions.

d. Miscellaneous decisions.

A decision by a committee of a stock exchange upon a question outside of the jurisdiction conferred upon it is not binding. *Morris v. Grant*, 34 Hun, 377.

But the principal case holds that the voluntary submission by a member of a board of trade to a trial of a dispute by a committee under rules of the board estops him from denying the jurisdiction of the committee either in respect to person or subject-matter.

The decision of an unincorporated association upon the question of an election to office is a matter peculiarly and exclusively to be determined by the association, and is final. *Ostrom v. Greene*, 20 Misc. 177, 45 N. Y. Supp. 852.

When the right to bury a person in a Roman Catholic cemetery is dependent upon his having died in the faith of the Roman Catholic church, the decision of the ecclesiastical authorities on that point is conclusive upon the civil courts. *McGuire v. St. Patrick's Cathedral*, 19 N. Y. S. R. 890, 3 N. Y. Supp. 781, Affirmed in 54 Hun, 207, 7 N. Y. Supp. 345.

Courts of equity rarely interfere with the exercise of discretionary powers by corporate bodies or their officers to whom such powers are confided. *Corrigan v. Coney Island Jockey Club*, 29 Jones & S. 393, 20 N. Y. Supp. 437, Reversing 27 Abb. N. C. 204, 15 N. Y. Supp. 705.

The decision of the executive committee of an incorporated jockey club against the right of a horse to enter a race conducted by the club, will not be disturbed by the civil courts except for plain abuse of power. *Ibid.*

open and accessible to all for the protection of their civil or property rights. Societies like the plaintiff in error cannot be regarded as purely charitable organizations, nor the benefits promised by them gratuities. The members pay for insurance, and the certificates issued to and accepted by them are, in effect, contracts of insurance. Although the insured is a member of the organization, and must generally be held bound by all reasonable and valid rules which it makes, yet, as to the insurance, he is in a certain sense a stranger to the organization, and their relations in that regard are somewhat antagonistic. In making the contract the organization deals with him as an individual, rather than as a member, and for an injury to his contract rights can he be barred from invoking the jurisdiction of the courts? Will a provision that the decision of the organization or of one of its tribunals shall be final preclude him from resorting to the ordinary legal remedies which the law affords? It may well be doubted whether a society can confer upon its own tribunals plenary power to decide finally and conclusively upon the property rights of insured members, but the

determination of the question is not necessary to the disposition of this case. No attempt has been made to prevent members from resorting to the courts to recover benefits, nor has any stipulation been made that the decisions of controversies as to benefits shall be final and conclusive. The constitutional provision of the order that the supreme lodge shall have original and exclusive jurisdiction over subjects pertaining to the welfare of the order was certainly not intended to oust the courts of their ordinary jurisdiction, and the further provision that the decisions of the supreme lodge upon questions and appeals shall be the supreme law of the order cannot be regarded as applicable to controversies over contracts of insurance between the order and the insured. The right of resort to the courts will not be deemed to have been taken away by mere inference, and if it can be done at all, it will only be where the restriction is stated in the clearest and most explicit terms. The provision in the constitution of the order that no claim or benefit shall be paid until the rules of the order have been fully complied with, and the requisite proof of the justness of the

It is not competent for a jury to constitute themselves a tribunal of appeal from a decision of the stewards of a jockey club upon a protest made by the owner of a losing horse, and upset their decision, on the ground that they did not give a full and fair investigation of the circumstances of the case, where the rules of the jockey club provided that the stewards shall judge of the sufficiency of evidence on questions referred to them, and that their decision shall be final. *Dines v. Wolfe*, 20 L. T. N. S. 251, L. R. 2 P. C. 280, 5 Moore, P. C. C. N. S. 382.

But the principal case holds that courts have power to correct abuses resulting from the unwarranted procedure of a committee of a board of trade, where property rights are involved.

And that its refusal in violation of the rules to hear evidence that the alleged market price on which the right to a margin deposit depends invalidates its decision against the party offering the evidence.

c. Duty to exhaust remedies within the organization.

With the exceptions hereafter alluded to, it is undoubtedly the rule that the remedies within the organization must be exhausted before resorting to a civil court for relief from a disciplinary decision, even when the conditions exist which justify interference by the civil courts within the rule laid down in subdivision II. a, and when the decision is impeachable within the rule laid down in subdivision II. b.

One expelled from a beneficial association must exhaust her remedy in the association before she can appeal to the courts either for reinstatement or damages for the expulsion. *Women's Catholic O. of F. v. People ex rel. Keefe*, 59 Ill. App. 390.

A subordinate lodge of a fraternal order must exhaust its remedy in the order before resorting to the courts for relief from action by the order. *Grand Lodge, K. of P. v. People ex rel. Waldeck Lodge, No. 136, K. of P.* 60 Ill. App. 550.

The members of an unincorporated beneficial association whose charter has been declared forfeited by the state council of the society cannot maintain a bill in equity against the officers of the state council to recover property of the association until they have appealed to the 49 L. R. A.

national council pursuant to a law of the order providing that a member of the order "may" appeal. *Oliver v. Hopkins*, 144 Mass. 175, 10 N. E. 776.

It is the duty of a member of a mutual benefit society, who has been expelled, to exhaust the remedies provided by the society before appealing to the courts. *Karcher v. Supreme Lodge, K. of H.* 137 Mass. 368.

In *State, Zeff, Prosecutor, v. Grand Lodge, K. of P.* 53 N. J. L. 530, 22 Atl. 63, an expelled member of a mutual benefit association sought a mandamus to restore him to membership upon the ground that the proceedings resulting in his expulsion were irregular and illegal, but the court held that he was premature in invoking the aid of the court before he had exhausted the remedies to which he could resort within the organization itself.

Where an association has power to suppress and punish the misconduct of its own members, one complaining of such misconduct must resort to, and must exhaust, the remedies provided by the association itself through its constitution and by-laws before applying to a court of equity for relief. *Strempel v. Rubing*, 21 N. Y. S. R. 483, 4 N. Y. Supp. 534.

A member of an incorporated association, organized to obtain by legal means fair remuneration for the labor of its members, cannot maintain an action to annul fines imposed upon him by the corporation, and for the restoration of his privileges as a member, until he has exhausted the remedies provided for him within the society itself. *Burns v. Bricklayers' Benev. Union*, 24 Abb. N. C. 150, 10 N. Y. Supp. 916.

A member of a fraternal order cannot resort to a court of law for relief from an action of the executive committee in declaring his election to an office within the order a nullity until he has exhausted his remedies within the order. *Levy v. United States Grand Lodge, I. O. S. of B.* 9 Misc. 633, 30 N. Y. Supp. 885.

An expelled member of a benefit society must exhaust his remedies within the society before appealing to the courts, even if the rules of the society do not in terms make it imperative on the members to exhaust such remedy. *Johansen v. Blume*, 65 N. Y. Supp. 987.

The courts will not interfere with the action

claim has been made in accordance with the general laws of the order, is a reasonable regulation, and no reason is seen why it may not be enforced. It is generally held to be competent for the organization to provide that claims for benefits shall be submitted to the tribunals of the order before they are made the subject of litigation in the public courts. In this way an opportunity is given to the order to fully investigate the nature and justness of the claims; and provisions of this character are not uncommon in insurance contracts. This provision, however, affords no justification for the contention that the order has abridged the right of members to resort to the courts when their claims for benefits have been rejected. It has been said that "courts of justice are freely open to those who seek money due them upon a contract, and the party who asserts that the right to invoke the aid of the court has been curtailed must show a clear agreement abridging the right. If a man has a legal right, and the society to which he belongs adds others,—that of submitting his claim to the society for adjustment, and that of appeal to its superior governing bodies,—the

added rights are merely cumulative, they are not exclusive. Positive words only can take away an existing right. Conferring a right to pursue a given course does not destroy an existing right. In order to destroy such a right, proper limiting words must be employed." *Niblack, Ben. Soc. § 313*. The supreme court of Illinois, having before it an interpretation of a provision which it was claimed made the decisions of the society and its tribunals as to claims for benefits final and conclusive, held that where the society itself and one of the parties to the controversy is sought to be made the final judge, "the courts will hesitate, and even refuse, to treat its decisions as final and conclusive, unless the language of the contract is such as to preclude any other construction. The judicial mind is so strongly against the propriety of allowing one of the parties, or its especial representative, to be judge or arbitrator in his own case, that even a strained interpretation will be resorted to, if necessary, to avoid that result." *Railway Pass. & Freight Conductors' Mut. Aid & Ben. Assn. v. Robinson*, 147 Ill. 159, 35 N. E. 108.

of an incorporated charitable benefit society in expelling a member until he has gone as far as he can go, and done as much as he can do, to obtain what he seeks in the domestic forum. *Essery v. Court Pride of the Dominion*, 2 Ont. Rep. 596.

A bill in equity will not lie for the removal of the officers of a beneficial order where the petition fails to show that the petitioner has complied with the constitutional conditions entitling him to be heard by the arbitration committee of the order. *Whitty v. McCarthy*, 20 R. I. 792, 36 Atl. 129.

But a member of a mutual benefit society who has been expelled is not bound to exhaust the remedy by appeal within the order before resorting to a court of law, where the case has been substantially prejudged by the appellate tribunal. *State ex rel. Schremp v. Grand Lodge, A. O. U. W.* 70 Mo. App. 456.

A member of an unincorporated club, who is wrongfully expelled by the governing committee, is not obliged to apply to the committee for a review or reconsideration of the matter, although such an application is permitted, where the probability of the committee reversing its action is extremely remote. *Loubat v. LeRoy*, 40 Hun, 546.

It is undoubtedly the rule that where the by-laws of a society afford a remedy by appeal from the tribunal to which is intrusted, in the first instance, the trial of members for offenses against the society, that remedy must be exhausted before the party claiming to be aggrieved will be heard upon application to the courts to annul the action of the constituted tribunal of the society; but the rule will only be applied where the appeal given is such that, as a matter of right, the aggrieved party may review the decision of the subordinate tribunal, and does not apply where the right to appeal is dependent on the discretion or favor of any person for its exercise. *Holomafsky v. National Slavonic Soc.* 39 App. Div. 573, 57 N. Y. Supp. 720.

Where conditions are attached to the right of appeal within the order, which render it burdensome and ineffective in that they require a compliance with the findings of the inferior tribunal and the payment of all expenses, a 49 L. R. A.

party need not exhaust the right before resorting to a civil court. *Weiss v. Musical Mut. Protective Union*, 189 Pa. 446, 42 Atl. 118.

The rule that the remedies within the organization must be exhausted before resorting to the civil courts does not apply where the expulsion was void because the offense charged against the member did not justify expulsion, and the action is by the beneficiary of the member after the latter's death for the recovery of the benefit. *Mulroy v. Supreme Lodge, K. of H.* 28 Mo. App. 463.

The court in that case conceded that there were a great many judicial decisions in favor of the proposition that where members are expelled from religious societies, social clubs, benevolent societies, and other voluntary organizations, incorporated or unincorporated, the civil courts will not interfere to reinstate them, or to revise the judgment of expulsion, until the expelled member has exhausted all the remedies available to him within the organization itself by appealing to a higher judicatory provided by the rules of the society or otherwise, but says that all the cases which so hold either expressly state, or tacitly assume, that in the action which the society took, and against which relief was sought, it acted within the scope of its powers.

The theory upon which the decision rests is that, the expulsion being void, it was a mere nullity, and, if so treated by the person concerned, did not affect his status as a member of the society, nor furnish any obstacle to the recovery of a benefit by his beneficiary after his death. Therefore, an essential condition of the exception as established by that case is wanting where the expulsion is not treated as void by the person affected. Accordingly the court held:

In *Hoeffner v. Grand Lodge, German O. of H.* 41 Mo. App. 359, that where a decision expelling a member from a mutual benefit society is void, the member must exhaust his remedies within the order before seeking reinstatement by mandamus, but if he treats the judgment of expulsion as void, he continues a member, and need not seek reinstatement, and the expulsion does not bar an action by his beneficiary after his death to recover the death benefit.

And in *Glardon v. Supreme Lodge, K. of P.*

We think the district court placed a proper interpretation upon the rules of the order and the provisions of the contract of insurance, and that the instruction complained of

correctly stated the law of the case. *Its judgment will be affirmed.*

All the Justices concur.

OHIO SUPREME COURT.

BALTIMORE & OHIO RAILROAD COMPANY, *Plff. in Err.*,

v.

John STANKARD *et al.*

(56 Ohio St. 224.)

*One of the rules in the relief department of a railroad company provided that all claims of beneficiaries should be submitted to the determination of the superintendent, whose decision should be final and conclusive, unless appealed to the advisory committee, and in case of such appeal the decision of the committee should be final and

*Headnote by the COURT.

50 Mo. App. 45, that the beneficiary cannot recover, although the expulsion of the member was void, where the latter failed to disaffirm the expulsion or take an appeal to a higher tribunal.

The want of jurisdiction for the expulsion of a member by a tribunal of a mutual benefit association obviates the necessity of seeking relief by appeal within the association itself to a superior tribunal, even if required by the constitution of the order, and the beneficiary of such member is not concluded by the expulsion. Supreme Lodge, K. of P. v. Eskholme, 59 N. J. L. 255, 35 Atl. 1055.

Blumenfeldt v. Korschuck, 43 Ill. App. 434, holds that a member of a mutual benefit association who has been expelled must exhaust his remedies within the order before he can appeal to the courts, either for reinstatement or damages for the expulsion; but if a member, or his beneficiary, is suing the order for keeping him out of the lodge or for money due upon a certificate, and an expulsion is set up as a defense, the question may be made whether the expulsion is "valid or void." The opinion cites the Missouri cases before alluded to, and seems to take exactly the same position taken in those cases,—that is, when the expulsion is void (not merely invalid), that fact may be shown in an action for benefits, although the remedies within the order have not been exhausted; but even when the expulsion is void it is still necessary to exhaust the remedies within the order before resorting to a civil court for reinstatement.

Croak v. High Court, I. O. of F. 62 Ill. App. 47, also held that an action for benefits by the beneficiary of a deceased member who had been expelled in his lifetime would not lie because the member had not exhausted his remedies within the order. The opinion refers to the facts that the charges made against the expelled member were such that, if established, they justified his expulsion, and that he actually knew of the proceedings, and did appeal to an intermediate tribunal.

But the Illinois supreme court, in *People ex rel. Keefe v. Women's Catholic O.* of F. 162 Ill. 78, 44 N. E. 401, seems to depart from that position. That was a mandamus proceeding by an expelled member of a benevolent order for restoration to the order. The court held that

conclusive upon all parties, without exception or appeal. *Held*, that, after the rejection of a valid claim by the advisory committee, the beneficiary could maintain an action in court for the recovery of the money due thereon, and that such rule is not a bar to the action.

(March 30, 1897.)

ERROR to the Circuit Court for Erie County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiffs in an action brought to recover the benefits due under an employment contract by the rules of the defendant's benefit association. *Affirmed.*

It was not shown that the expulsion was void for want of jurisdiction, and, therefore, decided against the relator, but it held, contrary to the views expressed in the Missouri cases and in *Blumenfeldt v. Korschuck*, 43 Ill. App. 434, *supra*, and contrary to the express decision in *Screwmen's Benev. Asso. v. Benson*, 76 Tex. 552, 13 S. W. 379, that mandamus will lie where the expulsion is void without first exhausting the remedies within the order. The court also, *arguendo*, seems to take a different view with reference to the necessity of exhausting the remedies within the order for relief from an expulsion, before bringing an action to recover benefits.

As already pointed out, the Missouri cases and the cases decided in the Illinois appellate court limit the exception to the rule requiring the remedies within the organization to be exhausted to cases in which the expulsion is void, even when the question arises in an action by the member or his beneficiary to recover a benefit, but the opinion in this case, as is apparent from the following quotation, seems to extend the exception to cases in which the expulsion is invalid merely, when the question arises in an action for benefits, only limiting it to void expulsions when the question arises in a proceeding for the restoration of the expelled member: "There is a distinction between the question of the validity of the expulsion when it is set up as a defense to an action upon a benefit certificate or other contract and the question of the validity of the expulsion when restoration to the privileges of the society is sought to be secured through the writ of mandamus or other procedure. In the former case it is sufficient for the beneficiary to show that the judgment of expulsion was invalid, without further showing the exhaustion of all remedies within the order or society for the purpose of having the judgment vacated. . . . In the latter case it must appear that the remedy provided by the rules of the society for the review of the judgment complained of was resorted to." The court apparently deduces that proposition from the proposition previously stated: "There is a clear distinction between the obligation to appeal from the lower to the higher tribunals of the society itself [a fraternal order, before re-

Statement by **Burket, Ch. J.:**

The action below was brought by John Stankard and Anna Stankard, parents of Michael Stankard, an unmarried man at the time of his death, against the Baltimore & Ohio Railroad Company, for the recovery of sick and death benefits growing out of said Michael's being an engineer in the transportation department of said company, and a member of the relief feature of the department and entitled to the benefits provided by the regulations of said department for a member of class D. Michael became sick on the 27th of January, 1890, and continued sick until his death, on the 13th day of November, 1890; and, having received no sick benefits during his sickness, his parents were entitled to receive \$484 sick benefits and \$1,000 death benefits, in case they were entitled to receive anything. The petition made the proper averments, including performance of all conditions. The railroad company, in its answer, set out certain of the rules of the relief department, and denied that Michael

was in its employ at the time he became sick or at the time of his death, and denied that he properly notified the company of his sickness, and also claimed that rule 11 was a complete bar to the action. The jury returned a verdict in favor of the plaintiffs below for the full amount claimed. A motion was made by the railroad company for a new trial, which was overruled, and judgment entered on the verdict, to which proper exceptions were taken. The circuit court affirmed the judgment. Thereupon a petition in error was filed in this court, seeking to reverse both judgments.

Mr. J. H. Collins, for plaintiff in error:

A person who is a member of a corporation, or contracts with it, is conclusively presumed to know the provisions of the charter, rules and regulations, by-laws, etc., of such corporation.

Boock v. Alleghany Coal & I. Co. 82 Va. 913, 1 S. E. 325, 3 Am. St. Rep. 128, and notes; *Boockover v. Life Assn. of America*,

sorting to courts of law], resting upon one who presents a question of discipline, and such obligation so far as it concerns one who asserts a claim to money due upon a contract. Where the controversy is concerning the discipline or policy or doctrine of the order or fraternity, the member must resort to the method of procedure prescribed by the association, including the remedy by appeal, before invoking the power of the courts. But it is otherwise where a member claims money due from the society on its contract, or where the beneficiary of a deceased member claims money due from the society on its contract of insurance; in such case the right to resort to the courts to coerce payments will not be abridged by the right of appeal from a lower to a higher tribunal of the society as conferred by its laws and rules."

When the expulsion of a member by a mutual benefit society is void because of want of notice, and because the facts were investigated in his absence, he may disaffirm the action of the order, and institute a suit at law for damages, without first having prosecuted an appeal to the higher judicatories within the order. *Slater v. Supreme Lodge, K. & L. of H. 76 Mo. App. 387.*

It is competent for a mutual benefit association to require a claimant to exhaust his remedies by appeal within the association before resorting to an action at law to recover a benefit after a decision rejecting his claim. *Harrington v. Workingmen's Benev. Assn. 70 Ga. 340; Bauer v. Samson Lodge, K. of P. 102 Ind. 262, 1 N. E. 571; Supreme Council, O. of C. F. v. Garrigus, 104 Ind. 133, 54 Am. Rep. 298, 3 N. E. 818; Supreme Council, O. of C. F. v. Forsinger, 125 Ind. 52, 9 L. R. A. 501, 25 N. E. 129; Jeane v. Grand Lodge A. O. U. W. 86 Me. 434, 30 Atl. 70; McMahon v. Supreme Council, O. of C. F. 54 Mo. App. 468; Cotter v. Grand Lodge A. O. U. W. 23 Mont. 82, 57 Pac. 650; Levy v. Order of Iron Hall, 67 N. H. 593, 38 Atl. 18; Poultny v. Bachman, 31 Hun. 49; Strasser v. Staats, 59 Hun. 143, 13 N. Y. Supp. 167; Schryver v. Columbia Lodge, 3 Ohio C. C. 422; Brubaker v. Denlinger, 17 Lanc. L. Rev. 212; Wood v. What Cheer Lodge, Sons of St. G. 20 R. I. 795, 35 Atl. 1045, 38 Atl. 895.*

Up to this point there seems to be no difference in this respect between disciplinary decisions and decisions upon claims for benefits. The distinction made in the last quotation from 49 L. R. A.

People ex rel. Keefe v. Women's Catholic O. of F. 162 Ill. 78, 44 N. E. 401, *supra*, does not bear upon the point as to the competency of the association to require the remedies within the order to be exhausted, but upon the point whether it has in fact done so. According to that distinction the mere existence of an unexhausted right of appeal within the order is fatal when a disciplinary decision is involved, but when a decision upon a claim for benefits is involved a mere right of appeal is not sufficient to prevent an action at law, but there must be an absolute requirement to appeal.

By-laws of a mutual benefit order, providing for the submission of claims for sick benefits to the arbitration of a tribunal of the order, are not to be extended by implication, and a by-law which merely permits an aggrieved member to appeal from a decision of the lodge does not preclude him from resorting to a court of law without taking such an appeal where his claim has been rejected, there being no provision for the submission of the claim in the first instance. *Grand Central Lodge, No. 297, A. O. U. W. v. Grogan, 44 Ill. App. 111.*

But *Grant v. Langstaff, 52 Ill. App. 128*, held that a member could not maintain an action against a mutual benefit society for a benefit until he had exhausted his remedy by appeal within the order, although there was merely a permissive right of appeal where the by-laws required the submission of the claim in the first instance.

Where the controversy is concerning the discipline or policy or doctrine of an order or fraternity, the member must refer to the method of procedure prescribed by the association, including the remedy by appeal, before invoking the power of the courts; but it is otherwise where a member claims money due from the society on its contract, or where the beneficiary of a deceased member claims money due on its contract of insurance. In such case the right to resort to the courts to coerce payment will not be abridged by the right of appeal from a lower to a higher tribunal of the society as conferred by its laws and rules. *Grand Lodge Brotherhood of R. Trainmen v. Rudolph, 84 Ill. App. 220.*

The same distinction is recognized by *Bauer v. Samson Lodge, K. of P. 102 Ind. 262, 1 N. E. 571*, which holds that to curtail the right of one to resort to a court of law for the re-

77 Va. 91; *Relfe v. Rundle*, 103 U. S. 222, sub nom. *Life Asso. of America v. Rundle*, 26 L. ed. 337; *Douglass v. Merchants' Ins. Co.* 118 N. Y. 484, 7 L. R. A. 822, 23 N. E. 806.

An officer or agent must have notice in his representative character, or the corporation will not be bound.

Mechanics' Bank v. Schaumburg, 38 Mo. 228; *Congar v. Chicago & N. W. R. Co.* 24 Wis. 157, 1 Am. Rep. 164; *Wheatland v. Pryor*, 133 N. Y. 97, 30 N. E. 652.

Mere private, unofficial information or knowledge acquired by an officer of a corporation, casually or by rumor or through channels open alike to all, as to matters upon which such officer is not required to act, is clearly not notice to the corporation if not communicated by such officer to the proper authorities in the institution.

United States Ins. Co. v. Shriver, 3 Md. Ch. 381; *Winchester v. Baltimore & S. R. Co.* 4 Md. 231; *Bank of Virginia v. Craig*, 6

Leigh, 399; *Mechanics' Bank v. Schaumburg*, 38 Mo. 228; *Miller v. Illinois C. R. Co.* 24 Barb. 312.

The agreement to refer the claim to the superintendent was binding.

Palmer v. Clark, 106 Mass. 389; *Vanderwerker v. Vermont C. R. Co.* 27 Vt. 125; *Boston Water Power Co. v. Gray*, 6 Met. 131; *North Lebanon R. Co. v. McGrann*, 33 Pa. 530, 75 Am. Dec. 624; *Matthew v. Ollerton*, 4 Mod. 226; *Hunter v. Bennison*, Hardres, 43; Kyd, Awards, 72; *Monongahela Nav. Co. v. Fenlon*, 4 Watts & S. 205; *Faunce v. Burke*, 10 Pa. 480, 55 Am. Dec. 519; *Easton v. Pennsylvania & O. Canal Co.* 13 Ohio, 79; *Mansfield & S. City R. Co. v. Veeder*, 17 Ohio, 385; *Kane v. Stone Co.* 39 Ohio St. 1; *Continental Ins. Co. v. Wilson*, 45 Kan. 250, 25 Pac. 629; *Mundy v. Louisville & N. R. Co.* 31 U. S. App. 606, 67 Fed. Rep. 633, 14 C. C. A. 583.

Mr. H. L. Peske also for plaintiff in error.

covery of a benefit from a fraternal order upon the ground that the laws of the order require him to exhaust his remedies within the order itself, it must clearly appear that such is the effect of the laws of the order, and a mere permissive right of appeal from one tribunal of an order to another is not sufficient for the purpose.

The right to resort to a court of law to recover a benefit from a fraternal order cannot be abridged by a custom of exhausting the remedies within the order itself before resorting to a court of law, when the laws of the order do not themselves require that the remedies within the order be previously exhausted. *Bauer v. Samson Lodge, K. of P.* 102 Ind. 262, 1 N. E. 571.

A member of a fraternal order is not bound to exhaust his remedies in the courts of the order before resorting to the civil courts to enforce his right to a benefit, unless the laws of the order so provide. *Supreme Council, O. of C. F. v. Garrigus*, 104 Ind. 133, 54 Am. Rep. 298, 3 N. E. 818.

Poultney v. Bachman, 31 Hun, 49, however, held that rules of such an association, providing that a certain official shall decide all questions of law and usage properly presented to him for that purpose, and providing for an appeal to the grand lodge, were broad enough to give an appeal from the rejection of a claim, and that the claimant was obliged to avail himself of it before resorting to an action at law, even if the decision of the appellate tribunals is not conclusive.

Provisions of the by-laws of a voluntary mutual benefit society that the decision of a particular officer or tribunal upon a claim for benefits shall be final and conclusive unless reversed on appeal to a higher tribunal are effectual for the purpose of requiring such an appeal before resorting to an action for benefits, although ineffectual to entirely prevent an action. *Supreme Council, O. of C. F. v. Forsinger*, 125 Ind. 52, 9 L. R. A. 501, 25 N. E. 129, *supra*; *Levy v. Magnolia Lodge, No. 29, I. O. O. F.* 110 Cal. 297, 42 Pac. 887, *supra*.

Even if ineffectual to entirely prevent an action. *Robinson v. Templar Lodge, No. 17, I. O. O. F.* 117 Cal. 370, 49 Pac. 170; *McMahon v. Supreme Council, O. of C. F.* 54 Mo. App. 468; *Cotter v. Grand Lodge A. O. U. W.* 23 Mont. 82, 57 Pac. 650.

But see *Danlher v. Grand Lodge A. O. U. W.* 49 L. R. A.

10 Utah, 110, 37 Pac. 245, *supra*, to the contrary.

Members of a mutual benefit order may stipulate that claims for benefits shall be submitted to a committee of the lodge, and that its determination, unless appealed from, shall be final. In such case, if the by-law be reasonable, proper notice be given, and the lodge and committee proceed fairly, the member would be concluded by the decision of the tribunal, unless he has appealed therefrom. *Grand Central Lodge, No. 297, A. O. U. W. v. Grogan*, 44 Ill. App. 111.

A by-law of a mutual benefit society requiring a claimant for sick benefits to submit his claim to the "sick committee," and providing for a grievance committee who shall have power to try the complaints brought to their notice, and from whose decisions there shall be no appeal, is reasonable, and before a member can resort to a court of law he must exhaust all the remedies given him by the association. *Harrington v. Workingmen's Benev. Asso.* 70 Ga. 340.

A member of a benefit order cannot appeal to the civil courts to enforce his claim for a benefit until he has resorted to the remedy of appeal within the order provided by his contract. *Levy v. Order of Iron Hall*, 67 N. H. 593, 38 Atl. 18. In that case there was an express provision to that effect.

A member of a fraternal order must exhaust his remedies within the order before resorting to a civil court to enforce a claim for benefits, which have been rejected by the authorities of the order. *Schryver v. Columbia Lodge*, 3 Ohio C. C. 422.

In neither of the last two cases is the language of the provision on this point set out.

Before bringing suit against a benefit society to recover a benefit the plaintiff must exhaust the remedies provided by the by-laws of the society. *Wood v. What Cheer Lodge, Sons of St. G.* 20 R. I. 795, 35 Atl. 1045, 38 Atl. 895.

Strasser v. Staats, 50 Hun, 143, 13 N. Y. Supp. 167, held that the rules of a benefit association forbidding resort to civil courts for the recovery of a benefit from the association until all the remedies within the association have been invoked and exhausted, do not apply to a beneficiary who is not a member.

A by-law of a mutual benefit society requiring that a member, before resorting to the courts, for aid in the enforcement of his claim for bene-

Messrs. Phinney & Merrill, for defendants in error:

The policy of the law is against forfeitures, and for this reason strict compliance with the manner and time of notice is not required if the insurer has had actual notice.

Manufacturers' Aoci. Indemnity Co. v. Fletcher, 5 Ohio C. C. 633; *Germania F. Ins. Co. v. Boykin*, 12 Wall. 435, 20 L. ed. 443; *Wood, Ins. § 413*; *Phenia Ins. Co. v. Pickel*, 3 Ind. App. 332, 29 N. E. 432.

A by-law of a benefit society, providing as to the manner of making proofs of loss, and for an appeal from certain subordinates to certain superior officers, and making the decision of the latter final, is valid and binding, except as to the part which makes the decision of the appellate tribunal final, and as to that point it is void; and such decision is no bar to a resort to the courts.

Supreme Council, O. of O. F. v. Forsinger, 125 Ind. 52, 9 L. R. A. 501, 25 N. E. 129; *Reed v. Washington F. & M. Ins. Co.* 138

fts, which has been rejected by a tribunal of the order, shall exhaust his remedies by appealing to a higher tribunal, is valid; but where the higher tribunal affirms the action of the lower without an appeal, the necessity of appealing before resorting to an action at law is waived. *McMahon v. Supreme Council, O. of C. F.* 54 Mo. App. 468.

BALTIMORE & O. R. Co. v. STANKARD intimated that the failure of the plaintiff in that case to take an appeal to the advisory committee under a rule that the decision of a certain officer upon a claim shall be conclusive unless appealed to the advisory committee, in which case its decision shall be conclusive, would have defeated the action, but for the fact that the advisory committee had acted upon and rejected the claim without an appeal, thereby waiving the necessity of appealing.

See also *Quinlan v. St. Francis Xavier Mut. Ben. Soc.* 2 N. Y. City Ct. Rep. 356, and *Danlher v. Grand Lodge A. O. U. W.* 10 Utah, 110, 37 Pac. 245, *supra*.

III. Ecclesiastical tribunals.

a. Basis of court's jurisdiction over ecclesiastical controversies.

As to ecclesiastical law; church doctrines; by what law governed,—see note to *Mt. Zion Baptist Church v. Whitmore* (Iowa) 13 L. R. A. 198.

As to civil power to review excommunication of church member, see note to *Nance v. Busby* (Tenn.) 15 L. R. A. 801.

As to power of local church society to withdraw from the general body of the church, see note to *Fuchs v. Meisel* (Mich.) 32 L. R. A. 92.

The tendency, referred to in subdivision II. a, to confuse the question as to the jurisdiction over controversies arising out of the decisions of tribunals of corporations and associations, with the question as to the conclusiveness of such decisions, is especially noticeable in controversies over ecclesiastical matters.

As subsequently shown, the only basis for the court's interference in an ecclesiastical controversy at all is that some property right or civil right is involved. An action or proceeding involving an ecclesiastical controversy may fail, or be defeated, for either one of two reasons: (1) It may happen that no civil or prop-

erty right is involved and, therefore, that there is nothing to which the jurisdiction of the court can attach. In that event the question of the conclusiveness of the decision of the ecclesiastical tribunal is not reached. The result would be the same if there were no such decision. (2) It may happen that a civil or property right is involved, but that it depends upon a decision of an ecclesiastical tribunal which the court accepts as final and conclusive. Therefore, the consideration of the question whether the decision of such a tribunal is conclusive presupposes that some property or civil right depends upon it, and, if not, the question cannot legitimately arise.

Burket, Ch. J., delivered the opinion of the court:

The questions as to whether or not Michael Stankard was in the employ of the company at the commencement and during the time of his sickness, and at his death, and whether or not the company was properly notified of his sickness, are questions of fact, submitted to the jury upon testimony competent in character, meager and unsatisfactory in substance, but from which a jury might find, as this jury did, in favor of the plaintiffs below.

The only matter in the case deemed worthy of report is as to the validity and scope

erty right is involved and, therefore, that there is nothing to which the jurisdiction of the court can attach. In that event the question of the conclusiveness of the decision of the ecclesiastical tribunal is not reached. The result would be the same if there were no such decision. (2) It may happen that a civil or property right is involved, but that it depends upon a decision of an ecclesiastical tribunal which the court accepts as final and conclusive. Therefore, the consideration of the question whether the decision of such a tribunal is conclusive presupposes that some property or civil right depends upon it, and, if not, the question cannot legitimately arise.

This distinction is clearly brought out in the following quotation from *White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends*, 89 Ind. 136: "Civil courts in this country have no ecclesiastical jurisdiction. They cannot revise or question ordinary acts of church discipline, and can only interfere in church controversies where civil rights or the rights of property are involved."

The true ground why civil courts do not interfere with the decrees of ecclesiastical courts where no property rights are involved is not because such decrees are final and conclusive, but because they have no jurisdiction whatever in such matters, and cannot take cognizance of them at all, whether they have been adjudicated or not by those tribunals. *Watson v. Garvin*, 54 Mo. 355.

The following citations are intended still further to illustrate the principle upon which the civil courts interfere in ecclesiastical controversies, and do not bear at all upon the distinct and separate question, which is hereafter treated, as to the conclusiveness of the decisions of ecclesiastical tribunals.

The civil courts may restore by mandamus one who has been wrongfully removed from an ecclesiastical or spiritual office when temporal rights, stipends, or emoluments are connected with, or annexed to, such office, which belong to the incumbent; but the courts are powerless to interfere where there are no fixed emoluments, stipends, or temporal rights connected with the office and the matter is purely ecclesiastical. *State ex rel. McNeill v. Bibb Street Church*, 84 Ala. 22, 4 So. 40.

The court of chancery does not administer ecclesiastical law, but church property and the

of rule 11. The following is a copy of the rule: "Rule 11. All claims of members of the relief feature, their beneficiaries or other representatives, or of depositors or borrowers of the savings feature, or of pensioners, arising under these regulations, and all questions or controversies, of whatsoever character, arising in any manner, or between any parties or persons, in connection with the relief department or the operation thereof, whether as to the construction of language or meaning of the regulations, or as to any writing, decision, instruction, or acts in connection therewith, shall be submitted to the determination of the superintendent of the relief department, whose decisions shall be final and conclusive thereof, subject to the right of appeal in writing to the committee, directly or through the advisory committee within thirty days after notice to the parties interested of the decision. When an appeal is taken to the committee, it shall be heard by them, without further notice, at their next stated meeting, or at such future meet-

ing or time as they may designate, and shall be determined by vote of the majority of a quorum, or of any other number not less than a quorum of the members present; and the decision arrived at thereon by the committee shall be final and conclusive upon all parties, without exception or appeal." The claim was presented by the parents to the superintendent of the relief department, who did not allow it, but referred it to the advisory committee; and that committee declined payment of the claim "because of his failure to report in accordance with the regulations," and so notified plaintiffs below. The reference of the claim to the advisory committee, and its action thereon, and notice of such action to the parents, was the equivalent and took the place of an appeal; so that the case stands as if an appeal had been taken, and the claim rejected by the advisory committee. It is claimed by the railroad company that the decision arrived at by the superintendent, if no appeal is taken, or by the committee in case of an appeal, is

right to its possession are subjects for judicial determination of the civil tribunal. *Stewart v. Lee*, 5 Del. Ch. 573.

The civil courts will not decide matters affecting the ecclesiastical rights of a church, but its civil rights to property are subjects for their examination, to be determined in conformity to the laws of the land and principles of equity. *Ferraria v. Vasconcellos*, 31 Ill. 25.

The Kentucky supreme court, in *Shannon v. Frost*, 3 B. Mon. 253, said: "This court, having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church discipline or excommunication. Our only judicial power in the case arises from the conflicting claims of the parties to the church property and the use of it."

Civil courts never take up matters of religious doctrine for the purpose of determining their abstract truth or falsity; and they never consider them at all except where civil rights of property or contract respecting the holding, control, use, or enjoyment of property are dependent on them. *East Norway L. N. Evangelical Lutheran Church v. Halvorson*, 42 Minn. 503, 44 N. W. 603.

While it is true that the civil courts may not properly interfere with that part of church management which concerns the spiritual welfare and discipline of the members, yet when rights of property are involved in controversies of this class those courts cannot justly evade the exercise of such jurisdiction as is necessary to the determination and vindication of such rights. *Prickett v. Wells*, 117 Mo. 502, 24 S. W. 52.

A court of law will institute an inquiry into the doctrines and opinions of a religious society when a right to property depends thereon; but with respect to spiritual matters, and the administration of the spiritual and temporal affairs of the church not affecting the civil rights of individuals or the property of the corporation, the ecclesiastical courts and governing bodies of the religious society have exclusive jurisdiction, and their decisions are final. *State, Livingston, Prosecutor, v. Trinity Church*, 45 N. J. L. 230.

Mandamus will not lie to restore a minister wrongfully excluded from his pulpit, where it does not appear that any legal or temporal right has been interfered with. *Union Church of Africans v. Sanders*, 1 Houst. (Del.) 100, 63 Am. Dec. 187.

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A contract for the payment of a stipulated salary to a minister so long as the pastoral relation subsists is a civil right which the courts will protect and enforce. *Jennings v. Scarborough*, 56 N. J. L. 401, 28 Atl. 559.

The only ground on which a civil court can exercise jurisdiction to restrain a bishop from prosecuting a sentence of an ecclesiastical tribunal, displacing a clergyman from the ministry, is that the threatened action may affect the civil rights of the plaintiff, for which he has a proper recourse to the civil courts. *Walker v. Wainwright*, 16 Barb. 486.

Every endowed minister of any sect or denomination of Christians, who has been wrongfully dispossessed of his pulpit, is entitled to the writ of mandamus to restore him to his function and the temporal rights with which it is endowed. The office or function of a minister, however, must be endowed, or a mandamus to restore cannot be granted. *Runkel v. Winemiller*, 4 Harr. & McH. 429, 1 Am. Dec. 411.

Courts of law will not interpose to control the proceedings of ecclesiastical bodies in spiritual matters which do not affect the civil rights of individuals. Neither will they interfere with the action of the constituted authorities of religious societies in matters purely discretionary; but where the civil rights of an individual are involved, jurisdiction is permitted to the courts of law to protect those rights, which the court cannot disregard. *Jennings v. Scarborough*, 56 N. J. L. 401, 28 Atl. 559.

Courts have no ecclesiastical jurisdiction, and will neither review nor revise the proceedings or judgments of church tribunals where therein are involved only questions of church discipline. *Powers v. Bundy*, 45 Neb. 208, 63 N. W. 476.

Over church matters, as such, the legal or temporal tribunals do not have any jurisdiction whatever, except so far as is necessary to protect the civil rights of others, and to preserve the public peace. All questions relating to the faith and practice of the church and its members belong to the church judicatories, to which they have voluntarily subjected themselves. But as a general principle these ecclesiastical judicatories cannot interfere with the temporal concerns of the church or society with which the church or the members thereof are connected. *First Baptist Church v. Witherell*, 8 Paige, 296, 24 Am. Dec. 223.

final and conclusive, and a complete bar to an action for the recovery of the benefits. If the superintendent had rejected the claim, and so notified the parents, and they had failed to take an appeal to the advisory committee, it may well be doubted whether they could have sustained an action in court upon the claim, because in such beneficial associations it is held that the claimants must pursue, to the full extent, the remedy provided by the rules and regulations, before resorting to actions at law. This is for the benefit of both parties, and is reasonable. *Supreme Council, O. of C. F. v. Forsinger*, 125 Ind. 52, 9 L. R. A. 501, 25 N. E. 129. But in the case at bar the equivalent of an appeal was had, and the advisory committee acted upon and rejected the claim, and then the parents were compelled to either abandon the claim or resort to an action at law. Does rule 11 bar such action? We think not. A long line of decisions holds that parties cannot by contract take away the jurisdiction of the courts in such cases, and that the attempt to

do so is void. *Supreme Council, O. of C. F. v. Forsinger*, 125 Ind. 52, 9 L. R. A. 501, 25 N. E. 129; *Whitney v. National Masonic Acct. Asso.* 52 Minn. 378, 54 N. W. 184; *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365; *Stephenson v. Piscataqua F. & M. Ins. Co.* 54 Me. 55; *Mentz v. Armenia F. Ins. Co.* 79 Pa. 478, 21 Am. Rep. 80; *Reed v. Washington F. & M. Ins. Co.* 138 Mass. 572. While courts usually base their decisions upon the ground that parties cannot by contract, in advance, oust the courts of their jurisdiction of actions, a more satisfactory ground is that under our Constitution all courts are open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law. Art. 1, § 16. Courts are created by virtue of the Constitution, and inhere in our body politic as a necessary part of our system of government, and it is not competent for anyone, by contract or otherwise, to deprive himself of their protection. The right to appeal to the courts for the redress of wrongs is

Mandamus will not lie to restore to membership one claiming to have been wrongfully removed from a church, notwithstanding that church membership was a condition of membership of the corporation. *Sale v. First Regular Baptist Church*, 62 Iowa, 26, 49 Am. Rep. 136, 17 N. W. 143. This decision rests upon the ground that the removal was the act of the church, and not of the corporation; that the corporation was not organized for pecuniary profit, and that no profit could possibly accrue to any member, and therefore no property interest or other valuable civil right had been affected by the action of the church.

The jurisdiction of a civil court to adjudge any ecclesiastical matter must result as a mere incident to the determination of some property rights. *Nance v. Busby*, 91 Tenn. 303, 15 L. R. A. 801, 18 S. W. 874.

Forbes v. Eden, L. R. 1 H. L. Sc. App. Cas. 568, was an action by a minister of the Scotch Episcopal Church (tolerated but not established by the government) to have it declared that certain canons enacted by the general synod ought to be reduced, and that it ought to be found and declared that he is entitled to celebrate Divine worship, and all the other services, and to administer the sacraments and all other rights of the church in conformity with the canons in force when he was ordained. The court refused to take jurisdiction upon the ground that there was no property right involved, and that, save for the disposal and administration of property, there is no authority in the courts to take cognizance of the rules of a voluntary society. The court distinguished the case from *McMillan v. General Assembly of Free Church*, 23 Dunlop, 1314 (which held that sentences of suspension and deposition pronounced by the general assembly of the Free Church of Scotland, a voluntary religious association, against one of its ministers, were properly the subject of an action of reduction and damages, on the allegation that such sentences had been irregularly pronounced in excess of their powers and in violation of the conditions which regulated the proceedings of the association), upon the ground that in the latter case there was a loss of emoluments in consequence of the sentence of suspension and deposition.

The question as to when property or civil rights are involved so as to give the court jurisdiction is not discussed in this note, except in 49 L. R. A.

identally in discussing the basis of the court's jurisdiction.

b. Conclusiveness of decisions, generally.

The court of appeals of South Carolina (*Harmon v. Dreher*, Speers, Eq. 87) clearly states the respective functions of the ecclesiastical and civil courts where property rights are involved, as follows: Where a civil right depends upon some matter pertaining to ecclesiastical affairs, the civil tribunal tries the civil right and nothing more, taking the ecclesiastical decisions out of which the civil right has arisen as it finds them, and accepting those decisions as matters adjudicated by another jurisdiction. The civil courts act upon the theory that the ecclesiastical tribunals are the best judges of merely ecclesiastical questions, and of all matters which concern the doctrines and discipline of the respective denominations to which they belong.

That statement is quoted with approval in *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666; *Lamb v. Cain*, 129 Ind. 486, 14 L. R. A. 518, 29 N. E. 13; and *White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends*, 89 Ind. 136.

The opinion in *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666, which involved the right to the possession and custody of the property of a Presbyterian church, says: "The questions which have come before the civil courts concerning the rights to property held by ecclesiastical bodies may . . . be profitably classified under three general heads, which, of course, do not include cases governed by considerations applicable to a church established and supported by law as the religion of the state. 1. The first of these is when the property which is the subject of controversy has been by the deed or will of the donor or other instrument by which the property is held by the express terms of the instrument devoted to the teaching, support, or spread of some specific form of religious doctrine or belief. 2. The second is when the property is held by a religious congregation which by the nature of its organization is strictly independent of other ecclesiastical associations, and, so far as church government is concerned, owes no fealty or obligation to any higher authority. 3. The third is where the religious congregation or ecclesiastical body holding the property is but a sub-

one of those rights which is, in its nature, under our Constitution, inalienable, and cannot be thrown off or bargained away.

There is a class of contracts which provides that the value of certain property, the amount of loss sustained, the quantity, quality, character, and value of work performed on improvements and the acceptance of a building by an architect, and other like matters, shall be determined by a certain person named in the contract, and his determination shall be final. Such contracts are lawful, and are usually upheld. They do not oust the courts of their jurisdiction over the subject-matter, but only provide a safe and speedy manner of fixing definitely some fact which is usually of a complex and difficult nature, and one that it would not be easy to establish by evidence. Such fact, when ascertained and fixed by the person and in the manner provided by the terms of the contract is conclusive between the parties in the absence of fraud or manifest mistake; but the parties are at liberty, after fixing such fact,

to go into court and litigate such differences as may still exist between them. In such contracts the person selected to determine the particular fact becomes the agent of both parties for that purpose, and what is done by such agent is, in legal effect, done by the parties themselves, and therefore there is no hardship in holding them conclusively bound thereby in the absence of fraud or mistake. The following cases are examples of such contracts: *Easton v. Pennsylvania & O. Canal Co.* 13 Ohio, 81; *Mansfield & S. City R. Co. v. Veeder*, 17 Ohio, 385; *Mundy v. Louisville & N. R. Co.* 31 U. S. App. 606, 67 Fed. Rep. 633, 14 C. C. A. 583; *Kane v. Stone Co.* 39 Ohio St. 1; *North Lebanon R. Co. v. McGivann*, 33 Pa. 530, 75 Am. Dec. 624; *Faunce v. Burke*, 16 Pa. 469, 55 Am. Dec. 519; *Monongahela Nav. Co. v. Fenlon*, 4 Watts & S. 205; *Hamilton v. Liverpool, L. & G. Ins. Co.* 136 U. S. 242, 34 L. ed. 419, 10 Sup. Ct. Rep. 945. See also 33 Cent. L. J. 168.

The following cases also throw some light

ordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization." With reference to the first class, the opinion holds that the court cannot escape the duty, when the doctrine to be taught or the form of worship to be used is definitely and clearly laid down, to inquire whether the party accused of violating the trust is holding or teaching a different doctrine, or using a form of worship which is so far variant as to defeat the declared objects of the trust, and hence that the decision of the church authorities is not conclusive. With reference to the second class, it holds that in case of a schism, leading to a separation into distinct and conflicting bodies, the numerical majority of members must control the right to the use of the property of the church to which no other specific trust is attached than that it shall be used for the congregation as a religious society, unless there be within the congregation officers in whom are vested the powers of control, in which case those who adhere to the acknowledged organism by which the body is governed are entitled to the use of the property. And in neither alternative will the court undertake to inquire which body adheres more closely to the religious dogmas of the founders. With reference to the third class, to which the case before the court belonged, it held that whenever the questions of discipline or of faith or ecclesiastical rule, custom, or law have been decided by the highest of the church dignitaries to which the matter has been carried the courts must accept such decisions as final and as binding on them in their application to rights in property not subject to a trust for the support of any special religious dogmas or peculiar form of worship.

The respective functions of ecclesiastical and civil tribunals where property rights are involved are well shown by the opinion of the California supreme court in *Wheelock v. First Presby. Church*, 119 Cal. 477, 51 Pac. 841. In that case an incorporated Presbyterian church had been divided by the authority of the presbytery to which it was subordinate into two organizations, and the presbytery directed a division of the funds realized from a sale of real estate of the corporation to be made between the two churches in proportion to their membership. 49 L. R. A.

ship. An action in equity was brought in behalf of one of the organizations against the other for a division of the church property. The court said that it might be conceded, for the purpose of the case, that the division and apportionment of the property was a matter for the civil courts, and that an ecclesiastical decree upon that subject was not binding upon legal tribunals, but held that the decree of the presbytery dissolving the original church into two new and independent organizations was conclusive on all the parties, and must be so treated by the civil court in determining the property rights of the parties. The court then by the application of equitable principles to the status of the parties as fixed by the ecclesiastical decision, came to the same decision as the ecclesiastical tribunal with reference to the division of the property.

White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends, 89 Ind. 136, illustrates two different phases which may be assumed by the question as to which one of two rival bodies is the legitimate ecclesiastical organization. In that case there was a division or schism in the Society of Friends, which extended through the yearly meeting and the quarterly meeting, subordinate to the yearly meeting. There was no ecclesiastical authority superior to the yearly meeting, and the court was therefore obliged, in determining which of the rival bodies was the legitimate yearly meeting, to examine the ecclesiastical laws and usages of the society; but when the question was reached as to which of the rival bodies claiming to be the true quarterly meeting was the legitimate organization, the court held that it had been conclusively determined by the recognition of one of them by the body adjudged to be the legitimate yearly meeting.

The decision of a presbytery that certain members under its jurisdiction have seceded is conclusive upon the civil courts in an action involving the right to the church property. *Gaff v. Greer*, 88 Ind. 122, 45 Am. Rep. 449.

The courts of law will not enter into the examination or discussion of purely theological questions in order to ascertain the proper beneficiary of a resulting trust, but if the trust is created for the benefit of those adhering to a particular denomination, courts of law will accept and follow the determination of the proper ecclesiastical tribunals as to who are adher-

upon the questions involved in this case: *Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co.* 139 U. S. 137, 35 L. ed. 118, 11 Sup. Ct. Rep. 512; *Gittings v. Baker*, 2 Ohio St. 21; *Conner v. Drake*, 1 Ohio St. 166; *Kill v. Hollister*, 1 Wils. 129. Such contracts are in their nature only applicable to cases wherein it becomes necessary to fix some fact, leaving the question of law to be settled by the courts upon proper pleadings.

The ultimate question to be determined—the liability or nonliability of the parties—must be left to the courts. The construction of a written contract is a question of law for the court, and a provision in a contract that the construction of such contract, or the meaning of rules or regulations, shall be finally determined by some designated person, is void, because the court cannot be robbed of its jurisdiction to finally determine such questions. In insurance and other like cases, where the ultimate question is the payment of a certain sum of money, certain facts may be fixed by a person selected for that purpose

in the contract; but the ultimate question as to whether the money shall be paid or not may be litigated in the courts, and a stipulation to the contrary is void.

The fixing of a particular fact by the person or persons named in the contract and in the manner therein provided is usually a condition precedent to the bringing of an action on the contract, and the performance of such condition should be averred in the petition, or some good excuse given for its nonperformance. *Viney v. Bignold*, L. R. 20 Q. B. Div. 172, 27 Cent. L. J. 40.

In the case at bar the claim having gone through the course provided by rule 11, and having been rejected, the parents had the right to go into a court of justice and establish their claim, and in the trial the fact that the claim had been so rejected was not a bar to a recovery. In so far as rule 11 attempts to cut off the right of action in court, it is null and void.

Judgment affirmed.

ing and in subordination to that denomination. First Constitutional Presby. Church v. Congregational Soc. 23 Iowa, 567.

The civil courts having no ecclesiastical jurisdiction cannot revise or question ordinary acts of church discipline or excommunication, but when there are conflicting claims of parties to the church property and the use of it, the court must pass upon them, but in so doing must take the fact of expulsion as conclusive proof that the persons expelled are no longer members of the repudiating church, for whether right or wrong the act of excommunication must, as to the fact of membership, be law to the court. *Shannon v. Frost*, 3 B. Mon. 253.

The courts cannot, and will not, supervise or review the action of any religious society as to whether, in excluding members, it acted wrongfully or justly. *Iglehart v. Rowe*, 20 Ky. L. Rep. 821, 47 S. W. 575.

The decision of the tribunal of the unincorporated membership of a religious association upon the election to an office is conclusive upon the court. *Atty. Gen. ex rel. Ter Vree v. Geerlings*, 55 Mich. 562, 22 N. W. 89.

The civil courts, where property rights are involved, may inquire by what warrant individuals exercise the powers and duties of the ministers, elders, and deacons of a church; but if there has been a decision of a competent church judicatory on that point it must be accepted as conclusive. *Den ex dem. Day v. Bolton*, 12 N. J. L. 206.

A civil court, in determining in an ejectment action respecting church property as to who are the lawful trustees of the corporation, are bound by a decision of the church judicatory empowered by the charter to finally determine any disputes respecting the validity, appointment, or call of the trustees. *Ibid.*

The decision of a church judicatory reversing a decision of an inferior judicatory deposing a minister is conclusive upon the court when a civil right depends upon the status of the person in question as a minister of the church. *Dieffendorf v. Reformed Calvinist Church*, 20 Johns. 12.

The decision of an ecclesiastical tribunal adverse to the claim of a priest that under a custom or law of the church he should be paid a salary by the bishop is binding upon him, and is a bar to a subsequent action by him in a civil court. *Baxter v. McDonnell*, 155 N. Y. 83, 40 L. R. A. 670, 49 N. E. 667. 49 L. R. A.

The decision of a church judicatory that a church had not been dissolved, and recognizing its continued and regular existence, is conclusive. *Reformed Dutch Church v. Harder*, 34 N. Y. S. R. 645, 12 N. Y. Supp. 297.

The decisions of ecclesiastical courts, like every other judicial tribunal, are final, as they are the best judges of what constitutes an offense against the Word of God and the discipline of the church. Any other than those courts must be incompetent judges of matters of faith, discipline, and doctrine; and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt which would do anything but improve either religion or good morals. *German Reformed Church v. Com. ex rel. Selbert*, 3 Pa. St. 282.

A decision of the highest judicatory of a religious denomination that the trial, conviction, and sentence of bishops by an inferior judicatory were irregular, illegal, and void, is conclusive upon the civil courts. *Krecker v. Shirey*, 163 Pa. 534, 29 L. R. A. 476, 30 Atl. 440.

An expulsion of a member by a tribunal of a religious society upon the charge that he entertained opinions and promulgated doctrines within the society at variance with the established belief, and subversive of the organization, is conclusive, and the court cannot examine into the merits. *Grosvenor v. United Soc. of Believers*, 118 Mass. 78.

Whether the religious teaching, faith, and church polity of one synod of a denomination differ in essential particulars from those of another, is a question for the ecclesiastical tribunals, not the civil courts. *Wenhner v. Fokenga*, 57 Neb. 510, 78 N. W. 28.

In *Grosvenor v. United Soc. of Believers*, 118 Mass. 78, certain members of a religious community had been expelled because they adhered to and promulgated certain doctrines within the society after the constituted authorities had decided that they were not in conformity with the religious faith and doctrine of the society. They were, in consequence, expelled under a provision of the covenant which they had signed as members, providing that the profits and enjoyments secured by the covenant to the members of the church shall not be considered as extending to any person who shall refuse to comply with the conditions of the association,

MAINE SUPREME JUDICIAL COURT.

Jarvis C. PERRY *et al.*

v.

William T. COBB *et al.*

(88 Me. 435.)

1. A prohibition against suits at law on policies of insurance by an association to its members, who were jointly, and not severally, liable thereon, is merely declaratory of the law itself.
2. A decision by an association of persons jointly liable on a policy of insurance to one of its members, which provides that the association shall finally determine the amount due on any loss, although not strictly an award, but subject to the power of equity to give relief against it, will be binding on the member except for cause shown to the contrary.
3. Damage to a cargo of lime, caused by a shrinking of barrel staves and

slacking up of the cooperage, allowing the contents to sift out, and leaving the barrels so tender that they could not easily be hoisted without danger of falling to pieces, was not caused by peril of the sea, if the protracted length of the voyage, due to rough weather, was the proximate cause of the condition of the cargo.

4. Loss of value of a cargo, due to a bad reputation on account of injury to a part of it, is not within the terms of an insurance policy, when the damage actually done was below the particular average or partial loss excepted.

(February 11, 1896.)

R EPORT by the Supreme Judicial Court for Knox County for the opinion of the full bench of a bill in equity to compel an adjustment of a marine loss which was alleged to have been covered by a policy of in-

or who shall refuse to submit to the admonition and discipline of a constituted authority of the church, "of which refusal or noncompliance the leading authority acknowledged in the first article of this covenant shall be the proper and constitutional judges." The court held that it could not determine the question whether the doctrines so adhered to were in reality inconsistent with the established belief of the society, but that the decision of the constituted authorities was conclusive on that point.

In forming a connection with any religious communion, it is a necessarily implied element of the contract that the parties forming that contract are to submit, in all things regarding the doctrines and discipline of the sect, to the judgment and determination of the church judicatories of the body, whose resolutions explaining or altering the original tenets or regulations of the sect are conclusive against all the members, and must be received as *probatio probata* by courts of law in all questions of civil right which may be affected thereby. Courts of law are not entitled to look to the grounds of their decisions, nor to consider whether they be in accordance with the original principles of the body or not, but can only inquire whether they be truly the sentences of the courts, or, in the case of a division, whether the court claiming to represent the body be truly composed of the majority, and, this being ascertained, their decisions must be looked to merely as facts, and be held as conclusive upon all parties united to the sect; and all property appropriated to the purposes of worship in connection with the sect must be administered in accordance with the principles and determinations of the majority of the church courts. *Galbraith v. Smith*, 15 Shaw & D. 808.

In *Allcroft v. Lord Bishop of London* [1891] A. C. 666, it was held that under English public worship regulation act 1874, providing that where a representation has been sent to the bishop of the diocese complaining of unlawful alteration in, or addition to, the ornaments of a cathedral church, the bishop shall take certain specified steps to have the matter of the complaint tried in one of the ways prescribed by the act, "unless the bishop shall be of opinion, after considering the whole circumstances of the case," that proceedings should not be taken on the representation," the decision of the bishop that the proceedings should not be 49 L. R. A.

taken is conclusive upon the court, where he considered all the circumstances which appeared to him, honestly exercising his judgment, to bear upon the case, and his reasons cannot be reviewed.

Each of the decisions under this subdivision presupposes a civil or property right involved as the basis of the civil court's jurisdiction, and they seem to establish that in passing upon such a right the civil court is bound to accept as conclusive, at least upon the merits, any decision by an ecclesiastical tribunal which may affect it.

The only case which goes to the extent of denying any effect whatever to these decisions when a property or civil right is involved is *Smith v. Nelson*, 18 Vt. 511. The opinion in that case, after alluding to the fact that in England the ecclesiastical law and the ecclesiastical courts are established by legitimate authority and become a part of the law of the land, and that the sentences of these courts are entitled to the same consideration as the sentences of any other inferior tribunal, and that their decisions are final and conclusive on all subjects within their jurisdiction, says: "In this state the case is wholly different. We have no religious establishment, no ecclesiastical law, or courts, established by any authority. All their laws are wanting in this essential requisite, to give them any authority, that they are not 'prescribed by the supreme power in a state.' And though they may form constitutions, enact canons, laws, or ordinances, establish courts, or make any decisions, decrees, or judgments, yet they can have only a voluntary obedience, cannot affect any civil rights, immunities, or contracts, or alter or dissolve any relations or obligations arising from contracts. When their proceedings are to be examined by ordinary tribunals of justice their power is a phantom, and they can receive no other consideration than the regulations of any other voluntary association formed for trifling, or grave and important, purposes." Again: "I cannot recognize any constitution, laws, ordinances, or sentences of any ecclesiastical tribunal, or of any voluntary society, as having any efficacy or power over the civil rights, immunities, or contracts of individuals." Under the influence of the principles so declared, the court for the purposes of the administration of the trust created by a will devising a sum to a church to be placed under the direction of the

insurance issued by defendants upon a plan of mutual insurance. *Bill dismissed.*

The facts are stated in the opinion.

Mr. W. H. Fogler for plaintiffs.

Messrs. C. E. Littlefield and *A. S. Littlefield*, for defendants:

While contracts for marine insurance are to be liberally construed in favor of the assured, they are not deemed to cover any risk or interest that was not fairly within the scope and intention of the parties when the contract was made.

Duncan v. China Mut. Ins. Co. 129 N. Y. 244, 29 N. E. 76.

All such contracts must be construed in accordance with known usages.

Coit v. Commercial Ins. Co. 7 Johns. 385, 5 Am. Dec. 282; *Taunton Copper Co. v. Merchants' Ins. Co.* 22 Pick. 108.

The insurer undertakes only to indemnify against extraordinary perils of the sea, and not against those ordinary ones to which every ship must inevitably be exposed.

3 Kent, Com. 300; *Baker v. Manufacturers' Ins. Co.* 12 Gray, 603.

The defendant is not answerable for a loss when it arises from the inherent nature of the articles, even though the voyage was protracted by boisterous and tempestuous weather.

1 Parsons, Ins. 541; *Baker v. Manufacturers' Ins. Co.* 12 Gray, 603; *Cory v. Boylston F. & M. Ins. Co.* 107 Mass. 140, 9 Am. Rep. 14; *Libby v. Gage*, 14 Allen, 286; *Smith v. Universal Ins. Co.* 6 Wheat. 176, 5 L. ed. 235; *Jordan v. Warren Ins. Co.* 1 Story, 342, Fed. Cas. No. 7,524; *Providence Washington Ins. Co. v. Adler*, 65 Md. 162, 57 Am. Rep. 314, 4 Atl. 121; *Taylor v. Dunbar*, L. R. 4 C. P. 206; *Tatham v. Hodgson*, 6 T. R. 656.

In order to constitute a peril insured against, "the peril must act directly, and not circuitously, upon the subject of the insurance. It must be an immediate peril, and the loss the proper consequence of it."

trustees of the church, the interest thereof to be paid annually to the minister forever, ignored the suspension of a minister by the synod to which the church was subordinate, and held that the status of the minister for the purposes of the trust was to be determined by the majority of the church.

The decision of a committee of a church to which two members of the church, pursuant to the church discipline, submitted a private controversy not relating to an ecclesiastical matter, is not binding and final in a court of law. *Tubbs v. Lynch*, 4 Harr. (Del.) 521.

When rights of property or civil rights, as contradistinguished from ecclesiastical rights, are involved, and such rights depend upon religious faith or orthodoxy of citizens, or the rules, discipline, and practice of churches or religious denominations, the courts may hear evidence and determine judicially all such questions so far as they affect the rights of persons or religious denominations to property or civil rights. *Grimes v. Harmon*, 35 Ind. 198, 9 Am. Rep. 690.

This was said in discussing the question as to the power of the court to receive evidence to determine whether persons claiming to act as trustees under a will giving a fund in trust to the "Orthodox Protestant clergymen" of a certain place met the test so prescribed. There was no organized body answering to the description in the will, and there was no decision by an ecclesiastical tribunal, and therefore the case does not trench upon the doctrine that the civil courts are to accept the decisions of the ecclesiastical tribunals as conclusive when property rights are involved.

A distinction is to be observed between the question as to the conclusiveness of the decision of an ecclesiastical tribunal upon a civil court in an action or proceeding involving a civil or property right, and the question as to its effect upon such right. The decision may be conclusive so far as concerns civil or property rights dependent upon it, and yet the particular right involved in the action may not be dependent upon, or affected by, it. The distinction is well brought out in *Gartin v. Penick*, 5 Bush, 110. The controversy in that case was between the two factions of a local Presbyterian church, with one of which the general assembly had renounced all connection, over property which had been conveyed in trust for the local church. The court held that adherence to the general assembly was not a condition of the 49 L. R. A.

right to the enjoyment of the property under the terms of the trust deed. The decision upon this point does not deny that the action of the general assembly conclusively determined for all purposes the status of the factions in their relation to the denomination acknowledging allegiance to that body, but merely denies that the property rights in question depend upon such status. The opinion also took the position that the action of the general assembly was unconstitutional, and therefore could not have affected the property rights in question, even if they had depended upon the status of the factions in their relation to the general assembly.

c. Jurisdiction of ecclesiastical tribunals.

Watson v. Avery, 2 Bush, 332, while recognizing the general principle that civil courts cannot, and ought not to, rejudge the judgment of spiritual tribunals as to matters within their jurisdiction, whether justly or unjustly decided, even when property rights depend thereon, held that the question of the jurisdiction of the ecclesiastical tribunal may be passed upon by the civil court, and that such court is not concluded on that point by the decision of the ecclesiastical tribunal. The court in that case actually passed upon the jurisdiction of the church tribunals to pass upon the particular question which they assumed to decide, and held, contrary to the decision of such tribunals, that under the constitution of the church they had no such jurisdiction.

This limitation upon the general rule that the decisions of ecclesiastical tribunals are conclusive upon the civil courts was repudiated, except so far as it applies to matters not ecclesiastical in their nature, by the United States Supreme Court in *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 606, which involved the same decision as that involved in the preceding case. The opinion says that the adoption of such a limitation in respect to matters ecclesiastical in their nature would deprive ecclesiastical bodies of the right of conclusively construing their own church laws, and impose upon the civil courts the duty of examining the whole subject of the doctrinal theology, the usages and customs, the written laws and fundamental organization of every religious denomination, and would in effect transfer to the civil courts, where property rights are concerned, the decision of all ecclesiastical questions. The opin-

Smith v. Universal Ins. Co. 6 Wheat. 185, 5 L. ed. 237; *Snouden v. Guion*, 101 N. Y. 458, 5 N. E. 322; *Cator v. Great Western Ins. Co.* L. R. 8 C. P. 552.

The burden is upon the plaintiff to establish the fact that the loss at bar was caused by a peril insured against.

Baker v. Manufacturers' Ins. Co. 12 Gray, 603; *Fleming v. Marine Ins. Co.* 3 Watts & S. 144, 38 Am. Dec. 747.

If not properly stowed, and the condition of the cargo resulted from such lack of proper care, the plaintiffs cannot recover.

Chandler v. Worcester Mut. F. Ins. Co. 3 Cush. 328; *The Newark*, 1 Blatchf. 203, Fed. Cas. No. 10,141; *Fleming v. Marine Ins. Co.* 3 Watts & S. 144, 38 Am. Dec. 747.

Mr. Eugene P. Carver, also for defendants:

No suit can be maintained by the plaintiffs against the defendants, even if there is a loss by perils insured against.

Until the committee or a majority of two-thirds of the votes of the association deter-

mines an amount to be due, there is no obligation on the association to pay anything.

Scott v. Avery, 5 H. L. Cas. 811; *Spackman v. Plumstead Dist. Bd. of Works*, L. R. 10 App. Cas. 229; *Tredwen v. Holman*, 1 Hurlst. & C. 72; *Elliott v. Royal Exch. Assur. Co.* L. R. 2 Exch. 237; *Collins v. Locke*, L. R. 4 App. Cas. 674; *Perkins v. United States Electric Light Co.* 16 Fed. Rep. 514; *United States v. Robeson*, 9 Pet. 319, 9 L. ed. 142; *Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 50 N. Y. 250; *Monongahela Nav. Co. v. Fenlon*, 4 Watts & S. 205; *Snodgrass v. Gavit*, 28 Pa. 221; *Preble v. Bangor*, 64 Me. 115; *Edwards v. Aberayron Mut. Ship Ins. Soc.* L. R. 1 Q. B. Div. 563; *London Tramways Co. v. Bailey*, L. R. 3 Q. B. Div. 217; *Fox v. Railroad*, 3 Wall. Jr. 243, Fed. Cas. No. 5,010; *White v. Middlesex R. Co.* 135 Mass. 216; *Brown v. Leavitt*, 26 Me. 251; *Sonneborn v. Lavarello*, 2 Hun, 201; *Cushing v. Babcock*, 38 Me. 452.

If the plaintiffs can maintain any proceeding, the scope of judicial inquiry in this

tion of ecclesiastical tribunals, even when property rights are involved, and they vigorously combat that position in notes appended to the case as reported in 10 Am. L. Reg. N. S. 308. Judge Redfield prefaces his note with an argument designed to show that the majority was wrong in holding that the right to the clerical office involved in that case was not a property right.

The decision of a tribunal upon any matter of church polity, creed, or discipline—matters purely ecclesiastical in character; or as to its own jurisdiction—is conclusive upon the civil courts. *Kuns v. Robertson*, 154 Ill. 394, 40 N. E. 343.

The opinion in *Connitt v. Reformed Prot. Dutch Church*, 54 N. Y. 551, in discussing the jurisdiction of an ecclesiastical judicatory to dissolve the relation between the pastor of the church and his congregation, refers to *Chase v. Cheney* (Ill.) 10 Am. L. Reg. N. S. 295, and *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666, as holding that the decisions of an ecclesiastical court upon an ecclesiastical matter as to its own jurisdiction are conclusive upon the civil courts. The commissioner who wrote the opinion did not assent fully to that view, but said that in all cases of doubt, when there is not clearly an abuse of jurisdiction, the decisions of church judicatories as to their own jurisdiction in ecclesiastical matters should receive great weight.

The case of *Pounder v. Ash*, 36 Neb. 564, 54 N. W. 847, 44 Neb. 672, 63 N. W. 48, arose out of the suspension of a minister by a church tribunal. The decision was challenged upon the ground that the discipline did not authorize suspension upon the charges made. The action was to restrain the members of the church who adhered to the suspended minister from using the church building for religious exercises conducted by him. In the first opinion, reported in 36 Neb. 564, 54 N. W. 847, the court took the view that inasmuch as the action involved conflicting claims of parties to the church property and the use of it, the civil court had jurisdiction to try and determine such claims, and in so doing to determine whether the church tribunal acted within its jurisdiction. Upon a rehearing (opinion reported in 44 Neb. 672, 63 N. W. 48), the court reversed its former decision, apparently taking the view that as both of the contending parties owed allegiance to one

ion cites *Chase v. Cheney*, 58 Ill. 509, 11 Am. Rep. 95, in support of its position denying the right of the civil courts to inquire into the jurisdiction of ecclesiastical tribunals, even when property rights depend upon the decisions of such tribunals. It quotes the interpretation which the minority opinion in that case placed upon the majority opinion, thus: "In the administration of ecclesiastical discipline and where no other right of property is involved than loss of the clerical office or salary as incident to such discipline, a spiritual court is the exclusive judge of its own jurisdiction [under the laws or canons of the religious association to which it belongs], and that its decision of that question is binding upon secular courts." That interpretation implies that the majority regarded the clerical office involved in that case as a property right, but the majority opinion itself clearly held that it was not a property right, and it is doubtful whether all it subsequently says in denial of the right of the civil courts to inquire into the jurisdiction of ecclesiastical tribunals was not based upon, and limited by, its previous decision that there was no property right involved. In that view the decision cannot be regarded even as *obiter* authority for the position that civil courts cannot inquire into the jurisdiction of ecclesiastical tribunals when property or civil rights are involved.

The minority of the court in *Chase v. Cheney*, 58 Ill. 509, 11 Am. Rep. 95, after interpreting the opinion of the majority in the manner above set forth, dissented from that position and held that while the secular courts will not revise decisions made in the administration of spiritual discipline by a spiritual court organized in conformity with the rules of the denomination of which it forms a part when it has jurisdiction of the parties and the subject-matter, it is nevertheless the duty of the civil courts to examine the question of jurisdiction without regard to the decision of the spiritual court itself, and if they find such tribunal has been organized in defiance of the laws of the association, and is exercising a merely usurped and arbitrary power, they should furnish such protection as the laws of the land will give. The opinion of the majority in that case was evidently considered by Judge Redfield and Mr. Fuller (the present Chief Justice), as denying the right of the civil courts to inquire into the jurisdiction of L. R. A.

suit must, in the light of the articles of the association, be limited to the question, "Was the decision of the committee and the association as to the plaintiffs' claim the result of any erroneous conception as to the kind of risks covered by the contract?"

Where the insurance contract is not specific as to details, it is a general policy of marine insurance by which the plaintiff is protected against fire and perils of the sea.

An insurer is not liable for damage which occurs by dampness in the hold of a vessel, when there was not actual contact with salt water.

Baker v. Manufacturers' Ins. Co. 12 Gray, 603; *Cory v. Boylston F. & M. Ins. Co.* 107 Mass. 140, 9 Am. Rep. 14; *Libby v. Gage*, 14 Allen, 261; *Spence v. Union Marine Ins. Co.* L. R. 3 C. P. 427; *Taylor v. Dunbar*, L. R. 4 C. P. 206; *Everth v. Smith*, 2 Maule & S. 278; *Tatham v. Hodgdon*, 6 T. R. 656; *Montoya v. London Assur. Co.* 6 Exch. 451; *Jordan v. Warren Ins. Co.* 1 Story, 342, Fed. Cas. No. 7,524.

and the same church, and were acting under the same church government and discipline, their dispute with reference to the use of the church did not involve a property right which would give the court jurisdiction. With reference to the rights of the minister himself, the court said that they were not property rights. The opinion says the church should be free from the interference of the courts where there is nothing drawn into question but the jurisdiction of the church over one of its members, or ministers, or officers, and to try him, and if need be expel him, for the violation of some church ordinance or law, so long as such action does not infringe upon his rights as a citizen, or the powers and jurisdiction of the state. The opinion quotes from the opinion in *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666, including that portion of it denying the right of civil courts to inquire into the jurisdiction of ecclesiastical tribunals when property rights are involved; but, inasmuch as the court had already decided that there were no property rights involved in the controversy, the relevancy of that portion of the quotation is not apparent.

The Indiana supreme court, in *O'Donovan v. Chatard*, 97 Ind. 421, 49 Am. Rep. 462, held that the civil court had no right to inquire into the decision of the bishop of the Commonwealth church removing a priest in an action by the latter against the former for damages, although the decision was attacked on the ground that the bishop was without jurisdiction, and acted without just cause or provocation.

The decision in *Nance v. Busby*, 91 Tenn. 303, 15 L. R. A. 801, 18 S. W. 874, that a sentence of excommunication was conclusive upon the civil courts, rests upon the ground that the church as a judicator adjudged that they had the jurisdiction, and that the usage and law of the church did not demand other trial or notice than such as attended the public action of the church. It takes the same view as *Watson v. Jones*, 13 Wall. 728, 20 L. ed. 676, as to the conclusiveness of the decision of the ecclesiastical tribunals on jurisdictional questions.

Brundage v. Deardorf, 55 Fed. Rep. 839, held that a decision by the general conference of a church, which was its highest judicatory, that the provisions of the constitution of the church that no amendment should be made thereto—*ex* 49 L. R. A.

Haskell, J., delivered the opinion of the court:

The plaintiffs and the defendants, lime burners in the county of Knox, formed a business company, to continue one year, for the purpose of insuring each other upon cargoes of lime shipped by them coast-wise. The business was to be conducted by a committee of members, who, in case of damage to any cargo underwritten, were to "determine the amount due, and pay the same at their first regular meeting after the claim for loss is presented, unless the association has insufficient funds, in which case thirty days' time for payment shall be granted. An appeal may be made to a majority of two thirds of the votes of the association, whose decision shall be final." Each kiln was entitled to one vote. All suits at law between members were prohibited, except on demand notes.

No action at law could be maintained upon any policy, because the promise was to be joint, and not several, as in the *Lloyds*

cept on request of two thirds of the whole society, and that the confession of the faith shall not be done away with or amended, are so far-reaching as to render them "extraordinary and impracticable," was void upon the ground that it was beyond the power of the conference. The opinion says that, even if the supreme judicatory has the right to construe the limitations of its own power, and the civil courts may not interfere with, but must take, such construction as conclusive, it is not understood that the supreme court in *Watson v. Jones* held that an open and avowed defiance of the original compact, and an express violation of it, will be taken as a decision of the supreme judicatory which is binding on the civil courts, and says that the effect of that case cannot be extended beyond the principle that a bona fide decision of the fundamental law of the church must be recognized as conclusive by civil courts, and that, although the civil courts have no power to revise or question ordinary acts of church discipline or of exclusion from membership by competent authority, yet it may inquire whether the resolution of expulsion was the act of the church or of persons who were not the church, and who consequently had no right to excommunicate others.

It will be observed that in many of the cases cited under subdivision III. b, the general rule as to conclusiveness of the decisions of these tribunals is stated in language broad enough to exclude the power of the court to inquire into the jurisdiction; but, as pointed out in *Watson v. Avery*, 2 Bush, 332, many of these cases assumed that the ecclesiastical tribunal had jurisdiction.

The decision of *Watson v. Avery*, 2 Bush, 332, that the civil courts may inquire into the jurisdiction of these tribunals, has direct support in some of the cases.

State ex rel. Watson v. Farris, 45 Mo. 183, involved the conflicting claims of different persons to act as the trustees of a college whose charter provided that vacancies in the board of trustees should be filled by the presbytery which was connected with the general assembly of the Presbyterian church. The presbytery was dissolved pursuant to a resolution adopted by the general assembly of the church to the effect that if any presbytery should enroll as members one or more of the signers of a paper called "The Declaration and Testimony" it should be

method, and the assured would become both plaintiff and defendant. So the prohibition against suits at law on policies was but declaratory of the law itself, and therefore has no significance.

The stipulation in the articles that the association shall finally determine the amount due on any loss is not strictly an arbitration clause, because it is an agreement *inter sese*, between associates, and does not purport to submit controversies to disinterested persons. An arbitrator is said to be "a private, extraordinary judge, chosen by the parties who have a matter in dispute, invested with power to decide the same." *Gordon v. United States*, 7 Wall. 194, 19 L. ed. 36. He should be disinterested, "for no man can lawfully sit as a judge in his own case." *State v. Delesdernier*, 11 Me. 473; *Friend, Appellant*, 53 Me. 387. "An interest that disqualifies from judicial action may be small, but it must be an interest, direct, definite, and capable of demonstration; not remote, uncertain, contingent or unsubstantial,

or merely speculative and theoretic." *Andover v. Oxford County Comrs.* 86 Me. 185, 29 Atl. 982; *Fletcher v. Somerset R. Co.* 74 Me. 434; *Jones v. Larrabee*, 47 Me. 474; *Warren v. Baxter*, 48 Me. 193. The duties of an arbitrator are judicial, and while many cases hold that interest, known to the parties, is waived by the submission, it would be going very far to say that the interest of a debtor, who was to determine his own liability finally, should have been waived by it. But, however that may be, it has been settled law in this state for more than a quarter of a century that an arbitration clause in a contract, ousting the courts of jurisdiction over the liability, is ineffectual for the purpose. *Stephenson v. Piscataqua F. & M. Ins. Co.* 54 Me. 55. That case, like this, was upon a policy of marine insurance, and it was cited with approval in *Buck v. Rich*, 78 Me. 437, 6 Atl. 871.

The stipulation in question differs from an arbitration clause in that it is an agreed method of procedure between associates,

ipso facto dissolved, and its ministers and elders who adhered to the action of the assembly should exercise all the authority and functions of the original presbytery. The court held that the trustees named by the presbytery adhering to the general assembly rather than the presbytery which had been dissolved, were entitled to the vacancies. It was urged that the *ipso facto* resolution of the general assembly was *ultra vires* and void; that the general assembly exceeded its jurisdiction, and that its functions were appellate only; but the court said that the general assembly possessed extensive, original, and appellate jurisdiction, and whether the case in the matter of the Declaration and Testimony signers was regularly or irregularly before it was a subject for it to determine for itself, and no civil power could revise, modify, or impair its action in a matter of purely ecclesiastical concern.

The *ipso facto* resolution of the general assembly referred to in the preceding case came before the court again in *Watson v. Garvin*, 54 Mo. 355. The action related to church property, and was between rival factions of a local church, one adhering to the new presbytery formed pursuant to the resolution, and the other denying its authority. The original opinion of the court, which was delivered by Judge Bliss, disposed of the case upon the ground that the resolution only operated to cut off presbyteries, and did not affect the status of individuals as members of the local church, and that the property in question was not held upon any condition of adherence to the general assembly. A rehearing opinion, delivered after the reorganization of the court, while adhering to the position first taken, discusses the general question as to the right of the civil court to inquire into the jurisdiction of ecclesiastical tribunals, and dissents from the decision of *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666, upon that point; and holds that the *ipso facto* resolution was void upon the ground that it was not within the scope of the ecclesiastical authority of the general assembly.

The decree of a church judicatory is binding only when it is affirmatively shown that it has acted within the scope of its authority, and has observed its own organic forms and rules. *Kerr's Appeal*, 89 Pa. 97. That case held that a decree of the general synod of the Reformed Presbyterian Church, dissolving a congregation 49 L. R. A.

and forfeiting the corporate franchises of the trustees and members thereof, was invalid, not only because it did not accord with the well-known law of the church, but also because it was made without notice or hearing.

The trustees of a Presbyterian church are not bound to pay any attention to the mandate of the presbytery with reference to the use of the parsonage or manse, since the presbytery has no jurisdiction over such matter. *Everett v. First Presby. Church*, 53 N. J. Eq. 500, 32 Atl. 747.

The above case distinguished *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666, upon the ground that the question whether the action of the synod involved in that case was, or was not, in accordance with the constitution was one wholly of procedure, while in the present case the question was whether the presbytery had jurisdiction over the subject-matter. The opinion says that the fundamental principle that the jurisdiction over the subject-matter is open to inquiry was not denied in that case, but it was held that the synod had jurisdiction of the subject-matter, and its action was final.

There is nothing in the opinion in *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666, *supra*, to suggest the distinction above attempted; but it does appear in *Watson v. Avery*, 2 Bush, 332, which, as before stated, involved the same decision, that the jurisdictional question there considered was not as to the existence of any jurisdiction whatever in the ecclesiastical tribunal, but as to whether that jurisdiction was original or only appellate. The question considered in *Watson v. Jones*, however, was the broad one whether the civil courts can inquire into the jurisdiction of ecclesiastical tribunals, and the question was not limited to one of procedure. This case upon its facts might, perhaps, have been brought within the exception made in *Watson v. Jones*, as to matters not in their nature ecclesiastical.

The action of a church tribunal, if in violation of the constitution of the church, may be disregarded by those whom it affects. *First Presby. Church v. Wilson*, 14 Bush, 252.

Long v. Gray, 1 Moore, P. C. C. N. S. 411, 9 Jur. N. S. 805, 8 L. T. N. S. 738, 11 Week. Rep. 900, was an action instituted in the supreme court of the Cape of Good Hope by an Episcopalian clergyman who had been suspended by the bishop of Cape Town. The privy council held

partners, joint promisors, where the claimant is himself one of them. Viewing it thus, what good reason can be given why they should not be held to their agreed methods of procedure? It is very like the by-laws of a benefit corporation, that bind the members to their observance, as a prerequisite to a forum in the courts. *Jean v. Grand Lodge, A. O. U. W.* 86 Me. 434, 30 Atl. 70. It is certainly a reasonable requirement, consistent with the purposes of the association, to mutually indemnify each other in the specific transit to market of their manufactured goods, upon equitable conditions. Equity alone has jurisdiction over their matters, because of mixed interests in all controversies that may arise.

No point is made but that the terms of the stipulation have been complied with. The associates considered the plaintiffs' claim, after investigation by the committee and a full hearing, and decided that they had none. In this proceeding the decision was in the nature of an award. Each associate was

an insurer. All participated and determined the whole matter, not effectually, either as to liability or damages, so as to preclude all judicial investigation, but they did pass upon the whole matter, as the very terms of their existence provided they might do; and the question arises, What effect, if any, shall be given to their decision? No suit at law can be maintained. Relief in equity, suited to the conditions of the controversy, is the only remedy. That is never given when equities are balanced, or when a sound judgment may not be moved to interfere. The decision was by all the associates, standing together for a common purpose,—men well versed in shipping lime, and familiar with precautions necessary for its safe carriage and discharge, and with matters that do or do not injure its quality or value and affect its price in the market. Why, then, should not this method, agreed to by the associates, have such force and effect upon a court of equity as the fairness of the investigation and deliberation of the deci-

that the church of England, in places where there is no church established by law, is in the same situation with any other religious body, and that the members may adopt, as the members of any other community may adopt, rules for enforcing discipline within their body which will be binding on those who expressly, or by implication, have assented to them. They further said: "It may be further laid down that where any religious or other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequences of such violation, the decision of such tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and, if not, has proceeded in a manner consonant with the principles of justice. In such cases the tribunals so constituted are not in any sense courts; they derive no authority from the Crown; they have no power of their own to enforce their sentences; they must apply for that purpose to the courts established by law, and such courts will give effect to their decision as they give effect to the decisions of arbitrators whose jurisdiction rests entirely upon the agreement of the parties." The action by the bishop in suspending the clergyman was held void upon the ground that the bishop had no jurisdiction to suspend him for the offense charged.

The Privy Council in *Re Colenso*, 3 Moore, P. C. N. S. 115, held that proceedings by a metropolitan bishop deposing a suffragan bishop was a nullity because the latter had no jurisdiction.

Murray v. Burgess, 4 Moore, P. C. N. S. 250, L. R. 1 P. C. 362, 36 L. J. P. C. N. S. 44, 16 L. T. N. S. 40, 15 Week. Rep. 722, was an appeal from a sentence of the supreme court of the Cape of Good Hope reversing and annulling a sentence of the synod of the Dutch Reformed Church in the colony of the Cape of Good Hope, a voluntary society, upon the ground that under the laws of the church the synod had no original jurisdiction, although, if the matter had originally come before the presbytery, the synod might of its own motion have taken cognizance of the case on appeal. The decision was upheld by the privy council.

The civil court will interfere where churches

are proceeding in violation of their own constitution and "their sentences are pronounced by those who are not judicatories to that effect." *McMillan v. Free Church of Scotland*, 22 Court Sessions, N. S. 290, 23 Court Sessions, N. S. 1314.

Some of the cases, while not directly passing upon the jurisdictional matter, state the general rule of non-interference with ecclesiastical decisions in such terms as to leave the question as to jurisdiction of the ecclesiastical tribunal open for the consideration of the civil court; thus:

An ecclesiastical tribunal, vested with powers in such cases, is the proper forum to inquire and determine whether a pastor settled upon a church for life has forfeited his office. *Whitney v. First Ecclesiastical Soc.* 5 Conn. 405.

When an ecclesiastical body divides into two conflicting bodies, each claiming to be the legitimate organization, the recognition of one of them by a superior tribunal, having a peculiar jurisdiction to decide such and all kindred questions, is conclusive where property rights depend upon the question. *White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends*, 89 Ind. 136.

The excommunication of a church member by a church judicatory properly constituted, and in the manner prescribed by the constitution and by-laws of the church, is conclusive upon the civil courts, and mandamus will not lie to compel the society to restore him to membership. *State ex rel. Soares v. Hebrew Congregation "Dispersed of Judah,"* 31 La. Ann. 205, 33 Am. Rep. 217.

Where the contract under which a church holds property provides, or by implication contemplates, that the question "What is according to and consistent with the particular doctrine or doctrines?" shall be determined by some church judicatory, the determination of such doctrine, duly made when the matter is properly brought before it, will be conclusive upon the civil courts. *East Norway L. N. Evangelical Lutheran Church v. Halvorson*, 42 Minn. 503, 44 N. W. 663.

When the ecclesiastical tribunal of a church, having jurisdiction in the premises, has determined that, according to the organic law of the church, a congregation may or may not withdraw from one synod and submit to another, and select its pastor and minister from the

sion indicate would be safe, work justice, and save expensive litigation to the parties, as it was originally intended that it should do? No good reason suggests itself, and some of the rules touching awards may safely apply. The opinion of the court in *Burchell v. Marsh*, 17 How. 349, 15 L. ed. 96, upon a bill in equity to set aside an award of arbitrators, is very instructive. It holds that an honest decision upon a fair hearing should stand, although the court feels that it could have arrived at a better result; for otherwise it would be the "commencement, not the end, of litigation." A judgment of Lord Thurlow is cited in confirmation of the doctrine. *Knox v. Symmonds*, 1 Ves. Jr. 369.

In this cause the decision of the associates is not an award, in the strict sense but a procedure in an equitable controversy between joint associates, that determines their rights *inter se*; and it should bind them, except for cause shown to the contrary. They were all interested parties, and that

fact, and the evidence adduced, may show a denial of equitable relief that should be given, and it may show the reverse. At any rate the whole cause may be heard anew, to see if any such error or mistake intervenes as should change the result. The relief prayed for is equitable relief, and will be granted or withheld as sound discretion may demand.

The plaintiffs contracted with the association for insurance to the amount of \$2,548 on a cargo of lime on board ship, under deck, at Rockland for New York. There were no conditions in the contract, except that 5 per cent particular average on the whole value of the cargo was exempted from insurance. The vessel was thirty-six days at sea,—an unusually long time for the voyage, occasioned by rough weather, head winds, and successive gales. She sailed the 14th of February, and arrived the 21st of March. She labored heavily, and strained somewhat, but arrived tight, and with no special damage in the hull, save the loss of a skylight, some sails,

latter, the civil courts will recognize such decision as conclusive when property rights depend upon it. *Wehmer v. Fokenga*, 57 Neb. 510, 78 N. W. 28.

A sentence of suspension of a minister by an ecclesiastical tribunal, acting within its jurisdiction and having authority over the person and the subject-matter, liable to an appeal to a higher tribunal by anyone aggrieved, from which, however, no appeal was taken, is binding upon the civil court where property rights depend upon it, and the civil court will not inquire into the truth or sufficiency of the alleged grounds of the sentence. *Den ex dem. Day v. Bolton*, 12 N. J. L. 206.

The decision of a church judicatory as to who have been elected to be the spiritual officers is conclusive upon the courts notwithstanding that such spiritual officers are also trustees by virtue of their office, where the act under which the society is incorporated provides that the validity of the election, appointment, or call of the trustees shall be referred for final decision to the superior church judicatory to which the congregation is subordinate. *Ibid.*

The civil courts cannot upon the merits overhaul the decisions of ecclesiastical judicatories in matters within their province. *Robertson v. Bullions*, 9 Barb. 64.

The only cognizance which a court will take of a sentence of an ecclesiastical tribunal displacing a clergyman is to inquire whether there was want of jurisdiction in the tribunal, and it will not review the exercise of any discretion on the part of the tribunal, or at all inquire whether its judgment can be justified by the truth of the case. *Walker v. Wainwright*, 16 Barb. 438.

Any pecuniary right of a member of a religious association to or in any of its funds or property, so far as it is by the rules of discipline of the church made solely dependent upon his church relationship and status, must depend for its determination upon the decision of the proper church judicatories, and such adjudication is final in the absence of a want of jurisdiction, fraud, or its equivalent. *Sampsell v. Esher*, 26 Ohio L. J. 156.

The expulsion of a minister by the sentence of an ecclesiastical judicatory having jurisdiction of the subject-matter is conclusive upon the courts when civil rights depend thereon. *Harmon v. Dreher, Speers*, Eq. 87. 49 L. R. A.

Travers v. Abbey (Tenn.) 58 S. W. 247, was an action to enjoin defendants from interfering with plaintiffs in the discharge of their duties as the pastor and stewards, respectively, of a church. The pastor had been deposed by the presiding elder, and the opinion says that civil courts will not review the decisions or proceedings of ecclesiastical judicatories in matters properly within their province under the constitution, laws, or regulations of the church; but it is apparent from the opinion as a whole that the decision, which affirmed the order of the court below dismissing the bill, rests upon the ground that there was no property right involved, and therefore the court had no jurisdiction of the subject-matter of the controversy. In this view of the case, the relevancy of the remark with reference to the decisions of ecclesiastical judicatories is not apparent. The position of the court that there were no property rights involved, and that therefore it had no jurisdiction, would seem to dispose of the case without reaching the question as to the effect of the ecclesiastical decision; and, indeed, it does not appear that there had been any ecclesiastical decision with reference to the stewards, it simply being alleged in the bill that they had been ignored by the presiding elder.

d. Regularity of procedure.

Some of the cases, especially those involving disciplinary decisions, seem to apply the same rule to decisions of ecclesiastical tribunals that obtains with respect to the decisions of the tribunals of other incorporated or voluntary associations, *i. e.*, that the civil court may inquire, not only into the jurisdiction, but also into the regularity and fairness of the procedure, of the ecclesiastical tribunal.

The civil courts will studiously give full effect to the judgment of an ecclesiastical court when matters ecclesiastical only are involved, but when civil rights as to property are involved the civil courts will insist that an accusation be made, that notice be given, and an opportunity to produce witnesses and defend be afforded, before they will give effect to an expulsion or suspension of members of one faction by another faction of the church. *West Koshkonong Cong. v. Ottesen*, 80 Wis. 62, 49 N. W. 24.

The power possessed by a religious society

and a compass box. On the 27th of March, she was given a berth, and broke cargo. Some 75 barrels of lime were discharged. About the 14th of April she was moved, and began the further discharge of cargo that was all out on the 28th. A few of the casks may have been stove, a few more showed signs of fire, and a few were bursting from swollen contents. The balance of the cargo was in bad condition, in that staves had shrunk and hoops loosened, allowing the lime to sift out and fall through the tiers of barrels to the deck or floor of the hold. No sea water reached the cargo, unless in a few instances when a hatch had been taken off, or when the cabin was flooded once. The damage from sea water must have been very slight, and did not affect the cargo, beyond the few barrels that it touched.

The insurance was against perils of the sea for a particular voyage. A voyage policy does not attach unless the vessel be seaworthy at the inception of the voyage, which is presumed, but may be rebutted. *Dodge v.*

Boston Marine Ins. Co. 85 Me. 215, 27 Atl. 105; *Hutchins v. Ford*, 82 Me. 370, 19 Atl. 832. It is so whether the insurance be upon the ship, or upon the cargo, or upon freight. *Van Wickle v. Mechanics' & T. Ins. Co.* 97 N. Y. 350; *Higbie v. National Lloyds*, 11 Biss. 395, 14 Fed. Rep. 143; *Daniels v. Harris*, L. R. 10 C. P. 1. She must not be overloaded, and the cargo must not be badly stowed. *Arnould*, lns. 679.

In this cause the insurance was "at and from Rockland to New York,"—meaning until safely landed in New York, or for a reasonable time to land there under the usages of that port. The sea risk continued until the goods might be put on shore by reasonable despatch. On the sixth day after arrival the vessel was given a berth at the wharf, and the hatches were opened. No damage to the cargo is claimed after that time, and no point is made that the insurance ended before. During the voyage the decks had been awash, and the cabin once flooded. Some sea water found its way to

to drop from the list any member who shall either cease to regularly worship with the society, or shall fail to contribute to the support of its worship for one year, can only be exercised by a vote of the society after giving the member notice and an opportunity to be heard. *Gray v. Christian Soc.* 137 Mass. 329, 50 Am. Rep. 310.

The expulsion of a member by a religious society is void unless it was for adequate cause shown, either in accordance with the rules of the society or after a fair examination of the charges upon due notice. *Jones v. State*, 28 Neb. 495, 7 L. R. A. 325, 44 N. W. 658.

In *Jennings v. Scarborough*, 56 N. J. L. 401, 28 Atl. 559, the court, on certiorari proceedings, set aside an order of a bishop of the Protestant Episcopal church, dissolving pastoral relation between a rector and his parish, upon the ground that the proceedings were taken under the wrong sections of the canons of the church, as a result of which the rector was deprived of the opportunity to be heard on the charges.

Com. v. Green, 4 Whart. 531, held that the dissolution of certain synods of the Presbyterian church by the general assembly was valid as a legislative act, although if the act were referable to its judicial capacity it would be invalid if there was no hearing or notice.

Batterson v. Thompson, 8 Phila. 251, held that the attempted dismissal of a rector by the vestry of a Protestant Episcopal church was invalid, both because the power to dismiss resided in the church at large and not in the vestry, and the rector was entitled to a trial which was denied him.

O'Hara v. Stack, 90 Pa. 477, involved the right of a court of equity to interfere in behalf of a priest of the Catholic church, who had been removed by the bishop from the church in which he ministered without being assigned to another, and had been forbidden to exercise any priestly function. The court held, first, that the priest had such a right of property in the revenues of his church and in his profession as to authorize a court of equity to inquire into the matter of his removal, although he had no specific salary and his income was derived from rent of pews, collections, subscriptions, and offerings; and, further, that his removal was invalid upon the ground that no man ought to be condemned without a hearing, and that, even

if a removal without a hearing is not contrary to the laws of the church, it is contrary to the supreme law of the land.

In order properly to exercise the right of a motion of a corporator notice must be given to all of the members of the corporation that it is intended to consider the question of removing the particular person, even if there is not an express provision to that effect in the constitution or laws of the church. *Weber v. Zimmerman*, 22 Md. 156. In this case the court granted a mandamus to restore the rector to his office and functions of pastor from which he had been removed at a meeting held in pursuance of a notice which omitted to state its object. It appeared that the pastor by the act of incorporation was constituted a corporator.

A deposed minister or an excommunicated member of a church cannot appeal to the civil courts for redress unless property rights are involved; but when property rights are concerned the ecclesiastical courts have no power whatever to pass on them so as to bind the civil courts. If they expel a member from his church, and he feels himself aggrieved in his rights of property by the expulsion, he may resort to the civil courts, and they will not consider themselves precluded by the judgment of expulsion, but will examine into the case to see if it has been regularly made upon due notice, and if they find it to be duly made they will let it stand; otherwise they will disregard it and give the proper relief. In most cases, no doubt, the judgment will be found to be sufficiently regular to fix the status of the expelled member, and to warrant the civil courts in denying the desired relief. *Watson v. Garvin*, 54 Mo. 355.

Dean v. Bennett, 24 L. T. N. S. 169, L. R. 6 Ch. 489, 40 L. J. Ch. N. S. 452, 19 Week. Rep. 363, held that the action of a Baptist church in removing a member was invalid and not binding, because the notice of the meeting did not comply with the terms of a trust deed under which the congregation acted.

The Privy Council in *Long v. Gray*, 1 Moore, P. C. C. N. S. 411, 9 Jur. N. S. 805, 8 L. T. N. S. 738, 11 Week. Rep. 900, *supra*, held that the decision of the tribunal of a nonestablished church suspending a minister, in order to be valid, must not only be within the authority of the tribunal, but the tribunal must have observed such forms as the rules require, if any rules be prescribed, and, if not, must have

the cargo, and may have caused the bursting of a few casks, and the scorching of a few more; but this damage was far below the particular average—or, in this instance, partial loss—that had been excepted from the insurance. So that the remaining loss or damage was from the shrinking of the staves of the barrels, and slacking up of the cooperage, allowing their contents to sift out and fall through the tiers of barrels to the deck or floor of the hold, and leaving the barrels so tender that they could not easily be hoisted out of the hatch without danger of falling to pieces. This condition is claimed to have resulted from the rolling and pitching of the vessel, caused by the storms and bad weather of an unusually protracted voyage; and the question is, Was it caused by a peril of the sea?

Tempests and rough weather are common incidents in sea transit. How long a voyage may continue is beyond the power of prophecy to foretell at the inception of it. Fair winds may serve, or head winds may

drive the vessel off her course. The voyage policy continues until the port of discharge shall have been reached, and, if upon goods, until they may have been safely landed. If the goods be of a perishable nature, and decay from a protracted voyage before they can be landed, the loss would not be from a peril of the sea. If the cargo be shaken and stove from the inherent weakness of the packages, unsuited to withstand the roughness of sea transit, or caused by the effect of their contents during the voyage, it would not be from a sea peril, but from natural causes produced either by the fault of the shipper, or by the inherent nature of the goods. The condition of the cargo when landed does not raise the inference that its injury resulted from a sea peril, but the burden rests upon the plaintiff to prove the fact.

No case has been cited at the bar that brings this loss within the hazard underwritten. *Ætna F. Ins. Co. v. Boon*, 95 U. S. 117, 24 L. ed. 395, is a suit upon a fire policy on goods ashore. So is *Louisiana Mut. Ins.*

proceeded in a manner consonant with the principles of justice.

The action by one of the factions of a church without notice, without hearing, and without evidence, declaring that the rival faction has withdrawn or been suspended from the church, is invalid and does not affect civil rights as to property. *West Koshkonong Cong. v. Ottesen*, 80 Wis. 62, 49 N. W. 24.

It has been held, however, that a civil court cannot look into the regularity of the process by which an ecclesiastical judicatory proceeds to its judgment expelling a minister. Every competent tribunal must of necessity regulate its own formulas. *Harmon v. Dreher, Speers*, Eq. 87.

Excommunication by vote of a majority of the members voting at any conference of a purely congregational and independent church, although it is made without notice to the accused of the charges against him or opportunity to vindicate himself, and under an erroneous construction of the usage and practice of the church, is an act of the church which cannot be reviewed or interfered with by a civil court. *Nance v. Busby*, 91 Tenn. 303, 15 L. R. A. 801, 18 S. W. 874.

That the general synod of the Reformed Presbyterian church, which is the highest judicatory, might in the exercise of its legislative functions have dismissed a presbytery and assigned its churches to some other existing presbytery, or to such new one as it might choose to erect, and that in the exercise of its judicial functions it might for proper cause and in due form depose any of its presbyters, or dissolve any of its churches and reorganize them, and that a synodical decree of the latter character, if founded upon some semblance of legal process, might be sustained, but if wholly without such foundation, it must be regarded as nugatory by the courts so far as it affects property rights, —is held in *McAuley's Appeal*, 77 Pa. 397.

The rejection by the synod of the application of a minister for membership is conclusive until set aside by a proper ecclesiastical tribunal, and cannot be impeached in a civil court by evidence of improper motives influencing the decision. *Heibig v. Rosenberg*, 86 Iowa, 159, 53 N. W. 111.

The suspension of a bishop by a church judicatory cannot be collaterally attacked in a civil court upon the ground that the bishop had been 49 L. R. A.

previously tried and acquitted on substantially the same charge. *Sampson v. Esher*, 26 Ohio L. J. 156.

Objections based on disqualification and prejudice of the members of a church judicatory before which charges against a bishop are tried, should be interposed at the time of the trial, and they are not available to impeach the decision of the judicatory when involved in an action in a civil court. *Ibid.*

e. Fairness and validity of decisions as tested by church laws.

Not only have the civil courts in some instances assumed the right to inquire into the jurisdiction of these tribunals and the regularity of their procedure, but in other instances have subjected their decisions to the test of fairness, or to the test furnished by the constitution and laws of the church.

Whatever is concluded in a church judicatory is valid and binding unless it can be shown to be contrary to the Word of God and the constitution of the church. *German Reformed Church v. Com. ex rel. Selbert*, 3 Pa. St. 282.

In *Nachtrieb v. Harmony Settlement*, 8 Wall. Jr. 66, Fed. Cas. No. 10,003, the court held that the expulsion of a member of a religious community at the mere whim and caprice of one who, with the assent of the community, but without any formal authority, exercised absolute authority, temporal and spiritual, was unlawful, and the court allowed the expelled member the proportionate part of the property accumulated by the community, notwithstanding that the original compact left to the discretion of the superintendent the decision whether any, and if any, what, allowance should be made to a withdrawing member.

The decisions of the supreme judicial legislative and administrative authority of a religious denomination, unless they are clearly and manifestly repugnant to the established laws of the denomination, are binding and conclusive upon the civil courts, and must be followed in the determination of such property rights as those courts may be called upon to adjudicate. *Schweiker v. Husser*, 146 Ill. 399, 34 N. E. 1022.

While the civil court cannot disturb the action of church courts upon matters purely religious, and is reluctant even to inquire into the invalidity of church action with reference to

Co. v. Tweed, 7 Wall. 44, 19 L. ed. 65. So is *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256. *Montoya v. London Assur. Co.* 6 Exch. 451, is upon a marine policy on tobacco shipped with hides. Sea water caused the hides to putrify and injure the tobacco, and it was held a sea peril; but the damage by sea water in the cause at bar did no mischief to the bulk of the cargo, and none resulted from the small part injured. In *Cory v. Boylston F. & M. Ins. Co.* 107 Mass. 140, 9 Am. Rep. 14, it is held that underwriters "do not assume the risk of ordinary perils incident to the course of the voyage, nor of damage arising from intrinsic qualities or defects of the thing insured," nor of "ordinary dampness of the hold, though aggravated by the length of the voyage and the variety of climate through which the vessel has passed in consequence of perils of the sea," because the result is attributable to the goods themselves, and not to sea perils, as the proximate cause. In *Neidlinger v. Insurance Co. of N. A.* 18 Blatchf. 297, 11 Fed. Rep. 514, the policy was upon barley, with a clause excepting damage from must or mold, unless from actual contact with sea water, and the hazard was limited to that part of the barley actually wetted. *Taylor v. Dunbar*, L. R. 4 C.

P. 206, holds that the decay of meat during a voyage protracted by tempestuous weather is not within the terms of a marine policy. In *Boyd v. Dubois*, 3 Campb. 133, Lord Ellenborough said: "If the hemp was put on board in a state liable to effervesce, and did effervesce and generate the fire which consumed it, upon the common principles of insurance law the assured cannot recover for a loss which he himself has occasioned." *Crofts v. Marshall*, 7 Car. & P. 597, is an insurance of thirty-six casks of oil, and, the cargo not having shifted, a part of them were found empty, and others had lost a part of their contents. The jury disagreed as to whether the leakage was from perils of the sea, and the court gave judgment for defendant by consent. These are all the cases cited by the plaintiffs.

The general rule is that everything which happens through the inherent vice of the thing, or by the act of the owners, master, or merchant shipper, shall not be reputed a peril, if not otherwise borne on the policy. *Emérigon*, Ins. 290; *Providence Washington Ins. Co. v. Adler*, 65 Md. 162, 4 Atl. 121; *Baldwin v. London, C. & D. R. Co.* L. R. 9 Q. B. Div. 582; *Baker v. Manufacturers' Ins. Co.* 12 Gray, 603; *Cory v. Boylston F. & M. Ins. Co.* 107 Mass. 140, 9 Am. Rep. 14; *Boyd*

the right of property, still the civil tribunal, as a matter of right and justice based upon principle and authority, can interfere and rejudge the judgment of spiritual courts where property belonging to church organizations and dedicated for religious purposes has been taken from its members by the mere arbitrary will of those constituting the judicators of such organization without regard to any of the regulations or constitutional restraints of which, according to the principles and objects of such organizations, it was intended that such property rights should be protected. *Kinkead v. McKee*, 9 Bush, 535.

Upon questions arising under the discipline, as upon those arising under the articles of faith, the decisions of the ecclesiastical courts are ordinarily final, and they will be respected and enforced by the courts of law; but if they plainly violate the law they profess to administer, or are in conflict with the laws of the land, they will not be followed. *Krecker v. Shirey*, 163 Pa. 534, 29 L. R. A. 476, 30 Atl. 440.

But the civil courts cannot review the decisions of ecclesiastical judicatories upon their merits. *Robertson v. Bullions*, 9 Barb. 64; *Nance v. Busby*, 91 Tenn. 303, 15 L. R. A. 801, 18 S. W. 874. See also III. b. *supra*.

The Kentucky supreme court, in discussing in *Lucas v. Case*, 9 Bush, 297, the question whether words written or spoken in the course of church discipline were privileged, said that when one becomes a member of an independent church he subjects himself to its ecclesiastical power, and that the civil court has no right to determine whether the church acted rightly or wrongfully in excommunicating him.

The question whether the resolution of the general conference of 1889 of the United Brethren in Christ that the amendments to the constitution had been duly adopted, was conclusive upon the civil courts in determining property rights that might be affected by it, arose in a number of the courts.

The original constitution required a request by two thirds of all members of the denomination to warrant amendments. It appeared that 49 L. R. A.

a majority of over two thirds of the members actually voting upon the question were in favor of the amendments, but they did not receive a majority of two thirds of all the members competent to vote. The resolution, therefore, involved, not only the determination of matters of fact, but also the construction of the constitutional provision referred to.

This resolution was held conclusive by *Brun- dage v. Deardorf*, 92 Fed. Rep. 214; *Lamb v. Cain*, 129 Ind. 486, 14 L. R. A. 518, 29 N. E. 13; *Rike v. Floyd*, 6 Ohio C. C. 80; *Kuns v. Robertson*, 154 Ill. 394, 40 N. E. 343.

Russle v. Brazzell, 128 Mo. 93, 30 S. W. 526, held that the resolution of the general conference of 1885 declaring that an affirmative vote of two thirds of those voting on the proposed amendments to the constitution should be taken as a request of two thirds of all the members, was conclusive upon the civil courts. The opinion does not state whether the resolution was regarded as the exercise of the legislative or judicial functions of the conference.

The circuit court, in *Brun- dage v. Deardorf*, 55 Fed. Rep. 839, *supra*, took the position that these resolutions were not conclusive, distinguishing the case from *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666, upon the ground already shown; but, when the case came before the circuit court of appeals in 92 Fed. Rep. 214, that court took a contrary view, and held that *Watson v. Jones* was decisive of the question.

Schlichter v. Kelter, 156 Pa. 119, 22 L. R. A. 161, 27 Atl. 45, and *Itter v. Howe*, 23 Ont. App. Rep. 256, decided in favor of those adhering to the new constitution, but upon the ground that the requirement of the original constitution with reference to amendments was in fact complied with rather than upon the ground that the resolution was conclusive.

Horsman v. Allen (Cal.) 61 Pac. 796, also decides in favor of those adhering to the new constitution, but upon the ground that the general conference of 1889 as the highest legislative body of the church had power to alter the

v. *Dubois*, 3 Campb. 133. If the inherent vice be stimulated by a protracted voyage, it is still no loss from a peril of the sea. *Cory v. Boylston F. & M. Ins. Co.* 107 Mass. 140, 9 Am. Rep. 14; *Taylor v. Dunbar*, L. R. 4 C. P. 206. So it is if the loss be from some other intervening cause, as where slaves die from starvation from the failure of provisions during an unusually long voyage, occasioned by bad weather. *Tatham v. Hodgson*, 6 T. R. 656.

Lord Ellenborough, in *Cullen v. Butler*, 5 Maule & S. 461, distinguishes between perils on the seas and perils of the seas. Lord Herschell says the latter phrase "does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril 'of' the sea. . . . There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen." *The Xantho*, L. R. 12 App. Cas. 503.

It is not always easy to mark the line between the ordinary operation of the elements and their perilous action. The latter must be the proximate cause of the loss. Lord Bacon's reason is: "It were infinite for the

law to consider the causes of causes, and their impulsions one on another. Therefore it contenteth itself with the immediate cause." Gow, Ins. §§ 92, 137.

In applying this rule to the cause at bar, the only direct damage to the cargo clearly shown is that resulting from the contact with sea water, amounting to less than the particular average excepted. The remaining damage to the cargo is not shown to have resulted but from the unexpectedly long voyage, that may have excited the inherent qualities of the goods, causing the packages to shrink and scatter their contents so as to need coopeage before they could be safely raised through the hatch. All authorities agree that a protracted voyage is not a sea peril, within a marine policy, because it is not an unusual event, but one of the natural incidents to sea transit. Insurance is not on the voyage, but for the voyage. *Pole v. Fitzgerald*, Willes, Rep. 644. If damage to the cargo resulted from its inherent vice that worked the mischief under natural conditions, it was not a sea peril. Had the voyage been performed in a week, such results would not have been expected. The evidence is conflicting as to the proximate cause for the condition of the cargo upon its arrival. The associates, to whom it was agreed to

constitution in such manner as not to destroy the church's identity.

Philmath College v. Wyatt, 27 Or. 390, 26 L. R. A. 68, 31 Pac. 206, 37 Pac. 1022, affirmed a decision below in favor of those adhering to the new constitution. The two judges who sat in the case were unable to agree as to the proper construction of the constitutional provision, but both agreed that the resolution of the general conference of 1889 was not binding because it was the exercise of a legislative, and not a judicial, function, and therefore was not within the rule making decisions of ecclesiastical tribunals conclusive upon the civil courts.

Bear v. Heasley, 98 Mich. 279, 24 L. R. A. 615, 57 N. W. 270, also held that that resolution was not conclusive because it violated the fundamental law of the church.

Schweiker v. Husser, 146 Ill. 399, 34 N. E. 1022, involved the right of two rival claimants to the office of pastor of a church, and the enjoyment of the property rights incident thereto. The ultimate question upon which the case turned was as to whether the attempt by the general conference of the denomination to delegate its power to designate the time of the next general conference was or was not constitutional. The court proceeded upon the theory that the action of the conference was not in itself conclusive of that question, but that the action could not be disturbed unless it was manifestly violative of the constitution, and that, in determining that question, great deference was due to the decisions of the conference. The decision in that case is followed by *Auracher v. Yerger*, 90 Iowa, 558, 58 N. W. 893.

In all matters of faith and of doctrine churches are left to speak for themselves. When rights of property are in question civil courts will inquire whether the organic rules and forms of proceeding prescribed by the ecclesiastical body have been followed; and, if followed, whether they are in conflict with the law of the land. *O'Hara v. Stack*, 90 Pa. 477.

The regularity and legal effect of the organization of an annual conference of a religious 49 L. R. A.

denomination raise an ecclesiastical question, and a decision of the general conference with reference to the matter, which does not violate the laws of the state or the church, will be followed by the civil courts. *Krecker v. Shirey*, 163 Pa. 534, 29 L. R. A. 476, 30 Atl. 440.

But a decision recognizing as lawful and regular an annual conference, and ratifying its acts and proceedings, is not binding where such annual conference was organized in plain disregard of the discipline of the denomination. *Ibid.*

1. Duty to obtain decision by higher tribunal.

One wrongfully expelled from a church without the consent of the congregation is not entitled to mandamus to restore him to membership until he has had a final adjudication in the highest church judicatory to which he may resort for relief. *German Reformed Church v. Com. ex rel. Seibert*, 3 Pa. St. 282.

The civil courts, in the exercise of their discretion, will refuse to grant a writ of mandamus to restore a rejected minister to his office and functions, even when temporal rights, stipends, or emoluments are connected therewith, before a final decision has been had by the church authorities. *State ex rel. McNeill v. Bibb Street Church*, 84 Ala. 23, 4 So. 40.

g. Congregational and independent churches.

Associations of independent churches, like Baptist churches, do not fall within the class of church judicatories, such as are provided in the organizations of the churches of some of the denominations, to finally and authoritatively settle disputes, and the decisions of which, on questions of theology and ecclesiastical government, are received as binding by the civil courts. *Jarrell v. Sproles*, 20 Tex. Civ. App. 387, 49 S. W. 904.

But it has been held that the decision of a Baptist council on the joint call of both factions of a Baptist church which agreed to ac-

submit the question of liability, are men of large experience in burning and shipping lime. They are all fair men, and appear to have heard the controversy with patience; and, after full investigation, all but the plaintiff agreed that he had no claim, and so decided. Their decision must have great weight upon the fact as to whether the condition of the cargo, upon its arrival in New York, was other than what might have been expected from ordinary sea weather at that time of year, February and March, during a voyage of thirty-six days, without any unusual sea peril. The cargo arrived all in position. It had not shifted or been knocked to pieces by the vessel having been thrown on her beam ends, or wrecked or stranded.

But it may be said that the damage, within the particular average clause, gave the cargo a bad reputation, and thereby lessened its market value. This result might be, and yet not be within the terms of the policy. *Benecke, Marine Ins. 438*. No case is cited that holds such doctrine. On the contrary, *Cator v. Great Western Ins. Co. L. R. 8 C. P. 552*, holds the reverse. That was insurance upon packages of tea. Some were damaged, and others were not; but the damage was restricted to the former, although there was a clause in the policy excepting damage other than by contact with sea water. The court held the rule would be the same with-

out the clause, for insurance covers actual damage, and not suspicion of damage. *Montoya v. London Assur. Co. 6 Exch. 451, supra*, comes the nearest to an authority for the contention, but there the tobacco was actually injured from the fumes of the putrefying hides. So in *Lawrence v. Aberdeen, 5 Barn. & Ad. 107*, approved in *Gabay v. Lloyd, 3 Barn. & C. 793*.

The plaintiffs were compelled to pay damages for delay in discharging cargo, and claim that as an element of damages. But, if all the damage to cargo was less than the particular average excepted, so that no liability on account of cargo attached to the underwriters, it would be singular to hold them for the plaintiffs' fault in delaying to seasonably unlade their cargo.

The decision of the association weighs heavily in determining this cause, especially as the evidence warrants the result arrived at upon the application of the law of the case. There is conflict of testimony, and the association heard and considered it all; and all its members were practical men in the handling of lime, and knew its peculiar qualities and dangers, and they must have considered that the principal damage to the cargo came from its own inherent qualities, excited by the long-continued transit.

Bill dismissed, with costs.

CALIFORNIA SUPREME COURT (Department 1).

Powell S. LAWSON, *Appt.*,

v.

Adolphus HEWELL *et al.*, *Respts.*

(118 Cal. 613.)

1. Individuals who associate themselves in a voluntary fraternal or-

cept it as final, that the doctrines taught by the majority faction are not in harmony with the teachings of the denomination, is conclusive, and may be adopted by a court as a basis of its action in giving the control of the church property to the other faction. *Mt. Zion Baptist Church v. Whitmore (Iowa) 13 L. R. A. 198, note, Ecclesiastical law; church doctrines, by what law governed.*

The decision of an association of independent churches to which both factions of a church belonging to the association have submitted their claims, even if it is merely advisory, is entitled to great weight in the courts on the question of religious doctrine, discipline, faith, and practice. *Smith v. Pedigo, 145 Ind. 381, 19 L. R. A. 433, 32 L. R. A. 838, 33 N. E. 777, 44 N. E. 363.*

In Massachusetts it is held that the settlement of a minister over a Congregational church and society, without any limitation as to the continuance or any express stipulation as to the mode of the dissolution of the relation, is a contract for life, determinable only in the manner and for the causes established by law.

When a church desires to dissolve its ministerial relation the ordinary course is to call an ecclesiastical council.

It was held in *Thompson v. Catholic Cong. Soc. 7 Pick. 160*, that the results of such a council "are never binding and conclusive un- 49 L. R. A.

ganization may prescribe conditions upon which membership in the association may be acquired or upon which it may continue, and may also prescribe rules of conduct for themselves during their membership, with penalties for their violation, and the tribunal and mode in which the offenses shall be determined and the penalty enforced.

2. The rules by which the members of

less assented to by the parties, until after they are sanctioned by legal adjudication."

The result of a mutual ecclesiastical council legally convoked will not bind either party rejecting it, but the effect of its advice is nothing more than a legal justification of the party who shall adopt it. *Burr v. First Parish, 9 Mass. 277.*

Stearns v. First Parish, 21 Pick. 114, held that if the advice of the council be that the ministerial relation between a pastor and his parish be dissolved for any sufficient cause, or that the former for any misconduct has forfeited his office, the party adopting it will be justified. The pastor may cease to perform his official duties without subjecting himself to legal liability, and the parish may reject the services, and will not be further liable for his salary. But if the council advise that the pastor relinquish a part of his annual salary, and that the parish give to him a stipulated sum or some specific article, and that the connection be dissolved upon those terms, the performance by one party would not give him or it a remedy in law or equity to compel performance by the other.

Gibbs v. Gilead Ecclesiastical Soc. 38 Conn. 153, after holding that the contract of settlement between a minister and a Congregational church is for the work in the Gospel ministry in accordance with the Congregational polity, and

an association agree to be governed constitute the charter of their rights, and the courts will decline to take cognizance of any matter arising under them, in respect of matters of policy or the internal economy of the organization.

3. The term "conspiracy" cannot be predicated of the deliberate vote of a governing body.
4. An injunction to restrain a chapter of Royal Arch Masons from proceeding with the trial of charges against a member cannot be granted when the proceedings are in strict accordance with the rules of the order, on the ground of the invalidity of the rule which the member is charged with violating, because it was adopted as the result of a conspiracy in the furtherance of which the proceedings are being taken.
5. The contractual relation between an association and one of its members is that which exists by virtue of the rules of the association, and the contract is not violated so long as the association acts towards him in accordance with those rules.
6. Any change or amendment of the rules of a voluntary fraternal organization, if adopted in accordance with the mode provided by the association therefor, is binding upon each of the members.
7. The interest of a member in the property of an association, when merely incidental to his membership, will not prevent his expulsion if his right of membership has been forfeited, nor will it give the courts any right to prevent the investigation of the charge against him, or to determine its sufficiency.

(October 15, 1897.)

A PPEAL by plaintiff from a judgment of the Superior Court for Sacramento County in favor of defendants in a suit brought to restrain defendants from proceeding to try plaintiff on charges preferred by a member of the chapter of Royal Arch Masons to which plaintiff belonged. *Affirmed.*

The facts are stated in the opinion.

Is for life, unless dissolved by mutual consent, or for sufficient cause, held, that the question whether a consociation of churches had jurisdiction to dissolve the relation upon an application by the church alone, merely on the ground of expediency, was a question for the jury in view of the provisions of the platform under which such consociation existed, and of the usages of the Congregational churches in that respect.

Sheldon v. Congregational Parish, 24 Pick. 281, held that the decision of an ecclesiastical council recommending the dissolution of the connection between a Congregational society and its minister does not justify such action on the part of the society, and will not defeat an action by the minister for his salary, where the misconduct of the minister on which the recommendation was based was not a sufficient cause for the dissolution of the relation, or the finding in that respect is vague and indefinite.

The decision of an ecclesiastical council of Congregational churches upon the application of a minister and his parish, that the evidence was not sufficient to furnish ground for advising a dissolution of the pastoral relation, is a justification to the pastor in his position if not impeached for good cause. It is conclusive upon the evidence and facts, but it may be impeached in various ways, such as for partiality of the members of the council, or any of them, 49 L. R. A.

Messrs. C. A. Elliott and Holl & Dunn for appellant.

Messrs. Myrick & Deering and McCune & George for respondents.

Harrison, J., delivered the opinion of the court:

The plaintiff has been for many years a member in good standing of Sacramento Chapter, No. 3, of Royal Arch Masons,—an unincorporated association organized at Sacramento, and one of the subordinate chapters of the grand chapter of Royal Arch Masons of this state. The grand chapter of Royal Arch Masons is the governing body of the subordinate chapters, and of the members thereof, and is composed chiefly of representatives from the several subordinate chapters, and has such powers as are granted to it by its constitution, and by-laws, rules, regulations, and decisions based upon said constitution. There are two bodies existing and active in this state, known as the "Ancient and Accepted Scottish Rite," one of which was organized under the authority of the Supreme Council of the Ancient and Accepted Scottish Rite of the United States of America, Their Territories and Dependencies, commonly known as the "United States Jurisdiction," and the other is organized under the authority of what is known as the "Southern Jurisdiction of the Ancient and Accepted Scottish Rite." In 1887 the grand chapter of Royal Arch Masons adopted a resolution designating certain bodies whose degrees of Masonry and orders of knighthood it acknowledged to be legitimate and genuine, and declared that any Royal Arch Mason who should thereafter take or receive any so-called Masonic degree or order of knighthood from any man or body of men not thus acknowledged to be legitimate and genuine, or who should be present at, or assist in conferring, or should

or it may be impeached or annulled in a court of law if the ground of the decision assigned by the council appears to be insufficient to justify the result. *Proprietors of Meeting-House v. Pierpont*, 7 Met. 493.

The dissolution of the relations between a minister and a Congregational church by a consociation of churches will be held invalid by the courts where the proceedings were in any respect unfair toward the minister. *Gibbs v. Gilead Ecclesiastical Soc.* 38 Conn. 153.

When public policy or the positive law of the land is not contravened, the decisions and orders of a religious society, when made in conformity to its polity, should have the same effect, upon the subject to which they relate, in civil courts, which the society intended should be awarded to them when pronounced by its own judicatories. *Harrison v. Hoyle*, 24 Ohio St. 254. That case involved a property right dependent upon which one of two rival bodies constituted the legitimate yearly meeting of the Society of Friends. There was no body in the Society of Friends having jurisdiction over the yearly meetings, but there were other co-ordinate yearly meetings, and the court held that the decisions of those several meetings with reference to the question were proper and legitimate evidence, and entitled to great weight as intelligent opinions and judgments upon the subject.

G. H. P.

solicit anyone to take, receive, or apply for, any Masonic degree or order of knighthood, except from one of the bodies acknowledged to be legitimate and genuine, should be liable to be expelled from all the rights and privileges of a Royal Arch Mason. In the Masonic bodies thus designated as legitimate and genuine, the Ancient and Accepted Scottish Rite, organized under the authority of what is known as the "Southern Jurisdiction," was included, and that organized under the authority of what is known as the "United States Jurisdiction" was excluded. Section 1 of article 24 of the constitution of the grand chapter of Royal Arch Masons provides that, when any member of a chapter shall be accused of unmasonic conduct, charges to that effect may be preferred in writing by any Royal Arch Mason in good standing, and shall be presented to the high priest of the chapter having jurisdiction thereof; and it is also provided by the rules of the grand chapter that upon the application of said high priest the grand high priest may transfer the trial of the accused from the chapter of which he is a member to some other chapter whenever, in his judgment, such transfer is necessary or expedient. In May, 1895, the defendant Vermilyea, a member of said Sacramento Chapter, No. 3, presented a charge in writing against the appellant to the defendant Boyd, who was the high priest of said chapter, charging him with conduct unbecoming a Royal Arch Mason, in that he did in February, 1895, openly solicit another member of said chapter to apply for, take, and receive the so-called degrees in the Ancient and Accepted Scottish Rite claiming its authority under the United States jurisdiction, and also that he was, and had for a long time been, an active member of a body of Masons claiming to be acting under a charter from the United States jurisdiction of the Ancient and Accepted Scottish Rite. Upon the presentation of these charges, the defendant Boyd forwarded the same to the defendant Hewell, who was the grand high priest of the grand chapter, and that officer directed that the trial of the plaintiff upon these charges be transferred to Stockton Chapter, No. 28. Thereupon the plaintiff was summoned by the last-named chapter to appear and answer said charges, and to be tried thereon, at its hall, in Stockton, on August 5, 1895. The members of said Stockton Chapter are also made defendants herein. The present action was brought to restrain the defendants from proceeding with the trial of said charges. A demurrer to the complaint was sustained, and the plaintiff has appealed from the judgment entered thereon.

Individuals who associate themselves in a voluntary fraternal organization may prescribe conditions upon which membership in the association may be acquired, or upon which it may continue, and may also prescribe rules of conduct for themselves during their membership, with penalties for their violation, and the tribunal and mode in which the offenses shall be determined and

the penalty enforced. These rules constitute their agreement, and, unless they contravene some law of the land, are regarded in the same light as the terms of any other contract. Organizations of this character are not recognized as legal bodies, or as entitled to recognition in courts for the enforcement of their rules, unless there is also involved the determination of some civil right or some right of property; and in these cases courts are limited to inquiring whether the rules prescribed by the organization for the determination of the right have been followed. In all matters of policy or of the internal economy of the organization, the rules by which the members have agreed to be governed constitute the charter of their rights, and courts will decline to take cognizance of any matter arising under these rules. Whether the rules have been violated, or whether a member has been guilty of conduct which authorizes an investigation by the association, or the imposition of the penalty prescribed by it, is eminently fit for the association itself to determine; and, if the investigation is in accordance with its rules, the party charged has no ground of complaint, since it is but carrying into effect the agreement he made when he became a member of the association. "When men once associate themselves with others as organized bands, professing certain religious views, or holding themselves out as having certain ethical and social objects, and subject thus to a common discipline, they have voluntarily submitted themselves to the disciplinary power of the body of which they are members, and it is for that society to know its own." *State v. Grand Lodge*, 8 Mo. App. 148. See also Niblack, Vol. Soc. § 113; *White v. Brownell*, 2 Daly, 329; *Mead v. Stirling*, 62 Conn. 580, 23 L. R. A. 227, 27 Atl. 591.

The plaintiff does not charge in his complaint herein that any of the proceedings taken against him have not been strictly in accordance with the rules prescribed for an investigation of the charges against him, or that he has been deprived of any privilege accorded to him by those rules, but he bases his complaint upon the invalidity of the rule which he is charged with violating. He charges that the adoption of the rule was the result of a conspiracy, and that the charges preferred against him and the proceedings taken for their investigation are a part of this conspiracy, and in furtherance of its objects. It is not charged that the resolutions establishing this rule were not regularly and properly adopted by the grand chapter, or that they did not receive the approval of a majority of the members of that body, nor is it claimed that since their adoption there has been any attempt to rescind or modify them. These rules were adopted in 1887, and as there have been annual meetings of the grand chapter since that date, composed of individuals chosen therefor in each year by the subordinate chapters, and no change has been made in the rule, it must be assumed that it is the deliberate judgment of that body that the conditions therein

named are essential qualifications to entitle anyone to become or remain a Royal Arch Mason. It is a misuse of terms to say that the vote of a majority of the members of a representative body is the result of a conspiracy; nor can the term "conspiracy" be predicated of the deliberate vote of a governing body. The charge, moreover, is made in general terms, and without any specifications of fact from which a conspiracy can be inferred; and no fact is alleged with reference to the acts of the defendants who are charged as aiding the conspiracy, other than such as appear to have been done for the purpose of enforcing the rules of the grand chapter. Whether it is for the best interests of the order that its members shall not belong to any other orders than those named in the resolutions adopted by the grand chapter, or whether membership in the Ancient and Accepted Scottish Rite of the United States jurisdiction is contrary to the best interests of Royal Arch Masonry, are questions pertaining solely to the internal economy of the order, and are purely of Masonic cognizance. Courts have no standard by which to determine the propriety of the rule, and are not competent to exercise any function in the matter. "The duly chosen and authorized representatives of the members alone are vested with the power of determining whether a change is demanded, and with their discretion courts cannot interfere. Were it otherwise, courts would control all benevolent associations, all corporations, and all fraternities. It is only when there is an abuse of discretion, and a clear, unreasonable, and arbitrary invasion of private rights, that courts will assume jurisdiction over such societies or corporations: With questions of policy, doctrine, or discipline, courts will not interfere. Courts will compel adherence to the charter and to the purpose for which the society was organized, but they will not do more." *Supreme Lodge, K. of P. v. Knight*, 117 Ind. 489, 3 L. R. A. 409, 20 N. E. 479. The proceedings against the plaintiff are shown by the complaint to have been taken in strict accordance with the rules of the order. He has received notice of the hearing, and he has shown no facts which authorize the conclusion that he will not receive a fair and impartial hearing. From the decision at that hearing he can seek redress by an appeal to the Grand Chapter. So long as he has this right of redress within the order, he has no right to invoke the aid of the courts.

The averment in the complaint that the attempt to expel the plaintiff by reason of his membership in the forbidden order is a violation on the part of the chapter of its contract with him, as well as the averment that

the adoption of the rule by the chapter creates a new condition in his contract, and is in violation of the constitution and laws of Royal Arch Masonry, and was in excess of its jurisdiction, are unavailing as an element in his cause of action, in the absence of averments showing the particulars of this contract of membership, and wherein it will be violated, or the particular provision of the constitution which was violated by the adoption of the rule. The contractual relation between the association and one of its members is that which exists by virtue of the rules of the association, and, so long as the association acts towards him in accordance with these rules, there is no violation of this contract. This relation is to be determined, however, by a consideration of the entire body of the rules governing the association, and is not limited to those existing at the time the individual became a member. Unless the rules at that time placed a limitation upon the power of the association to make any change or amendment therein, any amendment or change adopted in accordance with the mode provided by the association therefor is binding upon each of the members. The plaintiff does not show that any right of property belonging to him will be affected by the proposed action of the chapter. His averments that the chapter, as well as the commandery and council of which he is a member, have accumulated property by reason of the payment by himself and others of certain annual dues, fail to show that he has any severable proprietary right to any portion of this property, as against the body of which he is a member, or any right to its use or enjoyment, except so long as he shall remain a member of the body. His allegations in this respect are that the property is owned by him "in common with the other members," and that he, "together with the other members," has a right to participate in the use and disposition of said property, and to be assisted therefrom in case of need or distress. His interest in the property thus appears to be only incidental to his membership, and will cease upon his ceasing to be a member. If he has forfeited his right of membership by reason of his conduct, this interest in the property will not prevent his expulsion, or give to courts the right to prevent an investigation of the charge, or themselves to determine its sufficiency.

The demurrer to the complaint was properly sustained, and the judgment is affirmed.

We concur: **Beatty**, Ch. J.; **Van Fleet**, J.

Hearing in Banc denied.

CONNECTICUT SUPREME COURT OF ERRORS.

Andrew J. BROUGHEL, Jr., Admr., etc., of
George Davis, Deceased, *Appl.*,
v.

SOUTHERN NEW ENGLAND TELE-
PHONE COMPANY.

(72 Conn. 617.)

1. **Substantial damages may be recovered for an instantaneous death** caused by wrongful act under a statute providing that all causes of action for injuries to the person of a decedent, whether the same do or do not instantaneously or otherwise result in death, shall survive to his executor or administrator.
2. **A conditional assessment by the trial court of substantial damages** for death by wrongful act in case such damages may properly be awarded, together with an actual assessment of nominal damages only, is not conclusive in case the appellate court holds the actual assessment erroneous, since the finding was in the view of the trial court upon an immaterial fact.
3. **Exceptions by appellee to rulings of the trial court** under which its liability for wrongful death was established cannot be considered by the appellate court upon reversal on appeal as to measure of damages, where the statute requires consideration of appellee's exceptions only where the questions could arise on a new trial.
4. **A defendant which has defended an action** on the theory that it charged negligence cannot for the first time on appeal raise the question of variance on the ground that the complaint charged it with wilful wrong.

(February 13, 1900.)

A PPEAL by plaintiff from a judgment of the Superior Court for Hartford County assessing nominal damages only in an action to recover for the alleged negligent killing of plaintiff's intestate. *Reversed.*

Statement by Torrance, J.:

The complaint, in paragraph 4, alleged that the defendant "negligently, recklessly, wilfully, and wrongfully cut wires belonging to the Hartford Electric Light Company, and by so doing caused an electric current to pass through the plaintiff's intestate," Davis, while engaged in the performance of his duty as lineman for said electric light company, "and by this negligent and reckless conduct and wilful wrongdoing caused the death of the said plaintiff's intestate." The case was defaulted, and heard in damages. Upon this hearing the defendant gave written notice, under the statute and rules

NOTE.—The damages recoverable for wrongful death of a person, when the suit is brought for the benefit of his estate, must be carefully distinguished from the recovery allowed by the various statutes for the benefit of certain surviving relatives.

For discussion of the nature of the different rights of action for death, see also *Louisville & N. R. Co. v. McElwain* (Ky.) 34 L. R. A. 788; *Lubrano v. Atlantic Mills* (R. I.) 34 L. R. A. 797, and note therewith.
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of court, that it would deny, and, if necessary, offer evidence to disprove paragraph 4 of the complaint, and would offer evidence of contributory negligence. The parts of the finding material upon this appeal are these: "I find that the defendant did not prove that the death of the plaintiff's intestate was not caused by its negligence, nor did it prove that it was caused through the negligence of the plaintiff's intestate. Nor can I find that either of these facts was proved in this case. I find that the plaintiff's intestate died through the negligence of the defendant, to which the plaintiff's intestate did not materially contribute. Davis's death was instantaneous with the shock of the electric current, and he suffered no pain or sensation, and never recovered the least consciousness. If, upon the facts, substantial damages should be awarded, I find the damage should be assessed at \$5,000, which sum I so assess. I rule that nominal damages should be awarded, and assess the same at \$100." The plaintiff claimed that he was entitled to substantial damages. The court overruled this claim, and gave judgment for nominal damages only. The two errors assigned in the reasons of appeal relate to the action of the court in ruling (1) that upon the facts, as found, only nominal damages should be awarded; (2) that the plaintiff was not entitled to substantial damages, as claimed. Under § 16, chap. 194, of the Public Acts of 1897, a bill of exceptions in favor of the defendant was allowed by the trial court, and appears in the printed record. It relates to certain decisions of the trial court against the defendant upon questions of evidence, and upon certain claims of law made by the defendant during the trial.

Mr. Edward D. Robbins, for appellant:

The plaintiff is entitled to a judgment for \$5,000, unless the court below was right in holding that, under the law of this state, no damages are recoverable for injuries which result in death without pain or suffering.

Messrs. John W. Alling, F. L. Hungerford, and James T. Moran, for appellee:

The court below was correct in holding that, as the death of the plaintiff's intestate was instantaneous with the shock of the electric current, and without pain or suffering, only nominal damages could be awarded.

Budd v. Meriden Electric R. Co. 69 Conn. 272, 37 Atl. 683; *Goodsell v. Hartford & N. H. R. Co.* 33 Conn. 51; *McElligott v. Randolph*, 61 Conn. 157, 22 Atl. 1094.

It is neither common sense nor common justice for the state to impose a penalty upon merely actionable negligence, simply because it unexpectedly results in death.

The common law affords no remedy to a person suffering a loss of this kind.

Connecticut Mut. L. Ins. Co. v. New York & N. H. R. Co. 25 Conn. 265, 65 Am. Dec. 571.

Where the death and the injury causing it were simultaneous there was no cause of action in the administrator or executor of the deceased person because no right of action had accrued to the deceased, and therefore there could be no survival.

Carey v. Berkshire R. Co. 1 Cush. 475, 48 Am. Dec. 616; *Kearney v. Boston & W. R. Corp.* 9 Cush. 108; *Hollenbeck v. Berkshire R. Co.* 9 Cush. 478; *Bancroft v. Boston & W. R. Corp.* 11 Allen, 34; *Kennedy v. Standard Sugar Refinery*, 125 Mass. 90, 28 Am. Rep. 214; *Corcoran v. Boston & A. R. Co.* 133 Mass. 507; *Mulchahey v. Washburn Car Wheel Co.* 145 Mass. 281, 14 N. E. 106.

The alternative damages were excessive.

Five thousand dollars cash, with interest at 5 per cent, paid to the heirs of Mr. Davis, would represent, probably, more than Mr. Davis could have, let alone what he would have, saved out of his wages for them for twenty years.

Cheatham v. Red River Line, 56 Fed. Rep. 248.

Torrance, J., delivered the opinion of the court:

The trial court rendered judgment for the plaintiff for nominal damages only. From that judgment the plaintiff alone appealed. Upon that appeal the only grievance of which he complains is that the court gave him nominal, instead of substantial, damages. He is satisfied with the finding of facts as made. His only claim is that the trial court misapprehended the law, in giving him only nominal damages. The defendant did not appeal from the judgment, but it filed a bill of exceptions, which, as allowed by the court, appears in the record. The questions raised in that bill, however, are not necessarily to be considered in connection with those presented by the appeal. They are to be considered only "in case a new trial is advised." Pub. Acts 1897, chap. 194, § 16. The questions raised by the appeal will be first considered.

The trial court has found that Davis's death was, legally speaking, due solely to the negligence of the defendant. It has also found that his death "was instantaneous with the shock of the electric current" that caused it. The court held that inasmuch as the death was thus instantaneous, the law was so that the plaintiff was entitled to nominal damages only. In so holding, we think the court erred. One person may by a wrongful act cause the death of another person. In such case the death so caused may immediately follow the wrongful act,—may be, as we say, instantaneous with it, or it may follow after some interval of time. In either case the wrongdoer has violated the rights of the other person; but in either case, at common law, the death of the injured person practically put an end to the liability of the wrongdoer *civiliter* for his act. If the injured person died instantaneously, or died before suit was brought by or for him, the liability of the wrongdoer was at an end. If the injured person survived the act for a time, and brought suit, and

pending suit died before trial, the suit abated, and the liability of the wrongdoer ended. The liability ended because the right to enforce it ended with the life of the injured person. Such right did not survive in favor of anyone. The principles of the common law on this subject are embodied in the maxim, *Actio personalis moritur cum persona*. Mr. Pollock calls the rule expressed in the maxim a barbarous one, "which has been made at all tolerable for a civilized country only by a series of exceptions." Pollock, Torts, p. 54. This rule prevails in this state to-day, except so far as it has been modified or changed by statute or by judicial decisions. *Mitchell v. Hotchkiss*, 48 Conn. 1, 40 Am. Rep. 146. Another rule said to be a rule of the common law was to the effect that "in a civil court the death of a human being cannot be complained of as an injury;" that is, that no one can maintain an action for damages for the mere loss of the life of another. *Baker v. Bolton*, 1 Camp. 493; *Osborn v. Gillett*, L. R. 8 Exch. 88. This rule formed part of our law, also, and prevails to-day, except as modified or changed by statute. *Connecticut Mut. L. Ins. Co. v. New York & N. H. R. Co.* 25 Conn. 265, 65 Am. Dec. 571. The operation of these two rules frequently caused great hardship in cases of personal injuries resulting in death, and to remedy this hardship in such cases the rules in question, towards the middle of this century, began to be abrogated or modified by legislation. Lord Campbell's act, passed in England in 1846, may be said to have led the way in this kind of legislation; and it was speedily followed in this country by acts having in view the same general purpose as the English act. Speaking generally, this kind of legislation may be said to have, in effect, abolished one or the other, or both, of these rules, with reference to the class of cases here in question. Some of the acts provide that the decedent's cause of action against the wrongdoer shall survive, either for the benefit of his estate generally, or for the benefit of the beneficiaries described in the statute. Acts of this kind may be called "survival acts." By them, to a certain extent, both rules are abolished or made inapplicable. Other acts give substantially a new cause of action to certain described beneficiaries for loss sustained by them by the mere death of the injured person. Acts of this kind are not survival acts, and they, in effect, only abolish the second of the above rules. The English acts relating to this subject may be said to fall within the last class (1 Enc. Laws Eng. p. 108; Pollock, Torts, pp. 59, 60, and cases cited), while our own act falls more nearly within the first class. Legislation upon this subject in this state began in 1848. In that year it was enacted that "actions for injury to the person, whether the same do or do not result in death, . . . shall survive to his executor or administrator, provided the cause of action shall not have arisen more than one year before the death of the deceased." Pub. Acts 1848, chap. 5, § 2. The word "actions," as here used, means causes

of action or rights of action. *Soule v. New York & N. H. R. Co.* 24 Conn. 575. In 1875 the statute was changed in phraseology, and has since read, and now reads, as follows: "All actions for injury to the person, whether the same do or do not instantaneously or otherwise result in death, . . . shall survive to his executor or administrator," etc. Rev. Stat. 1875, p. 422, § 9; Gen. Stat. 1888, § 1008. In 1853 another statute was passed, which provided that "if the life of any person being a passenger or crossing upon a public highway in the exercise of reasonable care, shall be lost" by the negligence or carelessness of any railroad company in this state, such company should be liable to pay as damages for such loss a sum not exceeding five thousand nor less than one thousand dollars to the executor, or administrator, for the benefit of the persons described in the act. The provisions of these two acts, with some changes which it is not here important to note, are now consolidated in §§ 1008 and 1009 of the General Statutes. Among other things, these sections now provide, in substance, as follows: (1) That all causes of action for injury to the person of a decedent, "whether the same do or do not instantaneously or otherwise result in death," shall survive to his executor or administrator, "provided the cause of action shall not have arisen more than one year before the death" of the decedent; (2) that the recovery shall be for "just damages not exceeding five thousand dollars;" (3) that the damages recovered, whether in actions begun by the person injured in his lifetime, or by his personal representative after the death of the person injured, shall be for the benefit of the persons named in the act; (4) that the action shall be brought within a prescribed time. This legislation, in effect, sets aside, in this class of cases, the rule expressed in the maxim, *Actio personalis moritur cum persona*. *Murphy v. New York & N. H. R. Co.* 30 Conn. 184, 188; *Budd v. Meriden Electric R. Co.* 69 Conn. 272, 284, 37 Atl. 683, and it provides that the decedent's cause of action against the wrongdoer shall survive and be available to the executor or administrator. Furthermore, this legislation, in this class of cases, sets aside the other rule of the common law, which prevented the recovery of damages for mere loss of life. "It is a singular fact that by the common law the greatest injury which one man can inflict upon another—the taking of his life—is without private remedy. By a strange fiction, the extremity of the wrong precludes redress. The state of Connecticut was among the first to break through this principle." *Goodsell v. Hartford & N. H. R. Co.* 33 Conn. 51, 55.

In thus abolishing or modifying this rule of the common law in certain cases, and so permitting a recovery in damages to be had where before there could be none, our statute may be regarded as conferring such right, either upon the person injured, and continuing it by survival in his personal representative, or as conferring it upon the personal

representative upon the death of the person injured. It is not important here to determine which of these views is the correct one. In either case the right to redress arises from a wrongful act that violated the injured person's rights, and the right of the personal representative to sue thus comes through the person injured. The plain intent of our law is to give to the personal representative a right to sue for the wrong done to the person injured that caused his death. This is the construction put upon this legislation by this court from the beginning. *Soule v. New York & N. H. R. Co.* 24 Conn. 575; *Murphy v. New York & N. H. R. Co.* 29 Conn. 496; *Murphy v. New York & N. H. R. Co.* 30 Conn. 184; *Goodsell v. Hartford & N. H. R. Co.* 33 Conn. 51; *Andrews v. Hartford & N. H. R. Co.* 34 Conn. 57; *McElligott v. Randolph*, 61 Conn. 157, 22 Atl. 1094; *Budd v. Meriden Electric R. Co.* 69 Conn. 272, 37 Atl. 683. This right is given, whether death follows the wrongful act instantaneously or otherwise, by the express language of the statute. The real cause of action arises from the wrongful act. Death is but the effect or consequence of the act. When that event ensues the effects of the act are, legally speaking, complete. Under the statute, it makes no difference, as to the liability of the wrongdoer, whether the complete effect of his act instantly follows the act, or follows it after some short interval of time. This was the meaning of the act, we think, even before its phraseology was changed in 1875. See the headnote in the case of *Murphy v. New York & N. H. R. Co.* 30 Conn. 184, and the reasoning of the court in that case. But, however this may be, it is certain that since 1875 the remedy is given to the personal representative even in cases where death is instantaneous. The cases cited in the defendant's brief, from Massachusetts, where it is held that in cases of instantaneous death the cause of action does not survive, have no bearing upon the construction of our statute, as shown by Ellsworth, J., in *Murphy v. New York & N. H. R. Co.* 30 Conn. 184.

Our conclusion is that in the present case the trial court erred in holding that, because the death of Davis was instantaneous, the plaintiff was entitled to nominal damages only, and for that error the judgment must be set aside. This being so, the question arises whether there should be a new trial of the entire case, or whether it should be limited to the assessment of damages only. This question is complicated by the fact that the trial court has attempted, conditionally, to assess substantial damages. Its language is, "If, upon the facts, substantial damages should be awarded, I find the damages should be assessed at \$5,000, which I so assess." If such hypothetical and conditional assessment did not appear in the finding, it is clear that the new trial should be confined to a mere ascertainment of the *quantum* of substantial damages. The only error complained of on this appeal is that the court, on the facts found, gave nominal instead of substantial damages. No error is claimed

as to that part of the finding that establishes the liability of the defendant for causing the death of Davis. The error complained of and found affects the question of damages alone, and can be corrected without disturbing that part of the finding about which no complaint is made. If, therefore, the finding had been silent as to substantial damages, the new trial should be limited to an assessment of the *quantum* of damages merely; but, as the finding is not silent upon this subject, the question arises as to the effect that should be given to such conditional assessment. Is it binding and conclusive upon the parties in this case, so that a new trial, even as to the *quantum* of damages, ought not to be granted? We think not. All courts are required to cause the facts upon which they found their final judgments to appear on the record. Gen. Stat. § 1111. Such facts are adjudicated facts, found under the responsibility of the exercise of judicial duty, and forming the basis of the judgment rendered. Facts found upon which the judgment is not based, which are in no way necessary to it, need not appear on the record, and when placed there form properly no part of it. They are not facts adjudicated by the court, and the validity of the judgment rendered is in no way affected by their presence or absence from the record. In this case the judge was under no duty to assess the *quantum* of damages to which the plaintiff was entitled contingently upon a view of the law which the trial court held not to be law. In the conclusion of law reached by the court the assessment of other than nominal damages became entirely immaterial. The conditional and hypothetical finding as to damages is the expression of the opinion of the judge upon an immaterial matter, and not an adjudication by the court upon a matter upon which its judgment was founded. *Watson v. New Milford Water Co.* 71 Conn. 450, 42 Atl. 265. Then, again, if a judge commits some error of law affecting the finding of an unnecessary and immaterial fact, it is difficult to see how the party in whose favor judgment is rendered can have the error corrected; and, if he cannot, he ought not to be in any way injuriously bound by the finding of such fact. Findings of the kind here in question are often made by committees and also by courts, upon a reservation for advice; but in such cases the parties likely to be adversely affected by the finding are in a position to protect themselves against errors which may affect such finding. It is probably true, too, that findings have been made in this way in cases where, as in the present one, final judgment was rendered by the trial court; but, if so, no question appears to have been made in this court as to the effect of the conditional finding upon a new trial. We think that the interests of justice will be best subserved by holding in this case that the finding as to substantial damages is not binding on the parties, and that such damages must be assessed upon the new trial.

As a new trial must be granted for the limited purpose of ascertaining the *quantum*
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of damages, the question would arise whether this makes it necessary to consider the questions raised in the bill of exceptions were it not that substantially the same questions are presented upon the face of the finding.

Under the statute it is the duty of this court to consider and express an opinion on those questions, only in cases (1) where a new trial is advised, and (2) where upon that trial those questions would arise again. If the new trial is limited to the ascertainment of the *quantum* of damages, the questions presented by the bill of exceptions will not arise upon such trial, and therefore it would be unnecessary to consider them if they appeared upon the record only by means of such bill; but in fact substantially the same questions presented in the bill of exceptions appear upon the record in the finding of the trial court. That court has found all the facts on which its judgment is based, as well as the various claims of the defendant that such facts support a judgment for nominal damages only, even if the fact of instantaneous death is in law an immaterial one. The finding thus practically makes it necessary to pass upon the validity of the conclusion of negligence reached by the trial court from the facts found; for if that conclusion is not, as matter of law, warranted by those facts, then the plaintiff was not injured by the judgment for nominal damages and no new trial should be granted for any purpose.

The finding sets forth the facts proved in the case at great length. Many of them relate to certain duties of the defendant and the Electric Light Company, claimed to be due from each to the other, or to duties which the defendant claimed the other company owed to Davis, and consequently many of the facts found have little or no bearing upon the issues in this case, or upon the conclusion as to negligence reached by the trial court.

The important question in the case was, whether the defendant, when it undertook to cut and did cut the wires, under the circumstances set forth in the finding, was by law charged with a duty towards Davis, which duty, in doing as it did, it violated and thus caused his death.

We think the facts found, which have a material bearing upon this question, abundantly support the conclusion that the defendant did owe a duty to Davis, and that its violation of that duty caused his death. A conclusion of this kind as to negligent conduct is not reviewable, unless it is palpably and manifestly unsupported by the facts found, and that is not the case here; indeed it is difficult to see how any other conclusion could have been reached. There is no error in law apparent on the record which vitiates the result reached upon this point.

The assumption that the cutting of the wires was the cause of the death, although it operated through the consequent crossing of other electric wires, is clearly right.

The claims as to the conflicting rights of

the two companies are immaterial, and the other claims made in the case, except the claim of variance, are either immaterial or concluded by the finding of negligence. The complaint is certainly open to the objection that it alleges an intentional wrong, and it may be, as claimed upon the trial, that it is defective in other respects, such as the statement of the precise cause of the accident. If it is to be regarded as alleging a negligent act, merely, it fails to expressly allege the absence of contributory negligence on the part of the intestate. But these matters cannot now be of any avail to the defendant. The defendant did not demur to the complaint, but suffered a default; and upon that default it gave notice that it would deny that it had either negligently or wilfully injured the intestate, and that it would offer evidence of contributory negligence. Upon the hearing in damages, which under our practice is, for certain purposes, a trial of the

entire case, the plaintiff and defendant offered all the evidence they chose to offer upon all these matters. Both parties all the way through treated the complaint as one for negligence only and no claim was made that it was anything other than a complaint for negligence. Under these circumstances, and assuming, without deciding, that the complaint is defective, the claimed variance between it and the finding cannot now avail the defendant. The objections urged on the ground of variance between the complaint and finding come too late. For these reasons there should be no new trial upon the question of negligence.

The judgment of the court below is set aside, and a new trial is granted for the purpose of ascertaining and assessing the quantum of damages only.

The other Judges concur.

No further opinion after reargument.

ILLINOIS SUPREME COURT.

City of CHICAGO, *Appt.*,
v.

Lorin C. COLLINS, Jr., *et al.*

(175 Ill. 445.)

1. **Equity has jurisdiction of a suit by** a large number of taxpayers to enjoin a municipality from enforcing a void ordinance imposing a tax on private vehicles which would affect thousands of persons, although a remedy at law might exist by suit to recover back the tax after paying it.
2. **Power to regulate the use of streets** does not authorize the exaction of a license fee for their use by private vehicles.
3. **Invalid double taxation** is effected by imposing a license tax for the benefit of the highway fund upon vehicles for which an ad valorem tax has already been paid equal to that assessed upon other personal property in the city.

(October 24, 1898.)

A PPEAL by defendant from a decree of the Circuit Court for Cook County enjoining it from proceeding to enforce an ordinance requiring the payment of license fees on pleasure vehicles. *Affirmed.*

Statement by **Phillips, J.:**

The appellees, three hundred and seventy-three in number, residents and taxpayers of the city of Chicago, suing in behalf of themselves and all others similarly situated, filed a bill to enjoin the city from enforcing an ordinance providing that all vehicles used upon the streets of the city, including those for private use, for pleasure, etc., should pay an annual license fee, and that any per-

son using any vehicle without first having obtained a license therefor, or failing to have said vehicle properly tagged, so that it would appear the license had been paid, should, on conviction, be fined a sum of not less than \$10 nor more than \$50 for each offense. The ordinance requires wagons, carriages, coaches, buggies, bicycles, and all other wheeled vehicles propelled by horse power or by the rider shall be so licensed. The ordinance also provides that all money received under or collected from the operation and enforcement of the ordinance should constitute a separate and distinct fund, to be known as the "wheel-tax fund." The sole object and purpose for which said wheel-tax fund might be disbursed should be for repairing and keeping in good condition the streets of the city, and should, upon the recommendation of the council, be distributed in the thirty-four wards of the city of Chicago. At the time of the filing of the bill this ordinance was in full force and effect. It will be seen from an examination of such ordinance that it imposes a license fee or tax on all vehicles used on the streets of Chicago—even those in private use, and not for let or hire. All of the appellees are owners of bicycles, and many of them of other wheeled vehicles propelled by horses. Three hundred thousand bicycles and carriages, in private use only, are affected by the ordinance. The appellees use their bicycles, not for the purpose of traffic, nor for carrying merchandise or passengers for hire, upon the streets of Chicago, but solely for their private use, and as a means of locomotion from place to place, not letting or hiring either said bicycles or wheeled vehicles to any person or persons whomsoever; and 300,000 other vehicles in the city of Chicago, all of which are subjected to the license tax imposed by the ordinance, are similarly

NOTE.—As to license fee for use of streets by vehicles, see *Tomlinson v. Indianapolis* (Ind.) 86 L. R. A. 413, and *note*.
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used. All the personal property of the appellees owned by them on May 1, 1897, subject to taxation, has been listed and assessed for taxation; and, inasmuch as the law is uniform, it is reasonable to conclude that all other personal property, including the 300,000 other vehicles affected by the ordinance, has been similarly listed and assessed. The fiscal year of the city of Chicago commenced on January 1, 1897, and long prior to the enactment of the ordinance in question the city of Chicago had passed the annual appropriation bill provided for by § 2 of article 7 of the general act relative to cities and villages, providing that within the first quarter of the fiscal year such appropriation bill shall be passed, by which the corporate authorities may appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation, and in such ordinance shall specify the objects and purposes for which such appropriations are made, and the amount appropriated for each object; and no further appropriation shall be made at any time within such fiscal year without the sanction of the majority of the legal voters of the municipality. The bicycles owned by the appellees range in value from \$5 to \$1,500, and the value of the other wheeled vehicles from \$25 to \$5,000, and it is not denied by the answer that every day the appellees use one or more of their vehicles; and that, inasmuch as they are confined during the working hours of the day very closely to their places of business, it is needful for their health and mental and bodily vigor that they take exercise in the streets, boulevards, and parks of the city; that many thousands of people in the city of Chicago are similarly situated; and that, unless they submit to the exaction of the illegal ordinance, they will be debarred of the privilege of so using the streets, and will be greatly injured in their physical health and enjoyment. It is contended that the ordinance is void, because the city has no power to require a license for private vehicles used on the streets of the city, nor to impose a tax by way of license; that a tax so imposed on vehicles, on account of their different values, would not be uniform; that great injury would result because of injury to health and because of interference with the right of complainants to use the streets and consequent injury to business by the prevention of free locomotion from place to place, and by the citizens being harassed by arrests, etc. The bill prayed for an injunction perpetually enjoining the enforcement of the ordinance. The answer averred the right to enact and enforce the ordinance, and asserted complainants had a remedy at law if any existed. The cause was heard on a stipulation as to facts which embraced the facts as averred in complainants' bill. The stipulation showed the streets at night are full of passing vehicles; that the bicycle is almost noiseless, and chances of accident to persons using the streets have greatly increased because of its use; that the city has been obliged to enact

rules regulating the use of the streets because of the changed conditions; that prior to the passage of this ordinance the city was obliged to impose rules requiring bicycles to carry lights after dark, limiting their speed, regulating the meeting and passing of other vehicles and persons, and otherwise regulating the use of the streets; that many vehicles, especially those used for pleasure, are now fitted with rubber tires, and move with but slight noise, so that persons using the streets have little warning of their approach.

Messrs. Charles S. Thornton and Granville W. Browning and Miss Cora B. Hirtzel for appellant.

Messrs. Collins & Fletcher, for appellees:

The circuit court had jurisdiction.

Pom. Eq. Jur. 2d ed. §§ 243, 245; *Poyer v. Des Plaines*, 123 Ill. 117, 13 N. E. 819; *Copper v. Clerk*, 3 P. Wms. 155; *Beach, Modern Eq. Jur.* § 292; *Allwood v. Cowen*, 111 Ill. 481; *Baldwin v. Shine*, 84 Ky. 510, 2 S. W. 104; *Chicago v. Ferris Wheel Co.* 60 Ill. App. 384; *United States v. Western U. Tele. Co.* 160 U. S. 53, 40 L. ed. 337, 16 Sup. Ct. Rep. 210; *Davis v. Fasig*, 128 Ind. 271, 27 N. E. 726; *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *Rushville v. Rushville Natural Gas Co.* 132 Ind. 575, 15 L. R. A. 321, 28 N. E. 853; *Livingston v. Paducah*, 80 Ky. 657; *Covington v. Woods*, 98 Ky. 344, 33 S. W. 84; *Deems v. Baltimore*, 80 Md. 164, 26 L. R. A. 541, 30 Atl. 649; *Wood v. Brooklyn*, 14 Barb. 425; *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323, 32 S. W. 649; *Beach, Inj.* § 1290; *Clee v. Sanders*, 74 Mich. 692, 52 N. W. 154; *High, Inj.* §§ 1236, 1243, 1247.

Even if the ordinance imposed a license, and not a tax, as claimed by appellant, it is invalid because unwarranted by the statute.

13 Am. & Eng. Enc. Law, p. 530; *Cairo v. Bross*, 101 Ill. 478; *Emmons v. Lewistown*, 132 Ill. 380, 8 L. R. A. 328, 24 N. E. 58; *St. Louis v. Bell Teleph. Co.* 96 Mo. 627, 2 L. R. A. 278, 10 S. W. 197; *Twining v. Elgin*, 38 Ill. App. 356; *Faricell v. Chicago*, 71 Ill. 269; *Chicago v. Phoenix Ins. Co.* 126 Ill. 276, 18 N. E. 668; *Joyce v. East St. Louis*, 77 Ill. 156; *Burlington v. Bumgardner*, 42 Iowa, 674; *Covington v. Woods*, 98 Ky. 344, 33 S. W. 84; Ky. Stat. § 3094; *Livingston v. Paducah*, 80 Ky. 657; *Brooklyn v. Nodine*, 26 Hun, 512; *Millerstown v. Bell*, 123 Pa. 151, 16 Atl. 612; *Mt. Oliver v. Hazelbart*, 26 Pittsb. L. J. N. S. 400; 1 *Pepper & L. Digest*, Pa. Stat. p. 489, § 93; *Reading v. Bitting*, 167 Pa. 21, 31 Atl. 359; *Davis v. Petrinovich*, 112 Ala. 654, 36 L. R. A. 615, 21 So. 344; *St. Louis v. Grone*, 46 Mo. 574; 4 Am. & Eng. Enc. Law, p. 31; *New Orleans v. Great Southern Teleph. & Tele. Co.* 37 La. Ann. 571; 18 Am. & Eng. Enc. Law, p. 740.

The ordinance is a tax, and is invalid because it is not uniform and constitutes double taxation.

Hurd, Rev. Stat. chap. 24, §§ 88-90;

Tiedeman, Pol. Power, § 381; Cooley, Taxn. § 596; *Smith v. McDowell*, *ex rel. Hall*, 148 Ill. 63, 22 L. R. A. 393, 35 N. E. 141; Elliott, Roads & Streets, 69; Angell, Highways, § 2; 4 Am. & Eng. Enc. Law, 2d ed. p. 31; Ill. Const. art. 10, §§ 1, 9; *Johnston v. Maccon*, 62 Ga. 645; *Livingston v. Paducah*, 80 Ky. 657.

The ordinance is void because unreasonable and oppressive, and violative of constitutional rights.

Dill. Mun. Corp. 4th ed. § 319; 4 Am. & Eng. Enc. Law, 2d ed. note 4, pp. 31, 1002; U. S. Const. Amend. arts. 5, 14; Ill. Const. art. 2, § 2; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 758, 28 L. ed. 591, 4 Sup. Ct. Rep. 652; 17 Am. & Eng. Enc. Law, p. 253; *Farwell v. Chicago*, 71 Ill. 273; *St. Louis v. Grone*, 46 Mo. 574; *Davis v. Petrinovich*, 112 Ala. 654, 36 L. R. A. 615, 21 So. 344.

Phillips, J., delivered the opinion of the court:

Two questions are presented by this record: Has a court of equity jurisdiction to enjoin the enforcement of an ordinance of a city? And has the city, under the express or implied powers conferred on it by the legislature, authority to adopt this ordinance? The enforcement of a void city ordinance may be enjoined in order to prevent a multiplicity of suits, at the instance of any person whose interests are impaired by it. A court of equity, however, cannot determine whether the ordinance has been violated, but merely whether it is void. Where such court is resorted to on the ground of prevention of a multiplicity of suits, there must be a right affecting many persons. *Poyer v. Des Plaines*, 123 Ill. 111, 13 N. E. 819; *Chicago, B. & Q. R. Co. v. Ottawa*, 148 Ill. 397, 36 N. E. 85. Pomeroy, in his work on Equity Jurisprudence, vol. 1, § 245, in treating of the jurisdiction of courts of equity on that ground, divides them into four classes, and in the third and fourth classes states the principle: "3. Where a number of persons have separate and individual claims and rights of action against the same party, A, but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter might be settled in a single suit brought by all these persons uniting as coplaintiffs, or one of the persons suing on behalf of the others, or even by one person suing for himself alone. The case of several owners of distinct parcels of land upon which the same illegal assessment or tax has been laid is an example of this class. 4. Where the same party, A, has, or claims to have, some common right against a number of persons, the establishment of which would regularly require a separate action brought by him against each of these persons, or brought by each of them against him, and instead thereof he might procure the whole to be determined in one suit, brought by himself against all the adverse claimants as codefendants." It is familiar that on this ground taxpayers of a town, city, or county, or other tax-

ing district, may file a bill to restrain or set aside an illegal general tax, whether personal or made a lien upon their respective property. *Allwood v. Cowen*, 111 Ill. 431; *Kimball v. Merchants' Sav. Loan & T. Co.* 89 Ill. 611; *Searing v. Heavysides*, 106 Ill. 85.

The claim that the failure of complainants to pay this tax, and resort to legal actions to recover the amount, precludes equitable interference, cannot be sustained. Many cases undoubtedly exist where equity will interfere to protect an invasion of property rights where the remedy at law is not entirely adequate; and where peculiar difficulties intervene the jurisdiction will be upheld. In the present case three hundred and seventy-three complainants have filed their bill for relief. Their grievance is precisely the same, and arises from the same cause. The various parties aggrieved, although not jointly interested, are allowed to sue together for the express purpose of avoiding a multiplicity of suits, and to have the controversy settled in one hearing. The municipality is charged with a public trust, and where it is about to commit an act clearly illegal, the necessary effect of which will be to impose heavy burdens upon the property of citizens and taxpayers, it becomes amenable to the jurisdiction of equity for a breach of trust, and such court may interfere by injunction for the prevention of such act. Where the controversy is between two parties only, or where but few persons are involved, then, unless complainant's rights have been established at law, a court of equity will not interfere. *Poyer v. Des Plaines*, 123 Ill. 111, 13 N. E. 819; *Chicago, B. & Q. R. Co. v. Ottawa*, 148 Ill. 397, 36 N. E. 85; *Yates v. Batavia*, 79 Ill. 500. No inflexible rule can be laid down for the determination of the question as to whether jurisdiction exists in a court of equity. In general, an adequate legal remedy will suffice to make such courts hesitate in acting. But inadequacy in granting relief for the determination of a right may arise from causes other than mere forms of remedy, and it will not do to sacrifice justice on the mere ground of the form of the remedy, where convincing facts show that adequate relief can best be had in the forum of a court of equity. In this case three hundred and seventy-three complainants present facts showing that between 200,000 and 300,000 citizens and taxpayers are affected by the provisions of the ordinance, and, if compelled to pay the illegal tax, hardship and injustice will result to an enormous number of persons. If they pay the tax, and are compelled to resort to a court of law to recover back the amount so paid, the business of the courts will be obstructed by the number of actions of the same character. Long delay will ensue, and the costs to the persons so paying such illegal tax or license fee will be greater than the amount to be recovered. Under any circumstance, if the license exacted is illegal, it would amount to oppression and injustice to a large part of the population of the city

of Chicago, and this bill presents a case for the jurisdiction of a court of equity.

The contention of appellant is that the ordinance was lawfully passed under the powers delegated to the city by the general incorporation act, under which it was organized. That act, by § 1 of art. 5, provides the common council shall have the following, among other, powers: Clause 4: "To fix the amount, terms, and manner of issuing and revoking licenses." Clause 7: "To lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, public grounds, and vacate the same." Clause 8: "To plant trees upon the same." Clause 9: "To regulate the use of the same." Clause 10: "To prevent and remove encroachments or obstructions upon the same." Clause 11: "To provide for the lighting of the same." Clause 12: "To provide for the cleansing of the same." Clause 92: "To prevent and regulate the rolling of hoops, playing of ball, flying of kites, or any other amusement or practice having a tendency to annoy persons passing in the streets or on the sidewalks, or to frighten teams or persons." Clause 75: "To declare what shall be a nuisance, and to abate the same, and to impose fines upon parties who may create, continue, or suffer nuisances to exist." Clause 78: "To do all acts, make all regulations, which may be necessary or expedient for the promotion of health or the suppression of disease." Clause 66: "To regulate the police of the city, and pass and enforce all necessary police ordinances." Clause 96: "To pass all ordinances, rules, and make all regulations proper or necessary to carry into effect the powers granted to cities or villages, with such fines or penalties as the city council or board of trustees shall deem proper: provided, no fine or penalty shall exceed \$200 and no imprisonment shall exceed six months for one offense." The principal contention of appellant is that under clause 9 of § 1 of the act, which grants power to the common council to regulate the use of the streets, the implied power is conferred to require a license to use the streets, as it has been frequently held by this court that, the power to regulate being expressly granted, the power to license as a means of regulation was clearly conferred. *Chicago Packing & Provision Co. v. Chicago*, 88 Ill. 221, 30 Am. Rep. 545; *Kinsley v. Chicago*, 124 Ill. 359, 16 N. E. 260; *Banta v. Chicago*, 172 Ill. 204, 40 L. R. A. 611, 50 N. E. 233. The streets and alleys of a city are held in trust by the municipality for the use of the public, for purposes of travel thereon, and as a means of access to, and egress from, buildings abutting thereon or lots adjacent thereto. The right to travel on and along the streets of a city belongs to the general public, and does not belong to its denizens alone. The right to travel being in the general public everywhere, all persons have a right to pass along and use the streets and alleys of a city in all their parts, the full width and length thereof. The municipality, which is a mere trustee of the public, 49 L. R. A.

and holds the streets and alleys in trust for that public, cannot deny the right of the public to use the streets and alleys. It cannot assume an exclusive ownership, and deny the rights of the beneficiaries under their trust, and arrogate to itself a power greater than that of a mere trustee, and prevent the use of the streets and alleys by individual members of the public. The right of the public to use the streets is the right to use them for purposes of travel in the recognized methods in which the public highways of the state are used. Any method of travel may be adopted by individual members of the public which is an ordinary method of locomotion, or even an extraordinary method, if it is not, of itself, calculated to prevent a reasonably safe use of the street by others. If a right exists in a city council to impose a license fee, by way of tax, on every person using wheeled vehicles thereon, it may in like manner impose such license fee for such use of the streets in every other manner of locomotion or travel, and reach the man on horseback, or the pedestrian walking along the same. The right conferred on the city council by the legislature to regulate the use of the streets and alleys of the city did not contemplate a power in a trustee of a beneficiary to deprive that beneficiary of a right. The power to provide by ordinance for planting trees in streets; to prevent encroachments upon or remove obstructions from the same; to provide for lighting and cleansing them; to prevent and regulate the rolling of hoops, playing of ball, or flying of kites therein; or to prohibit any other amusement having a tendency to annoy persons,—is conferred for the purpose of keeping the streets in a condition for public use and travel. Any usual method of travel along the streets and alleys of a city cannot be declared to be a nuisance. The city council may regulate the use of the streets and alleys to the extent that it may require sidewalks exclusively reserved for use by pedestrians, and exclude certain character of loads and regulate the width of tires on vehicles used on a certain character of pavements, and provide that the rate of speed shall be much less on certain streets than on others, and otherwise regulate the use of the streets, having in view solely the welfare and safety of the public. The city may also regulate certain occupations, such as hackmen, draymen, expressmen, and the like, for such regulation is of a police character, having reference to the general welfare, as a means of preventing improper exactions and extortions; and for the same reason a license may be exacted for vehicles used in the transportation of goods and merchandise, or of passengers, or for other purposes of traffic; but such license is an occupation license, and not one for the use of the streets. The license in the latter-named case is designed to operate upon those who hold themselves out as common carriers, and a license may be exacted from such as a proper exercise of police power; but no reason exists why it should be applied to the owners of private vehicles, used

for their individual use exclusively, in their own business, or for their own pleasure, as a means of locomotion. *Farwell v. Chicago*, 71 Ill. 269; *Joyce v. East St. Louis*, 77 Ill. 156; *Collinsville v. Cole*, 78 Ill. 114; *St. Louis v. Grone*, 46 Mo. 575; *Livingston v. Paducah*, 80 Ky. 657; *Covington v. Woods*, 98 Ky. 344, 33 S. W. 84.

Anything which cannot be enjoyed without legal authority would be a mere privilege, which is generally evidenced by a license. *Cate v. State*, 3 Sneed, 120. The use of the public streets of a city is not a privilege, but a right. Tiedeman, Limitations of Police Power, p. 281, says, in distinguishing between a license and a tax: "It is therefore conclusive that the general requirement of a license for the pursuit of any business that is not dangerous to the public can only be justified as an exercise of the power of taxation or the requirement of a compensation for the enjoyment of a privilege or franchise." In *Cooley, Taxation*, p. 596, it is said: "A license is a privilege granted by the state, usually on payment of a valuable consideration, though this is not essential. To constitute a privilege, the grant must confer authority to do something which, without the grant, would be illegal; for if what is to be done under the license is open to everyone without it, the grant would be merely idle and nugatory, conferring no privilege whatever." A license therefore, implying a privilege, cannot possibly exist with reference to something which is a right, free and open to all, as is the right of the citizen to ride and drive over the streets of the city without charge and without toll, provided he does so in a reasonable manner. That such a right exists in Chicago is recognized in *Smith v. McDowell ex rel. Hall*, 148 Ill. 51, 22 L. R. A. 393, 35 N. E. 141, where it was said, relative to the streets of a city (148 Ill. 63, and 143, 35 N. E.): "The grant of power in this particular is to be construed in view of the purposes for which the municipality is invested with the control of its streets, alleys, and public grounds. The municipality in respect of its streets, is a trustee for the general public, and holds them for the use to which they are dedicated. The fundamental idea of a street is not only that it is public, but that it is public in all its parts, for free and unobstructed passage thereon by all persons desiring to use it." Section 6 of the ordinance provides: "All moneys received from or collected from the operation and enforcement of this ordinance shall make a separate and distinct fund, apart from all other moneys held or collected by the city government of the city of Chicago, and shall be known as the 'wheel-tax fund.' The sole use and purpose for which said wheel-tax fund may be disbursed or expended shall be for the repair and keeping in good condition of such streets as are under the direction of the city government proper, and shall be expended only as the commissioner of public works shall authorize, in the improvement of such public streets as he may have directed to be placed in proper condition." It is a fundamental

maxim in taxation that the same property shall not be subject to a double tax, payable by the same party, either directly or indirectly. It is only when statutes are passed which impose taxes on false or unjust principles, or operate to produce gross inequality, so that they cannot be deemed in any sense proportioned in their effect on those who are to bear the public charges, that courts can interfere, and arrest the course of litigation, by declaring such enactments void. It appears from the allegations of the bill and the stipulation of facts that the complainants are taxpayers, and were assessed for and paid an ad valorem tax equal to that assessed upon other personal property in the city. This ordinance, on its face, indicates that its purpose, in part, is to raise a special fund for the improvement of streets, and provides for the manner of its distribution, and this amounts to a double tax. The exaction imposed is a tax on specific articles of personal property, which are required by law to be, and which the bill alleges have been, assessed for general taxation at their value, and upon which taxes have been paid. To tax them again by declaring by ordinance they shall not be used until another tax is paid, levied, as in this ordinance, without regard to values, is not only double taxation, but is a violation of the principle of equality and uniformity, which is indispensable to all legal taxation. It imposes a heavier burden upon one class of taxpayers than is imposed upon others, and is violative of the principle of equality and uniformity which must underlie all valid taxation. A statute which makes any kind of property the subject of taxation, and, discriminating, imposes upon it a double burden for a single object, makes even approximate equality and uniformity impossible, because it is an arbitrary and radical departure from both. The authority to impose a tax or to exact a license must clearly appear, and must be strictly construed. If there is a doubt as to the right, it must be resolved adversely to it. In this case there is no express power given the city council to impose this license fee, and no implied power arises which gives the right. It has no power to levy a tax in this manner. In any view of the case, the city had no power to adopt this ordinance, and the injunction was properly made perpetual.

The decree of the Circuit Court of Cook County must be affirmed.

John I. WARMAN *et al.*, *Appts.*,
v.

FIRST NATIONAL BANK OF AKRON,
Ohio.

(185 Ill. 60.)

1. An affidavit to a plea sufficient to put plaintiff to proof of execution of the instru-

NOTE.—For purchase of notes and bills by banks, as distinguished from discounting, see *Nicholson v. National Bank (Ky.)* 16 L. R. A. 223, and note.

ment sued on, as provided by § 34 of the practice act, cannot be made by an agent of defendant.

2. A bank does not become a purchaser of negotiable paper by discounting it for one not its debtor at the time, and placing the amount to the credit of the holder by way of deposit.
3. The maker of a note cannot show that a bank which discounted it did not become its purchaser merely by showing that the proceeds were placed to the credit of the transferrer, but must prove by the state of accounts between the bank and the transferrer that it was not such, or had not, by the drawing of the deposit, become such, as to make the bank a purchaser.

(Magruder, J., dissents.)

(April 17, 1900.)

APPEAL by defendants from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of plaintiff in an action brought to enforce defendants' liability as makers of certain promissory notes. *Affirmed.*

The facts are stated in the opinion.

Messrs. Beach & Beach, for appellants:

The plaintiff cannot claim the protection of an innocent purchaser of the said notes for value before maturity. The bank parted with nothing of value to the payee in said notes, but merely extended additional credit to the said payee. Until it appears that said credit was used, and the bank account drawn upon or exhausted by the said payee, the bank has parted with nothing of value.

Drovers' Nat. Bank v. Blue, 110 Mich. 31, 67 N. W. 1105.

The evidence not showing the plaintiff to be a purchaser for value, the defendants, appellants here, should have been allowed to make the defense set up in their pleas upon which issue had been taken.

1 Dan. Neg. Inst. § 779b; *Dresser v. Missouri & I. R. Constr. Co.* 93 U. S. 92, 23 L. ed. 815; *Dougherty Bros. v. Central Nat. Bank*, 93 Pa. 227, 39 Am. Rep. 750; *Lancaster County Nat. Bank v. Huver*, 114 Pa. 216, 6 Atl. 141; *Mann v. Second Nat. Bank*, 30 Kan. 412, 1 Pac. 579; *Fox v. Bank of Kansas City*, 30 Kan. 444, 1 Pac. 789; *Hodson v. Eugene Glass Co.* 156 Ill. 397, 40 N. E. 971; *Kirchoff v. Goetzlin*, 30 Ill. App. 190; *Thomas v. Newton*, 2 Car. & P. 606; *Manufacturers' Nat. Bank v. Newell*, 71 Wis. 312, 37 N. W. 420; *Central Nat. Bank v. Valentine*, 18 Hun. 417.

Messrs. Paden & Gridley, for appellee:

The mere possession of a negotiable instrument, produced in evidence by the indorsee, or by the assignee where no indorsement is necessary, imports prima facie that he acquired it bona fide for full value, in the usual course of business, before maturity, and without notice of any circumstance impeaching its validity.

Dan. Neg. Inst. § 812; *Palmer v. Nassau Bank*, 78 Ill. 380.

Transferees of a negotiable instrument, 49 L. R. A.

such as a bill of exchange or promissory note, payable subsequent to its date, hold the instrument clothed with the presumption that it was negotiated for value in the usual course of business at the time of its execution, and without notice of any equities between the prior parties to the instrument.

Collins v. Gilbert, 94 U. S. 753, 24 L. ed. 170; *Story, Prom. Notes*, 4th ed. § 416; *Chitty, Bills*, 12th ed. 257; *Millis v. Barber*, 1 Mees. & W. 425; *Bank of Pittsburgh v. Neul*, 22 How. 96, 16 L. ed. 323.

Countervailing proof that the instrument was executed without consideration as between the original parties—as, for instance, that it was executed for accommodation as between them, or that the consideration, originally valid, has subsequently failed—does not impair the holder's superiority of position.

Dan. Neg. Inst. § 814.

Where the assignment is made before the maturity of the note the maker is allowed to show in defense that the execution of the note was procured by fraud or circumvention, but as respects other defenses he is required to prove that the assignee had notice of them when he received the assignment.

Walter v. Kirk, 14 Ill. 55.

Wilkin, J., delivered the opinion of the court:

This is a suit brought against appellants by appellee, indorsee of two promissory notes claimed to have been executed by appellants, payable to the Diamond Rubber Company, and by it indorsed and discounted with appellee. A plea of the general issue was filed in the court below, and with it the following affidavit:

State of Illinois, }
County of Cook. } ss.

S. I. Yoder, being first duly sworn, on oath says that he is agent of the above-named defendants in this behalf; that said defendants have a just and meritorious defense to the whole of plaintiff's demand; that he has read the foregoing plea, and knows the contents thereof, and verily believes the same to be true.

S. I. Yoder.

Subscribed and sworn to, etc.

A second plea denied the assignment by indorsement of the notes to the plaintiff before their maturity. The fourth alleged want of consideration for the execution of said notes, and knowledge thereof on the part of plaintiff at the time of their assignment to it. The fifth alleged total failure of consideration for the notes by reason of the breach of warranty of the goods sold to defendants by the payee, and knowledge of such total failure of consideration on the part of the plaintiff at the time of the alleged assignment of the said notes to it. The sixth alleged total failure of consideration for the reasons stated in the fifth plea, and that the notes sued upon were assigned to and taken possession of by the plaintiff after maturity of the same. The seventh alleged want of consideration for the notes, and that

the same were assigned to the plaintiff after their maturity. By replications, issue was taken upon each of these special pleas. On the trial the notes were introduced in evidence, over the objection of defendants, without proof of their execution; and the defendants, after showing that the notes in question were discounted by the payee of the same with the plaintiff, and that at the time of such discount the proceeds thereof were credited to the payees, attempted to introduce evidence in support of their pleas, but on objection it was excluded by the court, and exceptions taken. An instruction to the jury to find the issues for the defendants was refused, and one to find for the plaintiff and assess the damages at the sum of \$1,915.58 was given. A verdict for that amount was accordingly rendered. After overruling defendant's motion for a new trial, the court rendered judgment on the verdict. That judgment has been affirmed by the appellate court.

The amount for which the jury was directed to return a verdict was the amount due on the notes, and it is not claimed that the court erred in giving that peremptory instruction if its rulings upon the admissibility of testimony was correct. It is, however, insisted that error was committed in that regard, first, in overruling defendant's objection to the introduction of the notes in evidence without proof of their execution. This assignment of error is based upon the assumption that the affidavit attached to the plea of the general issue was sufficient to bring it within the provisions of paragraph 34 of the practice act. Rev. Stat. p. 779. It will be seen by reference to that statute that the affidavit necessary to put a party upon proof of the execution of an instrument sued on must, if to a plea, be the affidavit of the defendant. Here neither of the defendants to the action swears to the plea. They are the parties charged with the execution of the notes upon which the action is brought, and they alone could, within the meaning of the statute, make affidavit that they did not so execute them. They could not do so by an agent. *Stevenson v. Farnsworth*, 7 Ill. 715; *Warren v. Chambers*, 12 Ill. 124; *Davis v. Searritt*, 17 Ill. 202. But counsel insists the affidavit is sufficient under the proviso to the foregoing section. This position is also untenable. Under the proviso the one making the affidavit must still be a party to the suit. "The party making such denial" is fixed by that part of the section preceding the proviso. There is nothing, either in the body of the statute or proviso, authorizing a third party—that is, one not a party plaintiff or defendant—to deny the execution of an instrument upon which an action is brought.

The second and only other ground of reversal urged is the refusal of the trial court to admit evidence offered by the defendants in support of their special pleas. This assignment of error is based solely upon the proposition that under the evidence produced upon the trial the plaintiff was not such an innocent holder of the notes as to

be entitled to protection against defenses existing against the payee. The president of the bank, being called by the defense, testified that the \$1,500 note was discounted July 3 and the \$400 note August 19, and was then asked the question, "Will you tell just what was done when you say they were discounted?" And he answered, "I have the duplicate deposit tickets here, showing the credit to the parties for whom we discounted them of the proceeds upon those days." Upon this evidence counsel lay down the legal proposition, "The plaintiff cannot claim the protection of an innocent purchaser of said notes for value before maturity." And they say: "The bank parted with nothing of value to the payee in said notes, but merely extended additional credit to the said payee. Until it appears that said credit was used, and the bank account drawn upon or exhausted by the said payee, the bank has parted with nothing of value." The appellate court declined to pass upon the point, on the ground that it was not raised by the pleas filed. The question is, however, treated by both parties as before us, and, while we think there is force in the position taken by the appellate court, we shall pass upon it as properly raised. We think the authorities fully sustain the proposition that a bank does not become a purchaser of negotiable paper by discounting the same for one not indebted to it at the time, and merely placing the amount which the assignor is to receive to his credit by way of deposit. It is well understood that by a general deposit in bank the relation of debtor and creditor merely is created between the bank and depositor; and if in this case the bank only became such a debtor to the rubber company, and if that indebtedness continued to exist at the time of the trial, it could have protected itself, if the defenses set up prevailed against the notes, by refusing to pay the deposit, and therefore could not claim the protection of being an innocent holder for value, or if it had paid any part of the deposit it would be entitled to protection *pro tanto*. *Drovers' Nat. Bank v. Blue*, 110 Mich. 31, 67 N. W. 1105; *Central Nat. Bank v. Valentine*, 18 Hun, 417; *Fox v. Kansas City Bank*, 30 Kan. 441, 1 Pac. 789; *Mann v. Second Nat. Bank*, 30 Kan. 412, 1 Pac. 579; *Manufacturers' Nat. Bank v. Newell*, 71 Wis. 309, 37 N. W. 420; *Dougherty v. Central Nat. Bank*, 93 Pa. 227, 39 Am. Rep. 750; *Lancaster County Nat. Bank v. Huver*, 114 Pa. 216, 6 Atl. 141.

The more difficult question here is, Did the defendants prove the plaintiff to be within the rule announced by merely showing that no money was paid for the notes at the time of the discount, or were they not bound to go further, and prove the state of the account between the rubber company and the bank? The theory of appellants is that the proof offered by them showed prima facie that the plaintiff did not become a purchaser of the notes by the discount, and that the plaintiff could only claim the benefit of an existing indebtedness by the rubber company, or the subsequent payment of the deposit,

by proving it. The position is untenable. The rule deducible from the authorities on which the defense is based is accurately stated in 4 Am. & Eng. Enc. Law, 2d ed. p. 298, as follows: "Where a bank discounts paper for a depositor who is not in its debt, and gives him credit upon its books for the proceeds of such paper, it is not a bona fide holder for value, so as to be protected against infirmities in the paper, unless, in addition to the mere fact of crediting the depositor with the proceeds of the paper, some other and valuable consideration passes. Such a transaction simply creates the relation of debtor and creditor between the bank and the depositor, and so long as that relation continues, and the deposit is not drawn out, the bank is held subject to the equities of prior parties even though the paper has been taken before maturity and without notice." The plaintiff was in possession of the notes indorsed by the payee, and introduced them in evidence on the trial. That was sufficient prima facie proof that it acquired them bona fide for value, in the usual course of business, before maturity, and without notice of any fact or circumstance impeaching their validity, and that it was the owner of them, and entitled to recover the full amount due thereon against the makers. On the introduction of the notes the plaintiff, therefore, properly rested its case. *Palmer v. Nassau Bank*, 78 Ill. 380; Dan. Neg. Inst. § 812. Possession of the notes, indorsed in blank by the payee, was prima facie evidence that the bank was the proper owner of them, and nothing short of fraud—not even gross negligence, if unattended with *mala fides*—would have been sufficient to overcome the effect of that evidence, or to invalidate the title thus shown. *Collins v. Gilbert*, 94 U. S. 753, 24 L. ed. 170. Both upon principle and authority the defendants could not overcome the prima facie case thus made by merely showing that the original transaction between the plaintiff and the payee did not, of itself, amount to a purchase of the notes.

It will be seen that one of the requisites of the rule as quoted above is that the depositor is not in the bank's debt at the time of the discount, and proof of that fact would therefore be necessary to bring a defense within its provisions. The defense here insisted upon has received careful consideration by the supreme court of the state of Kansas in the several cases above cited, and in *Mann v. Second Nat. Bank*, 34 Kan. 754, 10 Pac. 150, it was held that mere evidence that, at the time when such an instrument was discounted by a bank, the bank merely gave credit for the amount of the instrument to the person selling the same, who had an account with the bank, without showing the state of the account at that or at any other time, will not, of itself and alone, prove that the bank was not a purchaser for value,—the court saying: "If we should assume that the bank did not pay the value of the note at the time it was discounted, but simply gave a credit to the Champion Machine Company therefor, still there would be nothing

to show whether at that time the bank owed the Champion Machine Company or the machine company owed the bank. The machine company, for anything that appears in the case, may have owed the bank more than \$143 at the time the note was discounted, and, if it did, the bank would have obtained the note unaffected by the equities existing between the antecedent parties of which it had no notice (*Draper v. Cowles*, 27 Kan. 484); and the Champion Machine Company may have continued to owe the bank ever since." We think the defendants could not claim that the bank did not become a purchaser of the notes sued upon without proving, not only that it took the notes upon a discount, crediting the payee with the amount as a deposit, but what the state of the account between the bank and the payee was at the time of the discount, and that the amount due on that deposit, if any, had not been drawn out prior to the trial; there being no claim that notice of the defenses set up in the special pleas came to the plaintiff prior to the trial.

We do not think it can be said that the state of the account between the bank and the payee of the notes was a fact so peculiarly within the knowledge of the plaintiff that the burden of proof should be cast upon it. The defendants, having the president of the bank on the witness stand, could have as readily proved by him the state of the account as they could just what was done at the time the bank got the notes, by asking him to state the fact; or, if it was necessary to prove the fact by the bank books, they had ample power by the process of the court to compel the production of them in court.

The judgment of the Appellate Court will be affirmed.

Magruder, J., dissenting:

I concur in the views expressed in this opinion, except the holding that appellants were obliged to prove that the amount of the credit had not been drawn out before the trial. I cannot subscribe to the correctness of this ruling, and therefore do not agree to the conclusion reached. It is claimed by the appellee that it was the duty of the appellants in this case, not merely to prove that credit was given to the Diamond Rubber Company by the appellee when the notes were discounted, but to go further and prove that the amount of the discount, as credited, was not drawn out by the rubber company before the beginning of this suit, because, when it was drawn out before notice to the bank of the defense, the bank had paid a valuable consideration. Under the circumstances of this case such proof, if it could be made, should have come from the appellee. The officers of the appellee bank could more easily prove whether or not the amount had been drawn out by the rubber company than the appellants. The books of the bank were within the control of the bank itself, and not within the control of the appellants. It was difficult for the appellants to prove a negative. It is true that, when the appellee introduced its notes upon the trial below, its

mere possession of them imported prima facie that the bank had acquired the notes in good faith, for full value, in the usual course of business, before maturity, and without notice of any circumstances impeaching their validity, and that the bank was the owner of the notes and entitled to recover the full amount due thereon. The production of the notes prima facie established the bank's case, and it was entitled to rest after such production. *Dan. Neg. Inst.* § 812; *Pulmer v. Nassau Bank*, 78 Ill. 380. When notes are thus produced, nothing short of fraud, not even gross negligence, if unattended with bad faith, is sufficient to avert the effect of the evidence or to invalidate the title of the holder. *Collins v. Gilbert*, 94 U. S. 753, 24 L. ed. 170; *Hodson v. Eugene Glass Co.* 156 Ill. 397, 40 N. E. 971. Where the maker of the note shows that it was obtained from him by fraud, the burden of proof is shifted from him to the holder, and the latter must show that he acquired it in good faith, for value, in the usual course of business, and in such a way as not to create a presumption of knowledge of its invalidity. *Hodson v. Eugene Glass Co.* 156 Ill. 397, 40 N. E. 971.

But, in the case at bar, although the defendants did not offer to prove fraud in the execution of the notes, yet they did prove, under the issue whether or not the appellee was purchaser of the notes in good faith, before maturity, for value, that the appellee actually paid no money for the notes, but merely gave the rubber company a credit upon its books for the amount for which the notes were discounted. When the defendants introduced this proof, it was natural to

assume that the credit given to the rubber company on account of the notes had not been paid by the bank when this action was commenced. *Manufacturers' Nat. Bank v. Newell*, 71 Wis. 315, 37 N. W. 420. After the proof thus made by the appellants, the bank could not be regarded as a bona fide purchaser for value of the notes by reason of the mere discount and credit. The defense which it was sought to prove was substantial, and went to the merits, and was sufficient to bar any recovery under the circumstances. It was therefore error for the court below to refuse to receive evidence in support of the pleas which set up a failure of consideration. It was within the discretion of the court to require from the appellee evidence, if such evidence existed, that the amount of the credit had been drawn out prior to the maturity of the notes, or prior to the beginning of the present suit, before the introduction of evidence by the appellants impeaching the consideration of the notes. If appellee had produced such proof, the action of the court here complained of would have been correct. Or, the court might have permitted the appellants to introduce their proof as to the failure of the consideration, and then allow the appellee upon rebuttal to show, if it could, that the amount of the credit had been drawn out of the bank. But the court should have pursued the one course or the other. *Dravers' Nat. Bank v. Blue*, 110 Mich. 31, 67 N. W. 1105. For the error thus indicated, I think that the judgments of the appellate court and circuit court should be reversed, and that the cause should be remanded to the circuit court for further proceedings.

KENTUCKY COURT OF APPEALS.

George M. NEVELS *et al.*, *Appts.*,
v.
KENTUCKY LUMBER COMPANY.

(.....Ky.....)

A cotenant cannot, without authority, sell the right to cut logs from land owned in common, so that the purchaser can convey a good title to them; and therefore the latter cannot enforce a contract by which a third person has agreed to purchase the logs after they are cut.

(May 24, 1900.)

APPEAL by plaintiff from a judgment of the Circuit Court for Pulaski County in favor of defendant in an action brought to

NOTE.—As to sale of property by cotenant as a conversion, see note to *Waller v. Bowling* (N. C.) 12 L. R. A. 261.

For sale of timber by tenant in common, see also *Benedict v. Torrent* (Mich.) 11 L. R. A. 278.
49 L. R. A.

recover damages for breach of contract to purchase logs. *Affirmed.*

The facts are stated in the opinion.

Mr. G. W. Shadoan for appellants.

Mr. O. H. Waddle for appellee.

Hobson, J., delivered the opinion of the court:

Appellants made a contract with appellee to get out for it 500 poplar logs, to be delivered in Big South Fork, or Little South Fork, or Big Sinking Creek, in Pulaski county, by the 1st day of September, 1893, and to be there received and measured by appellee. It was a part of the contract that when as many as 100 logs were ready appellee was to receive and pay for them. Appellants got out a number of logs, and called on appellee to receive them, but when it was about to do so it received notice that the logs were not the property of appellants, and declined to receive them. This suit was brought by appellants to recover damages of appellee for its failure to receive the logs. The proof

shows that the logs were cut from a tract of 300 acres of land which was owned by five or six parties as tenants in common; that the owner of an undivided one-fourth of the land sold the poplar timber on the land to appellants without authority from the other owners; that the owners of another fourth of the land notified appellee not to receive the logs; and that the owner of the other half of the land, who was a nonresident of the state, was ignorant of the cutting of the timber. If appellants had not good title to the logs, or one which would have protected appellee in receiving and using them, it had a right to decline to receive them. Their only right to the logs was by reason of their contract with one of the joint owners, who clearly had no right or authority to sell anything but his one-fourth interest in the property. Appellants, therefore, by their contract with him, only acquired one fourth of the title to the timber. In 11 Am. & Eng. Enc. Law, p. 1090, the rule is thus stated: "Joint tenants or tenants in common may, of course, join in a conveyance of the common property, but, one cotenant not being permitted to do any act which will prejudice the rights of another, a sale made by one will not divest another of his interest in the common property, unless he has been duly authorized to make such sale, or unless the sale was duly ratified by the other tenants. But such a sale is not, as a general rule, void; the purchaser's title attaching to such interest, and only such, as the tenant of whom he purchased was possessed." In *Shepard v. Pettit*, 30 Minn. 119, 14 N. W. 511, the cotenant had cut logs on the joint property without the consent of the other owner. After showing that a cotenant of real estate may enjoy the beneficial use of the land according to the usual course of husbandry, the court adds: "But this right to retain, use, and appropriate the benefits of the land extends only to the products of its proper use and employment, and not to anything which is part of the land itself, and not severable in the proper use of it. He is undoubtedly liable for waste, or for destruction of what is of the realty, or for acts amounting to a destruction of part of the realty, as the severance and removal of a mill or the fixed machinery. . . . The wrongdoer can acquire no rights by his wrongful act of severing part of the realty, and so changing its character from real to personal property. Standing trees are ordinarily, at least, to be regarded, as between the cotenants, as part of the real estate, and severing and removing them without consent of other cotenants is a destruction to that extent of the realty. After the severance they are the property of the cotenants, and by a conversion of them the cotenant converting them becomes liable to his cotenants as in case of other personal property." To same effect, see *Hinson v. Hinson*, 120 N. C. 400, 27 S. E. 80. A tenant in common, by § 2332, Ky. Stat., is made liable if he commits waste. It is clear that

it is waste to cut and remove the timber off timbered land, and where this is done by a tenant in common his cotenant may, at his election, claim the property in the hands of a purchaser, or hold him liable for a conversion. *Rickey v. Brown*, 58 Mich. 435, 25 N. W. 386; *Benedict v. Torrent*, 83 Mich. 181, 11 L. R. A. 278, 47 N. W. 129; *Balletine v. Joplin*, 20 Ky. L. Rep. 1062, 48 S. W. 417. As appellants had not title to the logs which they proposed to deliver to appellee, and it would have been liable to the other owners of the land for three fourths of the value of the logs, although it had paid appellants for them, it had a right to refuse to receive them, and the court below properly instructed the jury peremptorily to find for appellee.

Judgment affirmed.

Mrs. William M. IRVINE, Appt.,

v.

James B. McCREARY.

(.....Ky.....)

An easement in an alley across the rear end of an adjacent lot is created as incident or appurtenant to a building sold by the common owner, when the alley furnishes access to a cellar under the building, as well as light and air for the rear portion of it.

(May 16, 1900.)

APPEAL by defendant from a judgment of the Circuit Court for Madison County in favor of plaintiff in a suit brought to enjoin the closing of an alley in which plaintiff claimed an easement. *Affirmed.*

The facts are stated in the opinion. *

Mr. J. Tevis Cobb, for appellant:

An easement can be granted only by grant, express or implied, or by prescription, from which a grant is presumed. It is an interest in lands by the statute of frauds, and cannot be created by parol.

Hall v. McLeod, 2 Met. (Ky.) 98, 74 Am. Dec. 400; *Talbott v. Thorn*, 91 Ky. 417, 16 S. W. 88.

Where one merely receives through his windows light, air, and ventilation, which come over his neighbor's property to reach him, he simply exercises his own rights upon his own lands; he does no harm to his neighbor, and for so exercising his rights no action will lie against him.

Mahan v. Brown, 13 Wend. 261, 28 Am. Dec. 461; *Shell v. Kcmmerer*, 13 Phila. 502.

NOTE.—For implied easements, see also *O'Brien v. Baltimore Belt R. Co.* (Md.) 13 L. R. A. 126, and *note*; *Hahn v. Baker Lodge No. 47*, A. F. & A. M. (Or.) 13 L. R. A. 158, and *note*; *Robinson v. Clapp* (Conn.) 29 L. R. A. 582; and *Cummings v. Perry* (Mass.) 38 L. R. A. 149.

For implied reservation of easements, see *Sellers v. Texas C. R. Co.* (Tex.) 13 L. R. A. 657, and *note*.

The owner of a house may have constructed it with as many windows and doors as his fancy suggested, and thus have secured all the light, air, and ventilation possible; but his neighbor had and has the corresponding right to build his home in such position on his own land as he chooses; and the result of this may be to darken the windows of the house adjoining and shut off light, air, and ventilation. This is merely *damnum absque injuria*.

An easement in the unobstructed passage of light, air, and ventilation cannot be acquired by prescription.

Ward v. Neal, 37 Ala. 500; *Western Granite & Marble Co. v. Knickerbocker*, 103 Cal. 113, 37 Pac. 192; *Parker v. Foote*, 19 Wend. 309; *Ray v. Sweeney*, 14 Bush, 1, 29 Am. Rep. 388.

By enjoying air, light, and ventilation there is made no tangible or visible use of the adjoining lands, nor, indeed, any use of them which can be made the subject of an action by their owner, or which in any way interferes with the latter's enjoyment of the light, air, and ventilation upon his own land.

Keats v. Hugo, 115 Mass. 204, 15 Am. Rep. 80.

There is no implied grant of the right to light, air, or ventilation over the grantor's other land adjoining the land conveyed.

Robinson v. Clapp, 65 Conn. 365, 29 L. R. A. 582, 32 Atl. 939; *Keats v. Hugo*, 115 Mass. 204, 15 Am. Rep. 80; *Parker v. Foote*, 19 Wend. 309; *White v. Bradley*, 66 Me. 254.

Nor is the implication of a grant of light, air, and ventilation aided by a clause in the deed granting all rights, privileges, and "appurtenances" belonging to the granted premises.

Randall v. Sanderson, 111 Mass. 114; *Collier v. Pierce*, 7 Gray, 18, 66 Am. Dec. 453.

It should never be assumed, in the absence of plain and unambiguous words to such effect, that parties contract in relation to sales or exchange of real property with sole regard to its present condition, and without at all contemplating or providing for future changes and improvements that may take place in and around it.

Hobson v. Cartwright, 93 Ky. 368, 20 S. W. 281.

The fact that the vendor had a door at the entrance of said alley erected, the keys to which were carried by C. D. Chenault and his tenants and grantees of the other two said houses, is evidence that appellee had extended to him at the time of the transfer by Chenault a privilege or license to use and to have the benefit of this said alley; and this is a mere personal privilege revocable at the licensor's pleasure, and is actually revoked *ipso facto* by the licensor's conveyance of the land upon which privilege or license is given, and does not give appellee any absolute right in said alley.

3 Kent, Com. p. 452; *Wheeler v. West*, 71 Cal. 126, 11 Pac. 871; *Wiseman v. Luckinsinger*, 84 N. Y. 31, 38 Am. Rep. 479; *Eckerson* 49 L. R. A.

v. Crippen, 110 N. Y. 585, 1 L. R. A. 487, 18 N. E. 443.

The purchaser of land from which another claims right of way by agreement with the owner, of which agreement the purchaser has no notice, is not bound by it.

Barbour v. Pierce, 42 Cal. 657; *Taggart v. Warner*, 83 Wis. 1, 53 N. W. 33.

An easement of way cannot be acquired by prescription unless the use was adverse under claim of right and with the knowledge of the owner of the servient estate.

Parker v. Foote, 19 Wend. 309; *Smith v. Miller*, 11 Gray, 145; *Henry v. Koch*, 80 Ky. 391, 44 Am. Rep. 484.

A way cannot be acquired by prescriptive right if a gate across a way is kept locked, and the owner of the land or his tenants keep the key.

Luecken v. Wuest, 31 Ill. App. 506; *Bushey v. Santiff*, 86 Hun, 384, 33 N. Y. Supp. 473.

The interruption to the use of this way by appellee by a gate or bars, or by any means that prevent the unqualified enjoyment of it by appellee, strongly rebuts the presumption of a grant and the acquisition of a way by prescription.

Willey v. Norfolk Southern R. Co. 96 N. C. 408, 1 S. E. 446; *Barker v. Clark*, 4 N. H. 380, 17 Am. Dec. 428.

Although a permissive use may have continued for a century, or for any length of time, no absolute right is hereby conferred or confirmed.

Hall v. McLeod, 2 Met. (Ky.) 98, 74 Am. Dec. 400; *Conyers v. Scott*, 94 Ky. 123, 21 S. W. 530.

The rule allowing ways of necessity contemplates but one mode of access.

Kings County F. Ins. Co. v. Stevens, 101 N. Y. 411, 5 N. E. 353; *Carey v. Rac*, 58 Cal. 159; *Pierce v. Selleck*, 18 Conn. 321.

An easement does not result of necessity if there is a way over claimant's own property, even though inconvenient.

Oliver v. Pitman, 98 Mass. 46; *Cooper v. Maupin*, 6 Mo. 624, 35 Am. Dec. 456; *Ward v. Robertson*, 77 Iowa, 159, 41 N. W. 603.

Messrs. J. B. McCreary and J. A. Sullivan, for appellee:

Where during the unity of title an apparent, permanent, and obvious servitude is imposed on one part of an estate in favor of another, which at the time of the severance is in use, and is reasonably necessary for the fair enjoyment of the other, then upon the severance of such ownership, whether by voluntary alienation or by judicial proceedings, there arises by implication of law a grant of the right to continue such use.

10 Am. & Eng. Enc. Law, 2d ed. p. 420; *Lampman v. Milks*, 21 N. Y. 505; *Henry v. Koch*, 80 Ky. 391, 44 Am. Rep. 484; *Robbins v. Barnes*, Horbart, 131.

This easement includes the easement of light, air, and ventilation, and the right of ingress and egress over the alley to McCreary's property.

Robinson v. Clapp, 65 Conn. 365, 29 L. R.

A. 582, 32 Atl. 939; *Paine v. Chandler*, 134 N. Y. 385, 19 L. R. A. 99, 32 N. E. 18.

In *Ebner v. Stichter*, 19 Pa. 19, the court held that a right of way over an alley was sustained as an irrevocable license, where one party had made alterations and improvements on his adjoining property upon the faith of a mutual understanding as to the use of such alley with the adjoining owner.

Thompson v. McElarney, 82 Pa. 174.

The defendants are affected with both actual and constructive notice of the right to which the plaintiff lays claim.

Pierce v. Cleland, 133 Pa. 189, 7 L. R. A. 752, 19 Atl. 352.

Strohmeir v. Leahy, 10 Ky. L. Rep. 333, 9 S. W. 238, when contrasted with *Henry v. Koch*, 80 Ky. 391, 44 Am. Rep. 484, clearly shows the distinction between an easement arising from grant and one arising from reservation.

Protests and remonstrances by the owner of the servient tenement against the use of the easement rather add to the strength of the claim of a prescriptive right; for a holding in defiance of such expostulations is demonstrative proof that the enjoyment is under a claim of right, hostile and adverse.

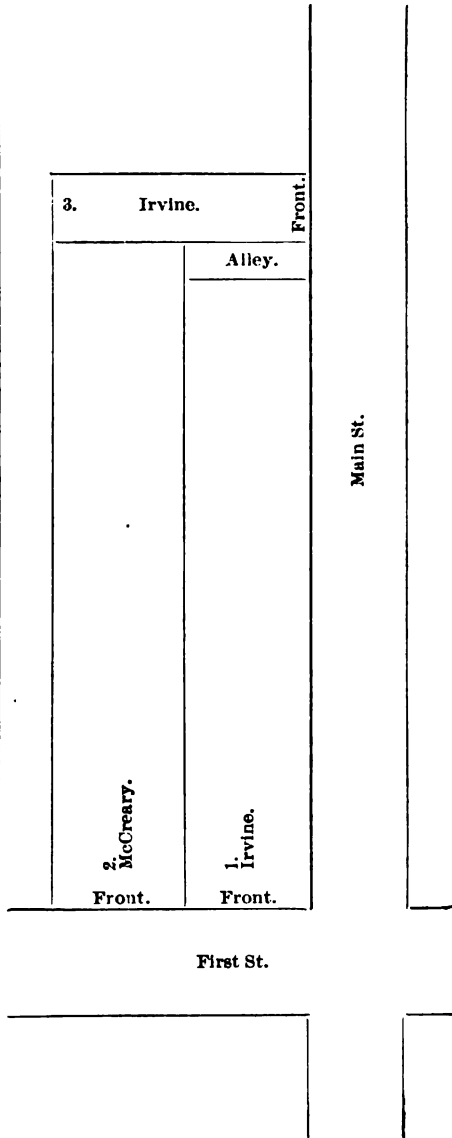
Lehigh Valley R. Co. v. McFarlan, 43 N. J. L. 605; 19 Am. & Eng. Enc. Law, p. 22.

Paynter, J., delivered the opinion of the court:

C. D. Chenault became the owner of a parcel of ground situated on the corner of First and Main streets, in the city of Richmond, upon which a hotel was situated, known as the "Frances House." That building was destroyed by fire, and he, by a contract with one Brawner, erected three brick houses thereon, to which reference will be here made. Two of the houses front on First street; the other, on Main street. Between the rear end of the corner house, which fronts on First street, and the side of the house which fronts on Main street, an alley was left, which runs from Main street back to the wall of the other house which fronts on First street. For convenience, we will designate the corner house as No. 1; the other one, fronting on First street, as No. 2; the one fronting on Main street as No. 3. There is a common wall between Nos. 1 and 2, to the alley. From that point to No. 3 the wall is alone used to inclose No. 2, and from the corner on the alley formed by Nos. 2 and 3 to the opposite back corner there is a common wall between Nos. 2 and 3. There is a doorway which enters the cellar under No. 2 from the alley, the house being two stories high. There are two windows,—one in the first and the other in the second story, overlooking the alley. There is one door entering the cellar under No. 1 from the alley, and two windows: one in each of its stories overlooking the alley. There are also windows and a door fronting on the alley in No. 3. The windows and doors were constructed as if they were to be of a permanent and en-

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during character. We give here a diagram showing the ground plan of the three houses:



On December 8, 1877, Chenault conveyed to the appellee, McCreary, brick storehouse No. 2. Subsequently he conveyed the other brick storehouses, Nos. 1 and 3, and by a succession of conveyances the appellant, Mrs. Irvine, became the owner of them. She threatened to close up the alley by extending her house over it, which would have resulted in closing up the door to the cellar, and two windows overlooking the alley, from what we shall now call the "McCreary House." To prevent this being done, the ap-

pellee, McCreary, instituted this action, and obtained an injunction. If it is done, it will result in cutting off appellee's use of the alley, and his access to his cellar by the door leading thereto from the alley, and also shut out the light and air from the rear part of his building; it being about 65 feet long,—according to the proof, to do which would greatly diminish the value of his property. The court below adjudged that the appellant was not entitled to close up the alley.

The appellee testifies that, before he bought the property, Brawner and Chenault (Brawner then having a title bond for the lot from Chenault, upon which McCreary's house is situated), pointed out to him this alley, and told him that it was left open for the use of the three houses. Chenault does not contradict him on this question, but simply says he has no recollection of having made that statement to him. The testimony also tends to show that appellee's tenants, since the time he purchased it until this controversy arose, in about 1896, used the alley for the purpose of carrying their goods, boxes, etc., from the street into the cellar under the house. The appellee, as well as his tenants, claimed that they had the right to so use the alley. He also claimed that at the time he bought the property there was no door to close the alley from Main street. While there is proof that most of the time he has owned the property a door has inclosed the alley from the street, still that does not seem to have interfered with the use by appellee's tenants of the alley. There is an absolute necessity for the alley for the useful enjoyment of the McCreary house, and to close it up will greatly damage it. This necessity was apparent at the time appellee purchased the property, as well as at all times thereafter during which the several conveyances were made by Chenault and his vendees. The doorway leading into the cellar, the windows above, and in fact the openings from the other houses on the alley, indicate that they were placed there for permanent use. Independent of what Brawner and Chenault said to appellee at the time he purchased the property, it must have been apparent to him and every other observing person that the alley was intended to be used by all who might occupy the three houses, and particularly by those who occupied the McCreary house. The title was in Chenault at the time the appellee purchased the property and the purchase money was paid to him. At that time Chenault held the title to each of the three houses, and, of course, a unity of title existed. As the windows and doors opening upon the alley indicated that it was to be permanently used, an obvious servitude was imposed in favor of each of the houses, and especially the McCreary house, because there was no way to reach the cellar in the rear end of the house except the door on the alley. Neither was there any means of giving light and air to that part of the house, and thus ventilation, if the windows and doors were closed. The door and windows opening onto the alley from the McCreary house are reasonably necessary for

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the fair enjoyment of the house. The deed which Chenault made to the appellee conveyed to him the house and lot and the appurtenances thereunto belonging, one of which is the permanent use of the alley for the purposes indicated. This servitude was imposed by the owner of the alley by his conveyance to the appellee.

Washburn, Easem. p. 81, says: "It may be considered as settled in the United States that, on the conveyance of one of several parcels of land belonging to the same owner, there is an implied grant or reservation, as the case may be, of all apparent and continuous easements or incidents of property which have been created or used by him during the unity of possession, though they could then have had no legal existence apart from his general ownership." It is said in 4 Kent, Com. *407: "Some things will pass by the conveyance of land, as incidents appendant or appurtenant thereto. This is the case with a right of way or other easement appurtenant to land. . . . And, if a house or store be conveyed, everything passes which belongs to and is in use for it, as an incident or appurtenance." In the case of *John Hancock Mut. L. Ins. Co. v. Patterson*, 103 Ind. 582, 53 Am. Rep. 550, 2 N. E. 188, it is said: "Where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another, which at the same time of the severance is in use, and is reasonably necessary for the fair enjoyment of the other, then, upon a severance of such ownership, whether by voluntary alienation or by judicial proceedings, there arises by implication of law a grant or reservation of the right to continue such use. In such case the law implies that with the grant of the one an easement is also granted or reserved, as the case may be, in the other, subjecting it to the burden of all such visible uses and incidents as are reasonably necessary to the enjoyment of the dominant heritage, in substantially the same condition in which it appeared and was used when the grant was made." In the case of *Lampman v. Milks*, 21 N. Y. 505, it is said: "The rule of the common law on this subject is well settled. The principle is that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement, or portion sold, with all the benefits and burdens which appear at the time of the sale, to belong to it, as between it and the property which the vendor retains. This is one of the recognized modes by which an easement or servitude is created. No easement exists so long as there is a unity of ownership, because the owner of the whole may at any time rearrange the qualities of the several parts. But the moment a severance occurs, by the sale of a part, the right of the owner to redistribute the properties of the respective portions ceases, and easements or servitudes are created, corresponding to the benefits and burdens mutually existing at the time of the sale. This is not a rule for the benefit of purchasers only, but is entirely reciprocal. Hence, if, instead of a bene-

fit conferred, a burden has been imposed, upon the portion sold, the purchaser, provided the marks of this burden are open and visible, takes the property with the servitude upon it. The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right, by altering arrangements then openly existing, to change materially the relative value of the respective parts." The doctrine of *Lampman v. Milks* was approved by this court in *Henry v. Koch*, 80 Ky. 395. In *Lebus v. Boston*, 21 Ky. L. Rep. 411, 51 S. W. 609, this court held that there was a general concurrence of authority, both in England and in this country, in support of the proposition that, on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee those easements which are necessary to the reasonable enjoyment of the

property granted, and which have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted. In that case the court quoted from *Jones on Easements* (§ 129), wherein it is said: "Where one conveys a part of his estate, he impliedly grants all those apparent or visible easements upon the part retained which were at the time used by the grantor for the benefit of the part conveyed, and which are reasonably necessary for the use of that part." We are of the opinion that the appellant is not entitled to close up the alley by the erection of a house on it or otherwise, and that the appellee is entitled to enjoy its use in connection with the other houses on it.

The judgment is affirmed.

Burnam, J., not sitting.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Theresa M. GARGAN

v.

WEST END STREET RAILWAY COMPANY.

(.....Mass.....)

A street-car passenger who was injured after leaving the car and while attempting to pass behind the car in the dark, by falling over a fender which had become disarranged without the knowledge of the company, and was projecting from the rear of the car, cannot hold the street-railway company liable for the injury.

(May 17, 1900.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence which resulted in a verdict in plaintiff's favor. *Sustained.*

The facts are stated in the opinion.

Messrs. M. F. Dickinson, Jr., and Walter Bates Farr, for defendant:

The evidence fails to disclose that the plaintiff exercised any care at all.

Gilman v. Deerfield, 15 Gray, 580.

The only reasonable inference to be drawn from the evidence is that she was in a hurry to get to her house across the street, and, looking to the goal of her destination, started across the street with no attention whatever to possible obstacles in her path.

The plaintiff, therefore, was not entitled to recover.

Crafts v. Boston, 109 Mass. 519.

The protrusion of the fender was not an actionable wrong.

That only constitutes an obstruction in the highway which it may be easily appre-

hended will cause inconvenience and injury to passers-by.

Keith v. Easton, 2 Allen, 552; *Jones v. Housatonic R. Co.* 107 Mass. 261; *Gordon v. Cummings*, 152 Mass. 513, 9 L. R. A. 640, 25 N. E. 978; *Judd v. Fargo*, 107 Mass. 264.

No greater degree of care as to pedestrians is required of a street-railway company than is required of the driver or owner of any other vehicle.

Unger v. Forty-Second Street & G. Street Ferry R. Co. 51 N. Y. 497; *Memphis City R. Co. v. Logue*, 13 Lea. 32; *Keller v. Hestonville, M. & F. Pass. R. Co.* 149 Pa. 65, 24 Atl. 159.

If the plaintiff made out a *prima facie* case by proving the position of the fender, the defendant met the issue by showing that it had been put in proper position before the trip began, and that there was no defect in the fender itself. It was not bound, then, in the absence of any evidence that such an accident had ever happened before, to anticipate such an occurrence upon this trip, and the failure of the conductor to discover the protrusion of the fender was in no sense negligence.

Hutchinson v. Boston Gaslight Co. 122 Mass. 219.

Since the accident could not have occurred from any defect or insufficiency of the appliance, and since the evidence shows the possibility of the wrongful intervention of third parties, the plaintiff has not sustained the burden of proving any negligence on the part of the defendant.

Kendall v. Boston, 118 Mass. 234, 19 Am. Rep. 446.

Messrs. Largan & Keating for plaintiff.

Barker, J., delivered the opinion of the court:

The car upon which the plaintiff rode from Boston stopped about opposite her dwelling to allow passengers to leave. She left by the rear door. Her house was upon the right as she passed from the door. The

NOTE.—For duty of street-railway company to passenger after leaving car, see also *Creamer v. West End Street R. Co.* (Mass.) 16 L. R. A. 490, and *Cincinnati Street R. Co. v. Snell* (Ohio) 32 L. R. A. 270.
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gate upon that side was up, and she descended from the platform by the steps leading to the left so that when she reached the street her back was towards her house. There was a cross walk, about 7 feet wide, partly occupied by the rear end of the car, from which at the time a fender projected about 2 feet. Enough of the cross walk was left unoccupied for her passage to the sidewalk of the side of the street where her house was. The hour was about 6 o'clock of an evening in the middle of December. There were street lights, not very near, and the locality was quite dark, although several witnesses testified that the fender was visible to them. Upon reaching the ground, the plaintiff at once turned, and began to walk towards the other side of the street upon the cross walk. In so doing she went so near the end of the car that she struck against the projecting fender, and fell. She did not see the fender, and did not know that it projected beyond the end of the car. The fenders of a street car are attached to both ends of the car, but are usually so adjusted that they project only from the front end. This fender had in some way become so disarranged that it projected from the rear end of the car without the knowledge of the defendant's servants who were in control of the car, and contrary to the intention of the defendant. It is admitted that when the plaintiff left the car she ceased to be a passenger of the defendant. See *Cramer v. West End Street R. Co.* 156 Mass. 320, 16 L. R. A. 490, 31 N. E. 391; *Bigelow v. West End Street R. Co.* 161 Mass. 393, 395, 37 N. E. 367. When she began to walk towards her house, she was merely a traveler upon the highway. The respective rights and duties of the plaintiff and the defendant were not those of a passenger and a common carrier, but those of a pedestrian crossing a public street in which was a street-railway track then occupied by a street car, and of a street-railway corporation lawfully using the same street in its traffic. From the time when she left the car until she was hurt the car remained stationary. The condition of things which existed at the time when she reached the street and turned to walk home was in no way changed by the defendant, nor were her actions in the least controlled or influenced by it. It cannot be contended that the presence of the car in the street, or its stoppage to allow passengers to leave, was unlawful; nor is it claimed that the stoppage was too long, or that the plaintiff expected that the car would move on to allow her to cross the street. The only cause of the accident was the plaintiff's own act in walking against the fender, and the contention is that the presence of the fender projecting from the rear end of the car was such a negligent occupation of the highway by the defendant as to make it liable for the plaintiff's injury. That the collision was the plaintiff's own act distinguishes the case from the common one in which two bodies, each lawfully present in a highway, and each in motion, come into collision. Instances in which a traveler collides with or is injured by a stationary

vehicle or other object lawfully placed in a highway by some other person or traveler are not very rare. One of our early cases declared the right of the owner of lands abutting on a highway to erect buildings and fences on the street line and to place in them doors and gates which would swing over the street when opened, to place temporarily building materials and earth from cellar excavations within the street, and to allow horses and carriages to stand occasionally in the street against or near a house. *O'Linda v. Lothrop*, 21 Pick. 292. In *Judd v. Fargo*, 107 Mass. 284, a sled with sap tubs upon it, left standing within the limits of the way and outside of the traveled path, caused the plaintiff's injury by the frightening of his horse. It was held that the defendant had a right to have the sled and tubs remain in the highway for a reasonable time for the purpose of transferring them to his own premises, and that all that the law requires in such a case is that the obstruction shall not be continued for an unreasonable length of time. That the probability or improbability of the presence of such an obstruction was considered to be immaterial to the defendant's right so to leave his sled and tubs is to be inferred from the fact that in the same case the defendant was not allowed to show that other persons were accustomed to do the like: in other words, it seems that the test applied to decide the question of the defendant's liability was not whether the sled and tubs as left by him were likely to produce the accident, but whether he had the right to leave them as he did. Any vehicle stationary upon a highway over which travelers are passing and repassing may be an occasion of injury to them if they come in contact with it in consequence of their own motions. In such cases the test of the liability of the owner of the stationary vehicle to compensate for his injury the traveler who walks against it is not the probability that the traveler will be hurt if he walks against the vehicle, but is whether its owner was within his right in having such a vehicle or load stationary upon the street. In the present case the car was properly upon the street, and its stoppage was merely temporary, and for a proper purpose. It is not contended that the car remained stationary longer than was necessary. The fenders at each end of the car were not like a cutting instrument, or an apparatus so dangerous that it ought not to be transported upon a public way without unusual care for the safety of travelers, but were appurtenances of the car, with which the law required it to be equipped. Stat. 1895, chap. 378. It is not contended that they were unlawful, or that there was any statute or ordinance which prescribed whether the fenders should be in one position or another, or which forbade the defendant to propel in the street a car with a fender projecting beyond the end of the rear platform. That fenders do not usually so project bears upon the question of the plaintiff's care or negligence, but does not make it unlawful to propel in the

street a car with a fender so projecting. Vehicles are frequently met with in the streets with appurtenances projecting as far from the rear end of the main portion of the vehicle as the fender projected in the present instance. So, loads of iron rods or pipes, lumber, beams, and other like articles often project to much greater distances behind the vehicles upon which they are. It is not unusual to see two or three wagons, one attached behind the other, drawn through the streets by one team. Yet a traveler who walked into such an obstacle to his passage, supposing that, if he avoided collision with the body of the vehicle to which the team was attached, the way would be clear, would collide with an obstacle which was rightfully in place, and could not recover for his injury. Nor would it be different if the traveler walked against such an obstruction in the night-time, not seeing the obstruction on account of the darkness, if the owner of the

vehicle had complied with such requirements as to lights as were in force at the place where the collision occurred. The case does not show that there were any such requirements, or that, if they were, they were not complied with by the defendant. We know of no requirement anywhere that a street car or other vehicle used at night upon a highway shall be so lighted that every part of it shall be plainly visible to those who come upon it in the rear as well as in front. We think, therefore, that, irrespective of the question whether the plaintiff could be found to have been in the exercise of due care in walking against the fender, a verdict should have been ordered for the defendant, because, upon the undisputed evidence, the obstacle against which the plaintiff walked was part of a vehicle lawfully using the street within the defendant's right.

Exceptions sustained.

MICHIGAN SUPREME COURT.

Thomas H. REED

v.

Benjamin C. PEACOCK *et al.*, *Plffs. in Err.*

(.....Mich.....)

1. **Odd Fellows are not disqualified as jurors** in an action by an Odd Fellow of a lodge to which they do not belong, on a lease assigned to him by his lodge.

2. **A talesman in a justice's court is not to be excused** because he is not a taxpayer.

(March 6, 1900.)

ERROR to the Circuit Court for Ionia County to review a judgment reversing a judgment of a justice of the peace in defendants' favor because of his allowance of challenges to jurors in a proceeding brought to recover rent alleged to be due and unpaid. *Affirmed.*

The facts are stated in the opinion.

Mr. R. A. Hawley, for plaintiffs in error:

The purpose of the trial of a suit at law is to administer justice between man and man; and to that end, in jury cases, it is absolutely essential that the jury impaneled be a fair, unprejudiced, and impartial one.

The real party in interest on the part of the plaintiff was a subordinate lodge of Odd Fellows. The questions litigated involved the honesty and fairness of the lodge, and the lodge was charged with gross negligence, mismanagement, violation of its contract duties, and acts so seriously oppressive in their nature as to involve moral turpitude.

To have permitted an Odd Fellow to sit upon the jury would have been to court disaster, and to invite at least a disagreement of the jury.

NOTE.—As to disqualification of juror for interest, see also *Com. v. Brown* (Mass.) 1 L. R. A. 620; *Goshen v. England* (Ind.) 5 L. R. A. 253; *Smith v. German Ins. Co.* (Mich.) 30 L. R. A. 368; *Little Rock & Ft. S. R. Co. v. Wells* (Ark.) 30 L. R. A. 560; *McLaughlin v. Louisville Electric-Light Co.* (Ky.) 34 L. R. A. 812. 49 L. R. A.

Even though the justice would not have erred in overruling the challenge, yet it was a matter within his discretion to sustain it, and by sustaining it no error was committed.

12 Enc. Pl. & Pr. 379, 444, 445; 12 Am. & Eng. Enc. Law, pp. 360, 361; *Holt v. People*, 13 Mich. 224; *Atlas Min. Co. v. Johnston*, 23 Mich. 36; *People v. Carrier*, 46 Mich. 442, 9 N. W. 487; *People v. Barker*, 60 Mich. 277, 27 N. W. 539; *People v. Fowler*, 104 Mich. 449, 62 N. W. 572; *People v. Evans*, 72 Mich. 367, 40 N. W. 473; *Luebe v. Thorpe*, 94 Mich. 271, 54 N. W. 41; *People v. Thacker*, 108 Mich. 652, 66 N. W. 562; *Brennan v. O'Brien*, 6 Det. L. N. 519, 80 N. W. 249; *Com. v. Livermore*, 4 Gray, 18; *Omaha & R. Valley R. Co. v. Cook*, 37 Neb. 435, 55 N. W. 943.

Mr. F. C. Miller, for defendant in error:

It is no cause of challenge that a proposed juror is a Free Mason where one of the parties to a suit at law is a Free Mason and the other is not.

Purple v. Horton, 13 Wend. 9, 27 Am. Dec. 167; *Barton v. Erickson*, 14 Neb. 164, 15 N. W. 206; *Burdine v. Grand Lodge*, 37 Ala. 478; *Delaware Lodge No. 1, I. O. O. F. v. Allmon*, 1 Penn. (Del.) 160, 39 Atl. 1098.

The statutes in no case make it a necessary qualification for a juror, and especially a talesman, that he be a taxpayer.

Stewart v. People, 23 Mich. 63, 9 Am. Rep. 78.

Long, J., delivered the opinion of the court:

This action was commenced in justice court to recover for an alleged balance due on a certain lease entered into between the West Sebewa Lodge of Odd Fellows and defendants, and which lease had been duly assigned by the said lodge to the plaintiff. The defendants pleaded the general issue, and gave notice of recoupment. The plaintiff was a member of the West Sebewa Lodge of Odd Fellows. The defendants demanded a jury. Six jurors were selected for such

jury in the usual way; that is, the officer wrote down the names of eighteen jurors to serve as jurors, and each party struck off six. The six jurors remaining constituted the jury so struck. Two of the persons so selected were not found by the officer, and he summoned talesmen to fill their places. The jury thus present were sworn on their *voir dire*, and on examination it was ascertained that one of the original jurors, Lyman Shumway, and one of the talesmen, Carl Servoss, were Odd Fellows; not, however, belonging to the West Sebewa Lodge but belonging to the lodge in the city of Ionia. They were challenged by counsel for defendants for that cause, and the challenge held good by the justice. The plaintiff then exercised two peremptory challenges upon talesmen summoned by the officer, and the defendants also exercised two peremptory challenges upon talesmen summoned by the officer; after which other talesmen were summoned by the officer, and the plaintiff peremptorily challenged one more of them, but this challenge was denied on the ground that the plaintiff had exhausted his peremptory challenges. The cause was then tried by the jury, three of whom were of those originally struck and three talesmen. The jury returned a verdict in favor of defendants. The plaintiff removed the cause to the circuit court by certiorari. The justice, in his return to the writ of certiorari, says that he excused Lyman Shumway from serving on the jury for the reason that he announced that he was an Odd Fellow; that he excused Carl Servoss because he was also an Odd Fellow, and was not a taxpayer. The circuit court reversed the judgment of the justice, and the defendants bring the case to this court by writ of error.

It is well settled that one of the regular panel of jurors in justice court cannot be excused on a peremptory challenge. *Eldridge v. Hubbell*, 119 Mich. 61, 77 N. W. 631. The justice, however, returned that he excused both Shumway and Servoss because they were Odd Fellows. It appeared that

they did not belong to the same lodge of Odd Fellows that assigned the account to plaintiff. The fact of their being Odd Fellows did not disqualify them from sitting as jurors in the case. It was held in *Purple v. Horton*, 13 Wend. 9, 27 Am. Dec. 167, that it was no cause of challenge to a juror that he was a Free Mason, when one of the parties to a suit was a Free Mason and the other not. It was said by the court, in speaking of the rule which the defendant claimed would exclude such a person: "This rule would exclude every stockholder in the same bank, every member of the same church, and every associate of the same benevolent society." In *Delaware Lodge No. 1, I. O. O. F. v. Allmon*, 1 Penn. (Del.) 160, 39 Atl. 1098, it was held that in an action against a subordinate lodge of a beneficial society members thereof are disqualified as jurors, but that disqualification does not extend to members of other lodges. In *Barton v. Erickson*, 14 Neb. 164, 15 N. W. 206, it was held that a person who belongs to a religious denomination—as the Lutheran—is not thereby precluded from sitting as a juror in a case where a church organization of the same denomination, of which he is not a member, is a party. The justice also returned that he excused Servoss because he was not a taxpayer. Servoss was called as a talesman, and it was error for the justice to excuse him for the reason that he was not a taxpayer. He was summoned as a talesman, and there was nothing to show that he did not possess the necessary qualifications of an elector. *People v. Wright*, 89 Mich. 70, 50 N. W. 792. By the course taken by the justice the defendants were, in effect, given four challenges against the objection of the plaintiff. The court below very properly reversed the judgment of the justice.

The judgment of the Circuit Court must be affirmed.

The other Justices concur.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Joseph BAGEARD

v.

CONSOLIDATED TRACTION COMPANY,
Plff. in Err.

(.....N. J.....)

*1. A passenger on a street car, who,

*Headnotes by COLLINS, J.

NOTE.—For liability of carrier for exposing intoxicated passenger to danger by ejection from car, see *Roseman v. Carolina C. R. Co.* (N. C.) 19 L. R. A. 327, and note; also *Fisher v. West Virginia & P. R. Co.* (W. Va.) 23 L. R. A. 758; and *Louisville & N. R. Co. v. Johnson* (Ala.) 31 L. R. A. 372.

For other cases as to the duty of a carrier to intoxicated passengers, see *Missouri P. R. Co. v. Evans* (Tex.) 1 L. R. A. 476; *Louisville & N. R. Co. v. Logan* (Ky.) 3 L. R. A. 80; *Cincinnati, I. St. L. & C. R. Co. v. Cooper* (Ind.) 40 L. R. A.

as he testified, was sick, but whom the carrier's servants supposed to be under the influence of liquor, was helped from the car at the terminus of the route, and by the conductor of the car was led to the front of the station, at or near to the public street, and left at a place where his way was open in the direction in which he wished to go; the conductor then leaving on his outward trip. He

6 L. R. A. 241; *Fisher v. West Virginia & P. R. Co.* (W. Va.) 33 L. R. A. 69; *Kingston v. Fort Wayne & E. R. Co.* (Mich.) 40 L. R. A. 131, and note beginning on page 134; and *Haug v. Great Northern R. Co.* (N. D.) 42 L. R. A. 664.

For duty of carrier to passengers taken ill during journey, see *Lake Shore & M. S. R. Co. v. Salzman* (Ohio) 31 L. R. A. 261; and *McCann v. Newark & S. O. R. Co.* (N. J.) 33 L. R. A. 127.

turned and went towards the back of the station, and twenty minutes later slipped down between the front and rear wheels of a car moving on a track that lay between where he was then standing and the place where he was left. In a suit against the railway company to recover damages for the resulting injury, held, that no cause of action was established.

2. On the trial of an issue of fact, where the bona fides of a claim is challenged, it is competent to prove that on a former trial of the same issue, in which the party whose claim is challenged testified to an entirely different state of facts, he produced, also, a witness to corroborate his statement. The evidence is not to be received as affirmative proof of what was deposited, but as discrediting such party.
3. When one, by reason of his own voluntary intoxication, exposes himself to danger and receives injuries which he could, and by the exercise of ordinary prudence would, have avoided if sober, he is guilty of contributory negligence, and cannot recover for such injuries.

(March 6, 1900.)

ERROR to the Supreme Court to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

Statement by **Collins, J.:**

The plaintiff in the first count of his declaration complained that the defendant, a common carrier of passengers upon an electric street railway, did not use due care to assist him to get safely off a car, on which he was a passenger, at the terminal station at the foot of Exchange Place, in Jersey City, near the Pennsylvania Railroad ferry to New York, and to pass through such station to the street, and so negligently managed another car as to run him down while he was carefully proceeding through the station in departing from the car on which he had arrived. In the second count he complained that on his journey in defendant's car he became seriously ill and faint, and it thereby became the duty of the defendant to use the highest practicable degree of care for his safety and safe delivery beyond the tracks of the defendant in its said station, and averred, as breach, that the defendant so negligently managed another car propelled along one of the tracks of the station, and so negligently placed and left the plaintiff in his condition of illness and faintness in the station, and among the tracks of the defendant, that while he was endeavoring to proceed from the station he was run down by such other car. Under plea of the general issue, the cause came on for trial at the Union circuit, and resulted in a verdict for the plaintiff. This writ of error removes the consequent judgment, and reversal is sought upon exceptions sealed at the trial.

Mr. James B. Vredenburg for plaintiff in error.

Mr. George H. Bruce for defendant in error.

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Collins, J., delivered the opinion of the court:

Exceptions to the refusal of the trial judge to nonsuit the plaintiff or direct a verdict for the defendant involve an examination of the evidence in the cause. The plaintiff was injured on June 12, 1897, in the terminal station of the defendant's electric street railway at the foot of Exchange Place, in Jersey City, near the ferry to New York. This terminal station was thus arranged and used: Inbound cars ran east down York street on a single track, and then into the station on four tracks, diverging therefrom and curving to the north. In the station the four tracks were parallel with each other, and ran northward to the south line of Exchange Place. Thence they converged, crossing the sidewalk and curving to the west until they merged in a single outward-bound track in that street. The cars came to a stop a little south of the line of Exchange Place, and thence started forward on their outward trips. These terminal tracks were covered by a shed, open front and rear, and supported at the sides by posts 10 inches square. The company's office adjoined this shed on the east, and Taylor's Hotel adjoined it on the west. The space between Taylor's Hotel and the westernmost track in the station was 4 feet and 8 inches wide. Between the line of the posts and the line of a car on the track the distance was not more than 2½ feet. Passengers had no proper occasion to go within this space, the car exit and entrance being on the other side, but men sometimes did so for a purpose which there would be a nuisance. Further down the station there was an offset in the wall, and a door of entrance to the hotel. The plaintiff was a passenger on a car that ran into the station on the westernmost track at 11:25 P. M. His destination was the ferry to New York. He was asleep in the car, and after the other passengers had gone he was awakened by the conductor and motorman. He testified that he was sick. They testified that they supposed that he was under the influence of liquor. There was no proof that anything was said by or to him. He was helped to the ground on the east side of the car, and led out to the front of the station. He called as witnesses the conductor and motorman, who at the time of the trial were not in defendant's employ. The conductor testified that he led the plaintiff to the edge of the sidewalk, beyond the company's premises. The motorman testified that he saw the conductor leading the plaintiff along by the side of the car towards the street, but did not see how far he went. The plaintiff testified that he was taken beyond the car, but not to the street. How near to the sidewalk he was brought, he could not say. He further testified that he knew nothing of what happened from the time he was left until he was injured, except that he was trying to get out of the station. The conductor admitted that on the trial of a suit brought for the same injury, in which there was a nonsuit, he had testified that he left the plaintiff 5 or 6 feet short of the sidewalk.

but he said that his memory had been refreshed, and his present statement was correct. The plaintiff did not repudiate the conductor as a witness, as he possibly might have done, on the ground of surprise; and, in view of his own uncertainty, it must be considered as proved that he was taken beyond the defendant's premises. It makes little difference, however, whether he was taken to the street, or to within a few feet of it. At either point he was perfectly safe, and his course to the ferry was open. He was able to walk, and there was no proof that anything in his condition indicated that it was improper or unsafe to leave him at the front of the station, whatever may have been the exact spot where he was left. The conductor testified that as his car left the station on its outward trip the plaintiff turned and went towards the back of the station. He was next seen, as far as the testimony shows, by a witness called in his behalf, and by two called for the defendant, and was then standing between the hotel and a car on the westernmost track, that was awaiting the starter's signal. Its schedule time to arrive was 11:40 P. M., and to leave was 11:45 P. M. He was leaning against the hotel, or one of the posts of the shed, and had been vomiting. His witness was the motorman of a car that had just come in behind the other, and upon the same track. The car ahead started, and as it did so the plaintiff slid down to the ground, and his feet went under the rear wheels and were crushed. No negligence is attributable to those in charge of that car, for they had no reason to look for anyone in the place where plaintiff stood; and none to the motorman of the car behind, for he was under no duty to give warning. Nor was there any apparent danger to the plaintiff. He was safe as long as he stood still, and his fall was not due to the car's starting, but to his own sick or drunken state.

The first count of the declaration, of course, had no support, and the case under the second count was rested solely on the failure to take the plaintiff "beyond the tracks" in the company's station. If the plaintiff was able to walk, and merely under the influence of liquor, he could ask no greater care than that due to sober passengers. If the proof warranted notice to the car conductor that the plaintiff was sick, although not helpless, then such extra care was demanded as the circumstances seemed to require. That would have been a jury question, but, to justify submission of recovery for the plaintiff's injury, it must have appeared that the injury was proximately caused by neglect to exercise such care. For example, had the plaintiff been injured, as in fact he claimed upon a former trial, in attempting immediately to cross the tracks that lay between where he was left and the ferry which was his destination, a jury might well have found that sufficient care towards a sick man had not been exercised; and this although he may have been taken to the sidewalk, for even then he would have had to cross the tracks. But the proof

showed that the plaintiff turned and re-entered the station, and that he was hurt some twenty minutes later, on a track that did not lie within his course. Plainly, there was no causal connection between the alleged negligent omission and the accident to the plaintiff. There should have been a nonsuit or a direction of a verdict for the defendant.

As the case may be retried, attention should be called to two incidental errors in the rulings at the trial. One was with respect to the evidence on the trial of the former action. At that trial the plaintiff testified to an entirely different condition of affairs from that developed at the trial now under review. This was his testimony: "I alighted from the car after it stopped. I alighted and walked towards the ferry, and as I was walking up the hill, and turned to go to the ferry, a car struck my right leg, threw me to the ground, and ran over my foot." That he so testified, the defendant was permitted to prove; but an offer to prove that at the former trial he produced a witness to corroborate his story was overruled, against defendant's exception, on the ground that the evidence would be hearsay. Such exclusion was erroneous. The evidence was competent on a challenge of the bona fides of the plaintiff's claim. It could not be received as proof of what was deposed, but it might properly discredit the plaintiff. Of course, a party is not bound in one trial by the testimony of a witness produced by him upon a previous trial of the same issue. He may have been disappointed in such testimony. It may have been false or mistaken testimony. But, where the point sought to be established is that the plaintiff had previously put forth a different claim, it is permissible to prove, not only that he himself asserted it in testimony, but also that he procured others to support him. Affidavits or statements of third persons, used by a party, are evidence against him in a subsequent controversy. They stand on the ground of admissions. *Brickell v. Hulse*, 7 Ad. & El. 455; *Gardner v. Moul*, 10 Ad. & El. 464; *Richards v. Morgan*, 4 Best & S. 641. There is, of course, a difference between such cases and that now in hand; but, to the extent indicated, there is like reason for the legality of the excluded evidence.

The other error was in the inadequate treatment, in the charge, of the subject of the plaintiff's alleged intoxication, as constituting contributory negligence. The defendant requested the trial judge to instruct the jury that if the intoxication of the plaintiff contributed to the injury, as a proximate cause thereof, he could not recover; and, again, that if the jury should believe from the testimony that at the time of the accident the plaintiff was in a state of intoxication, and that such state of intoxication placed him in such a condition that he was unable and failed to exercise that care and caution required of a sober man, and that by reason of such condition he was injured, then and in such event he could not recover. To these requests the sole response in the charge was this: "Therefore I say to you

that the company, in taking charge of that man, if he was in a condition that he could not take care of himself, owed him a duty to take him out to the street, or out of a place of danger. Now, did they do that? If they did, then, if he, on account of being in an intoxicated condition, or for any other reason, afterwards went back upon the premises of the company, and was injured, the company is not liable, unless they injured him intentionally." This ruling, in effect, deprived the company of the defense of contributory negligence arising from intoxication. It was entitled to that defense, if lawful, whether the plaintiff was taken from or left upon its premises. If a drunken man is accepted as a passenger, the carrier should not leave him in a place of danger; but I know of no rule that requires the carrier to follow up the drunken man, if left in a place of safety, though on the carrier's premises, and see that in his wanderings he does not get in danger. The question, however, is entirely apart from defendant's negligence. A sober man in the position of the plaintiff when he slid down beneath the car wheels would, with proper care, have avoided such an accident. In fact, he would have been not at all in danger. No matter how the plaintiff came to be in that position, if his sliding down was wholly or partly due to drunkenness, and the rule contended for be-
 av. there could be no recovery. That such is the legal rule is well established. In all that I have said upon this subject, it must be understood that the drunkenness, to constitute a defense, must have been voluntary on the plaintiff's part; and this, I understand, was assumed in the requests to charge. There was proof sufficient to go to the jury of such drunkenness, and the requests were pertinent. Drunkenness alone, though vol-

untary, is not negligence. A drunken man may be careful. The true rule is that voluntary drunkenness does not relieve the drunken man from the degree of care required of a sober man in the same circumstances, and if his drunkenness renders him incapable of exercising such care, then it contributes to any injury thereby sustained, and bars recovery for another's negligence. The text writers who treat of contributory negligence all assert this doctrine. A great array of references will be found in the recent case of *Smith v. Norfolk & S. R. Co.* 114 N. C. 728, 25 L. R. A. 287, 19 S. E. 863, 923, where the doctrine is declared and elaborately defended. The adjudged cases are collected in 7 Am. & Eng. Enc. Law, 2d ed. p. 491. The best statement of the doctrine I have found is that of McBride, J., in *Woods v. Tipton County Comrs.* 128 Ind. 289, 291, 27 N. E. 611, as follows: "When one by reason of his own voluntary intoxication exposes himself to danger, and receives injuries which he could, and by the exercise of ordinary prudence would, have avoided if sober, he is guilty of contributory negligence, and cannot recover for such injuries." Another apposite judicial utterance is found in *Illinois C. R. Co. v. Cragin*, 71 Ill. 177-181, where it is said that "a person who voluntarily uses intoxicating drinks until he has become physically helpless, or his powers so far impaired that he is unable to exert the necessary effort to avoid danger, is guilty of negligence when he places himself in a position of danger; and so when he thus stupefies and deadens his intellectual powers so that he is unable to foresee and guard against danger." These words seem strikingly appropriate to the plaintiff's plight just previous to his injury, if due to drink, and not to sickness.

OHIO SUPREME COURT.

STATE of Ohio *ex rel.* Walter D. GUILBERT, State Auditor,
v.

William H. HALLIDAY.

(.....Ohio.....)

Where a letter of instruction sent by the auditor of state to a county auditor embraces and commands the performance of a number of acts, some of which are proper and others not, the latter officer is bound to follow the former, but may disregard the latter.

Where the manufacture of an article of tangible personal property is protected by a patent, and such article, when manufactured, is not put on the market

for sale, but its ownership retained by the manufacturer in himself, and the article leased or rented by him to another for a valuable consideration, payable to him, it should be taxed as his property at "its true value in money," although that value is enhanced by reason of the patent. Its true value in money for taxation is the value that attaches to it in his hands.

3. In ascertaining the true value in money of such property in the hands of its owner, every fact or circumstance, brought to the attention of the person or officer who is charged with the duty of fixing that value, and which, in its nature, bears on the question, should be considered by him. One of those circumstances is the earnings or rental of such article.

(December 19, 1899.)

Headnotes by the COURT.
TE.—As to taxation of patent rights, see *ex rel. Edison Electric Illuminating Co. v. Brooklyn Bd. of Assessors* (N. Y.) 42 L. R. A. 786, and *note to Com. v. Petty* (Ky.) 29 L. R. A.

APPPLICATION for a writ of mandamus to compel defendant to fix the value of certain telephone instruments for taxation according to the instructions given by the state auditor. *Writ denied.*

Statement by **Bradbury, Ch. J.:**

This action was brought by the attorney general on behalf and in the name of the relator, as auditor of state, to compel the auditor of Franklin county, in fixing the value of hand telephones and transmitters for taxation, to consider the uses to which such instruments were applied, and their earnings or rental value thereof accruing to the owners from such use. The petition, after setting forth the official character of the relator, and his powers and duties in relation to taxation, states that these hand telephones and transmitters are owned by the American Bell Telephone Company, a foreign corporation, and had hitherto been valued for taxation at \$1.02 for hand telephones and \$1.80 for transmitters, or \$3.42 for the two, which sum was supposed to equal the cost of manufacturing them, together with a profit of 20 per cent added. The petition then, as far as need be stated for present purposes, proceeds as follows: The said plaintiff further instructed the defendant the true way to compute the value of said property for the purposes of taxation. He was not to assess them at their physical value, fixed by the company at \$3.42 per instrument, but to ascertain their earning value, which, as plaintiff was informed and believed, and so instructed said defendant, was an annual earning or rental value of \$14 per instrument, paid to said American Bell Telephone Company for the use of such instruments in said county of Franklin by the lessees of said telephones, to wit, the Central Union Telephone Company; that, if such rental value is not the exact amount, to ascertain the earning capacity of the same, and to take that into consideration in fixing the value of said personal property; that if there was an enhanced value by reason of the use to which such instrument was put in said taxing district, which could be determined from its income, he should so compute it; that the \$14 per year was over and above freight charges, repairs, and supplies paid therefor by the lessee company, and that the same was equivalent to 6 per cent interest upon a capital of \$233 for each of said instruments. Said plaintiff further instructed the defendant, after ascertaining the amount of capital that it would represent from its earning capacity, to deduct one third, or so much thereof as to place said telephone property upon the same basis as other taxable values in each of said taxing districts; and to determine what would be the usual selling price of said instrument at the time of listing, if the same were upon the market bringing in such an income, valuing each instrument at the place where the same was then and there; and, if there be no usual selling price known to him or to the assessor, then to fix such price as it is believed could be obtained therefor in money at such time and place, taking into consideration what said property was then and there used for, in compliance with § 2739, Rev. Stat. He further instructed said defendant that, if he had reason to believe and was informed that said valuations were erroneous, or that

the full amount or value had not been returned on each instrument, he should proceed to place the same upon the tax duplicate at its true value, and to charge such corporation on the duplicate with the proper amount of taxes. Whereupon the defendant, claiming that he was advised by learned counsel in the law that he had no power as such auditor and as such taxing officer to take into consideration the purpose for which said instruments were used, or to take into consideration their income in fixing their values, or to consider their earning capacity as an element of value for the purpose of taxing said instruments in any way whatsoever; that he believed the boards, the vitriol bottle, and the rubber transmitter and electric bells and attachments for said instruments, independent of their use, were worth for taxation the sums so returned, and he had no authority to take into consideration an enhanced value by reason of the use thereof. He then and there refused, and still refuses, to correct such tax duplicate in the county of Franklin, or to add any value whatsoever further than the physical, tangible values of such instruments, independent of their use. He refused and refuses to compute or consider the values based upon their said use, and refused to obey said instructions given by plaintiff to adopt said system of estimating and determining the values of property, or any other system of computation, for ascertaining the true value thereof in money, save and except that of a tangible value independent of its use or earning capacity. Wherefore your petitioner prays that a writ of mandamus may issue against said defendant, William H. Halliday, auditor of Franklin county, commanding him forthwith to obey the instructions of the auditor of state, to ascertain, as near as practicable, the true amount and value of each of said instruments in each of the said taxing districts where the same are situated in the county of Franklin, and to take into consideration the earning capacity and the purposes for which said instruments and attachments are then and there used, and for the five years previous thereto, and to the amount so ascertained as omitted for each year to add 50 per cent and multiply the amount so omitted as increased by said penalty by the rate of taxation belonging to said year or years, and accordingly enter the same on the tax lists in his office, and duly give his certificate therefor to the county treasurer; and to assess and tax the property of the said American Bell Telephone Company, after so taking into consideration its earning capacity, its rights and franchises, that give value to said instruments, on the same basis as other real and personal property in each of said taxing districts; and to do all other things enjoined upon him in respect to the levying and collection of taxes on the true value of said property so computed, as is required by statute.

To this petition an answer was interposed by the defendant, in which he admitted he had been instructed by the auditor of state, the relator as averred in the petition, and that he had declined to follow such instruc-

tions, and sought to justify his action in this respect by setting forth, among other facts, the following: This defendant further says that § 2739 of the Revised Statutes of Ohio provides that, "in listing personal property it shall be valued at the usual selling price thereof at the time of listing, and at the place where the same may then be, and if there be no usual selling price known to the person whose duty it is to fix a value thereon then at such price as it is believed could be obtained therefor, in money, at such time and place." The defendant is informed by the attorney for the American Bell Telephone Company, and upon such information avers the fact to be, that said telephone company, at the time of making said returns, could and did manufacture said hand telephones and transmitters at not to exceed the following cost: Hand telephones, \$1.02; transmitters, \$1.80; which is the valuation put upon said instruments for taxation by said returns made to this defendant. That said price of manufacture, which includes a profit of 20 per cent to the manufacturing agent, is the reasonable cost thereof. And this defendant further avers, upon like information and belief, that, although said telephone company did not manufacture said hand telephones and transmitters for the purpose of selling the same, yet hand telephones practically and substantially, if not identically, the same, were bought and sold in said county and state during said time for less than the valuation at which said telephone company returned such property belonging to it for taxation, and less than the valuation put thereon for purposes of taxation; and this defendant, upon like information and belief, avers the fact to be that the usual selling price in said county for hand telephones substantially similar to those belonging to said telephone company, and used for substantially similar purposes, was during the year 1897, and prior thereto and now, less in amount than said valuation of said hand telephones so made from year to year for taxation belonging to said telephone company in said county. This defendant further says that he is informed and believes, and upon like information and belief denies, that said telephone company receives an annual rental or income of \$14 per instrument, and avers that the total annual sum paid by the Central Union Telephone Company to the American Bell Telephone Company measured by the total number of hand telephones and transmitters in use in the territory in which said Central Union Telephone Company does business does not exceed \$2 for each set, consisting of a hand telephone and transmitter: and that in said Franklin county, by reason of the fact that the rates there paid by subscribers are higher than the average rates charged by said Central Union Telephone Company, the annual sum paid by the Central Union Telephone Company during the year 1897 did not exceed the sum of \$4.23 per set. And this defendant, upon like information and belief, avers the fact to be that said the American Bell Telephone Company is the owner of many and divers patents issued by

the United States of America, covering and relating to the aforesaid transmitters, and also many other parts and appliances useful in the operation of telephone exchanges, and carrying on of the telephone business; and that said telephone company has licensed and permitted the Central Union Telephone Company, to the exclusion of all others, to use, in carrying on the telephone business of said Central Union Telephone Company in said Franklin county and elsewhere, the aforesaid transmitters, and also the aforesaid divers and sundry parts and appliances protected and covered by said patents as aforesaid, and also the right to use any additional patents or improvements acquired by said the American Bell Telephone Company, and has bound itself by contract not to permit any other person or corporation to use the same in said territory; and that the said annual amount paid by said Central Union Telephone Company to said the American Bell Telephone Company is substantially all paid as royalty or compensation for the right to use the transmitter, hand telephone, and patented devices and appliances in the territory aforesaid, and for the agreement aforesaid not to permit such use by any other person or corporation and for the right to secure the use of new and additional patents as aforesaid; and that the title to the instruments was and is kept in the American Bell Telephone Company solely from considerations of convenience, and for the better securing of protection of the patent rights of the American Bell Telephone Company. And this defendant further says that he is informed and believes, and upon such information and belief avers the fact to be, that the American Bell Telephone Company owns no part of the telephone outfit except the hand telephone and transmitter, and that the boards, vitriol bottles, electric bells, and all attachments for the appliance or combination of parts and instruments commonly described as a telephone instrument, do not belong to the American Bell Telephone Company, but are owned by the Central Union Telephone Company, and he has no right to impose taxes against the same on the tax duplicate against the American Bell Telephone Company; and he avers that the usual life of said hand telephones and transmitters does not exceed about four years.

Further answering, this defendant admits that he has refused to adopt the system of estimating and determining the value of the aforesaid property belonging to the American Bell Telephone Company set forth in the instruction of the plaintiff herein, that is to say, the system of valuing the personal property of the American Bell Telephone Company at the principal sum, which would produce, at the rate of 6 per cent per annum, an income or revenue equivalent to the amount paid by the Central Union Telephone Company to the American Bell Telephone Company as aforesaid, and says that he has done so for the foregoing and the following reasons: It is provided in § 2 of article 12 of the Constitution of the state of Ohio that "laws shall be passed taxing by a uniform

rule all . . . real and personal property according to its true value in money"; that, to follow the instructions of plaintiff, would be to tax the personal property of said telephone company by a different rule from that applied to the property of all other persons and corporations, and not at its true value in money; and that it is further provided in § 2739 of the Revised Statutes of the state of Ohio that the usual selling price actually ascertained or estimated in compliance with said § 2739 should be the standard and method of ascertaining the true value in money of personal property subject to taxation, which requirement of the statute would be violated by obeying the instructions of plaintiff. And this defendant says that to adopt the system of taxation in accordance with the instructions of the plaintiff would be to place a tax upon the intangible property of a nonresident of this state. And this defendant further says that it is provided in § 1 of the 14th Amendment to the Constitution of the United States that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, and the instructions of plaintiff are in conflict with said 14th Amendment. This defendant says that to comply with said instructions of plaintiff would be to levy a tax upon a franchise and privilege granted by the United States to said the American Bell Telephone Company, to wit, upon patents granted by said United States to said company, which is forbidden by the Constitution and laws of the United States. And this defendant says that, if the hand telephones and transmitters belonging to the American Bell Telephone Company in said Franklin county, Ohio, should be valued for taxation upon the basis and in the method required by plaintiff, and which plaintiff, by his petition herein, asks this honorable court to direct defendant to adopt, such valuation and such basis or method of arriving at valuations for taxation would be in conflict with and contravention of the Constitution and laws of the state of Ohio and the Constitution and laws of the United States of America. And this defendant denies that it is his duty to comply with any instructions given by the plaintiff under § 166 of the Revised Statutes of Ohio, aforesaid, when such instructions or the construction by the plaintiff of any statute of Ohio conflicts with the true meaning and intent of the Constitution and laws of Ohio, or of the Constitution and laws of the United States. Wherefore this defendant prays that he may be hence dismissed, with his costs in this behalf most wrongfully sustained.

A reply was filed which, so far as material, admitted that the American Bell Telephone Company is the owner of many and divers patents issued by the United States of America, covering and relating to transmitters, and also to many other parts and appliances, useful in the operation of telephone exchanges and carrying on of the telephone business. With the exception of what 49 L. R. A.

is herein expressly admitted, the plaintiff denies each and every allegation of the answer of the defendant.

Messrs. E. B. Kinhead and F. S. Monnett, for plaintiff:

This property falls within the division of personal property which is to be valued for purposes of taxation at its usual selling price under § 2739 of the Revised Statutes.

Where an article is patented it has two properties; if it is personal property the tangible article is classed separately and alone as personal property; the patent right is a class of property by itself.

A patent right is property.

Rehfuas v. Moore, 134 Pa. 462, 7 L. R. A. 663, 19 Atl. 750; *Com. v. Westinghouse Electric & Mfg. Co.* 151 Pa. 265, 24 Atl. 1107, 1111; *People ex rel. Edison Electric Illuminating Co. v. Brooklyn Bd. of Assessors*, 150 N. Y. 417, 42 L. R. A. 290, 51 N. E. 269.

This right of exclusion is a species of incorporeal property which is valuable. The right, without the exclusion, would not be, and is not, such a right as could be taxed as property. The invention or discovery, so long as it remains with the inventor or discoverer, is ideal merely; and it is only when the invention or discovery takes shape, and results in some material thing, it can be called property, and taxed as such.

Re Sheffield, 64 Fed. Rep. 833.

Letters patent do not exclude from the operation of tax laws of a state the tangible property in which the invention is embodied.

Com. v. Central Dist. & P. Teleg. Co. 145 Pa. 121, 22 Atl. 841.

The fact that there are letters patent for the personal property in controversy does not prevent the state from taxing the tangible property at a value determined, as is the case with all property, by the use to which it is put.

Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565.

This right being intangible, separate, and distinct from patented articles, the state may treat the latter in any way that may become necessary for state purposes, so long as it does not interfere with or encroach upon the rights granted by the government in the patented right.

Patterson v. Kentucky, 97 U. S. 501, 503, 25 L. ed. 1115, 1116; *California v. Central P. R. Co.* 127 U. S. 1, 40, 32 L. ed. 150, 157, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *Com. v. Westinghouse Electric & Mfg. Co.* 151 Pa. 271, 24 Atl. 1107, 1111.

It is only sought to have the property in this case taxed at a price which it is believed could be obtained therefor, based upon the uses to which it as a patented article is put, and this in no wise affects the right granted by the United States to make, use, license, or sell the patented article.

A tax upon the property manufactured under the patented right, the valuation of which is fixed in the manner just stated, leaves the patentee free to manufacture, sell, or lease, and is not in conflict with United States authority.

Union P. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787; *Thomson v. Union P. R. Co.* 9 Wall. 579, 19 L. ed. 792; *Com. v. American Bell Teleph. Co.* 129 Pa. 217, 18 Atl. 122.

This property is chiefly valuable for rental purposes, or, in other words, because of the right which the owner has granted him by the United States government to the exclusive use and enjoyment.

In arriving at the usual selling price of personal property for the purpose of taxation, or, where it has no usual selling price, at such price as it is believed could be obtained therefor in money, it lies solely within the province of the taxing officers to adopt such tests and methods as will arrive at the proper conclusion and within the statutory power.

Value of personal property for purposes of taxation may be determined by the uses to which it is put.

The earning capacity of real estate owned by individuals may be considered in fixing its value for taxation.

State v. Jones, 51 Ohio St. 492, 37 N. E. 945.

We can discover no satisfactory reason why the same rule should not be applied to the telephone box owned and operated by a foreign corporation that is applied to a block owned by a citizen in this city.

Ibid.; *People ex rel. Powers v. Kalbfleisch*, 25 App. Div. 432, 49 N. Y. Supp. 546; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 439, 38 L. ed. 1041, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122; *Wells, F. & Co.'s Express v. Crawford County*, 63 Ark. 576, 37 L. R. A. 371, 40 S. W. 710.

It is the duty of the board to assess the property of the company at its true value, although that value may be in part due to the fact that such property is a portion of a large profit-producing plant.

Cleveland, C. C. & St. L. R. Co. v. Backus, 154 U. S. 444, 38 L. ed. 1045, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122.

While for some purposes, by a legal fiction, the residence of the owner of personal property determines its situs, its actual location authorizes its taxation without regard to the owner's residence.

Nashua Sav. Bank v. Nashua, 46 N. H. 389; *Cooley, Taxn.* 56. 373; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep 475; 1 *Desty, Taxn.* p. 322.

Messrs. Albert Lee Thurman, Gilbert H. Stewart, and Williams, Holt, & Wheeler, for defendant:

The property in controversy is tangible personal property.

It belongs to a Massachusetts corporation having its only office and place of business in that state, and therefore not a resident of Ohio.

Ex parte Echollenberger, 96 U. S. 369, 24 L. ed. 853; *Shaw v. Quincy Min. Co.* 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935; *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 5, 26 L. ed. 643.

The American Bell Company, by operating under these contracts, was not doing business in the respective states.

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People v. American Bell Teleph. Co. 117 N. Y. 241, 22 N. E. 1057; *Com. v. American Bell Teleph. Co.* 129 Pa. 217, 18 Atl. 122; *United States v. American Bell Teleph. Co.* 29 Fed. Rep. 17; *Com. v. American Bell Teleph. Co.* 1 Dauphin Co. Rep. 168; *Com. v. Standard Oil Co.* 101 Pa. 119.

Any construction or application of the law which would result in taxing the intangible property of a nonresident is contrary to the statute itself, and is condemned by repeated decisions of this court.

Grant v. Jones, 39 Ohio St. 506; *Myers v. Scabarger*, 45 Ohio St. 232, 12 N. E. 790; *Worthington v. Sebastian*, 25 Ohio St. 8; *Brown v. Noble*, 42 Ohio St. 405; *Sommers v. Boyd*, 48 Ohio St. 648, 27 N. E. 497.

The power to tax and to direct the mode of assessment and collection are legislative, and can be exercised only within constitutional limitations which, however, are not to be implied.

25 Am. & Eng. Enc. Law, pp. 18, 22; *State v. South Penn. Oil Co.* 42 W. Va. 80, 24 S. E. 638; *United States v. Wigglesworth*, 2 Story, 373. Fed. Cas. No. 16,690; *Savannah v. Hart-ridge*, 8 Ga. 23.

Beyond the words employed, if the meaning is plain and intelligible, neither officer nor court is to go in search of the legislative intent.

Cooley, Taxn. 2d ed. 263, 264.

No tax can be levied except by express authority of law.

Zanesville v. Richards, 5 Ohio St. 589.

The legislature, in the exercise of its discretion, is limited by the constitutional requirement of uniformity, and this means, not only uniformity in the rate, but in the method of valuation; otherwise the Constitution would be a mockery.

Exchange Bank v. Hines, 3 Ohio St. 1.

The rule which the legislature has made for valuing tangible personal property is in listing personal property it shall be valued at the usual selling price thereof at the time of listing.

This is a declaration that selling price, or selling value where there is no selling price, shall measure the "true value in money."

Burroughs, Taxn. § 99; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. ed. 903.

As instruments are capable of indefinite reproduction at a known cost, that cost must, in the nature of the subject, be their value for the purpose of the statute. And when that cost is shown by evidence which is uncontradicted and in no way doubtful, or in fact doubted, then such cost must be deemed the value of those separate articles.

People ex rel. Western U. Teleq. Co. v. Dolan, 126 N. Y. 166, 12 L. R. A. 251, 27 N. E. 269.

The rule of valuation proposed by the state auditor is wrong in fact and in law.

The proposed method offends against the requirement of uniformity.

Exchange Bank v. Hines, 3 Ohio St. 1; *Zanesville v. Richards*, 5 Ohio St. 589; *Fields v. Highland County Comrs.* 36 Ohio St. 476; 25 Am. & Eng. Enc. Law, pp. 57, 65; *Bureau*

County Supers. v. Chicago, B. & Q. R. Co. 44 Ill. 229; *Chicago & N. W. R. Co. v. Boone County Supers.* 44 Ill. 240; *Kelley v. Rhodes* (Wyo.) 39 L. R. A. 594, 51 Pac. 503.

The income of property in general is no criterion for the assessor in making his valuation.

State, Coles, Prosecutor, v. Platt, 24 N. J. L. 108; *State, Dickerson S. Min. Co., Prosecutor, v. Dickerson*, 25 N. J. L. 427; *State, Easton Delaware Bridge Co., Prosecutor, v. Metz*, 31 N. J. L. 378; *Wilcox v. Middlesex County Comrs.* 103 Mass. 545.

Executive or ministerial officers can enforce tax laws, but they cannot exercise the taxing power, or add to or vary a tax lawfully levied.

25 Am. & Eng. Enc. Law, p. 73; *Cooley, Taxn.* 279.

The rights conferred by the United States patent laws are no part of the tangible property, and are not taxable.

Bloomer v. McQuewan, 14 How. 539, 14 L. ed. 532; *Com. v. Philadelphia Co.* 157 Pa. 527, 27 Atl. 378; *People ex rel. Edison Electric Illuminating Co. v. Neff*, 19 App. Div. 599, 46 N. Y. Supp. 388; *Com. v. Davis-Colby Ore Roaster Co.* 1 Dauphin Co. Rep. 118; *People ex rel. New York & N. J. Teleph. Co. v. Neff*, 15 App. Div. 8, 44 N. Y. Supp. 46.

Bradbury, Ch. J., delivered the opinion of the court:

After issue had been joined between the parties, evidence was taken bearing on the matters in dispute. Both the pleadings and the evidence, we think, took a wider range than was necessary, and embraced inquiries into matters not within the province of the court, at least in this action. The pleadings and evidence seem to indicate that this court would or might fix a value for taxation on the hand telephones and transmitters which are the subjects of dispute. This notion, if it was in fact entertained by the parties, is erroneous, for it is not for this or any other of the courts of the state in the first instance to place values for the purpose of taxation on any property whatever. The subjects of the dispute—the hand telephones and the transmitters—were the property of the American Bell Telephone Company, a foreign corporation, and under § 2744, Rev. Stat., the duty of fixing their value for taxation and making return thereof to the county auditor devolved on its officers and agents, subject, of course, to the control and revision of the former. If any mistakes or errors occur in these returns, either on the part of the persons making them or of a county auditor, whether such mistakes and errors consist in omitting to return all property lawfully taxable, or in the values placed on that returned, or both, there is provided by law an appropriate remedy for the same; but the present action, being in mandamus, is not adapted to that end. *State v. Crites*, 48 Ohio St. 460, 28 N. E. 178. If, however, the laws of the state invest the auditor of state with authority to instruct county auditors in certain respects, and require obedience on the part of county auditors to such

instructions when given, then it is quite clear this obedience is a duty enjoined by law, and may be enforced by mandamus. It falls strictly within the definition of mandamus contained in § 6741, Rev. Stat. This authority of the auditor of state rests on § 166, Rev. Stat., which reads as follows: "Sec. 166. He shall, from time to time, prepare and transmit to the auditors of the several counties in the state such forms of returns to be made by them to his office, and such instructions upon any subject affecting the state finances, or the construction of any statute, the execution of which devolves in part upon county auditors, and which affects the interests of the state, as he deems conducive to the best interests of the state; and county auditors and all local officers acting under such laws, shall observe and use such forms and obey such instructions." This section clearly and explicitly confers on the auditor of state power to instruct county auditors in all matters affecting the state's finances, and with equal clearness enjoins obedience on the latter officers to such instructions.

The instructions given by the auditor of state to the county auditor, as set forth in the petition, relate to the value that should be placed on certain property listed for taxation, and that is unmistakably a matter affecting the "state's finances," for the chief source of the revenue of the state is taxes levied on property. The instructions in question, therefore, fall within the power conferred by § 166, Rev. Stat., on the state auditor. While this section imposes on county auditors the duty of obedience to the instructions of the state auditor, it should be understood to embrace only lawful instructions. They would, upon the plainest principles of reason, be exempt from obeying an unlawful instruction, and certainly no court by mandamus would compel obedience to an instruction unwarranted by law. Where, however, the letter of instruction sent by the auditor of state embraced several different, though connected, commandments, some of which were lawful and some unlawful, the county auditor should not be excused from obeying those that are lawful because of the joinder with them of the unlawful ones. The petition discloses that the auditor of state was of opinion that the telephonic instruments involved in this inquiry, and known as "hand telephones" and "transmitters," had no "usual selling price,"—that is, were not manufactured and put upon the market for sale at all,—and for that reason their capacity to earn money, or their rental value, should be considered in estimating for taxation their actual value in money. He also states that he is informed what that rental value or earning capacity is, and places it at \$14 per year, and insists that, as \$14 is equal to 6 per cent per annum on \$233, the value of the instrument should be deemed equal to that sum. But, as he seems to concede that property in general is taxed only at two thirds of its value, the same favor, in his opinion, should be extended to the telephone company, and these instruments valued only

at two thirds of \$233 (their alleged rental value), or \$155.33. It appears, therefore, as we construe the petition, that the auditor of state not only commands the county auditor, in placing a value on the instruments in question for taxation, to consider their earnings or rental, but also instructs him to make that the sole test of that value. The answer interposed by the county auditor advances a great many matters that we have not deemed necessary to refer to specifically; but, construing the answer all together, we find that it admits that the transmitters have no "usual selling price," but avers that the hand telephones are manufactured and sold in the market, and therefore have a "usual selling price." The answer, according to our construction, also shows that the county auditor, in fixing a value on these instruments, considered only the cost of manufacture. The answer also denies that the earning capacity of these instruments is \$14 per year, and avers that, while that may be the sum annually received by the owners of the instruments, other valuable considerations besides their use entered into the contract by the terms of which that sum was payable. The pleadings, as thus construed, raise the questions that we care to discuss.

The evidence taken by the parties to maintain their respective contentions took as wide a range as the pleadings themselves, and, as already indicated, went into details much further than was necessary according to the view of the case adopted by this court. Among other things, it appears from the pleadings and evidence that the "hand telephones" mentioned is the hard rubber trumpet-shaped cylinder which is placed to the ear in receiving a telephonic message, and called a "receiver," while the "transmitter" is the mouthpiece, into which the words are spoken, with the diaphragm, etc., immediately connected with it. The instruments are protected by a patent issued under the authority of the United States, which is owned by the American Bell Telephone Company, a corporation created under the laws of Massachusetts, which manufactures and owns them, and by which they are rented or leased to the Central Union Telephone Company, to be used in this state, in connection with the wires, etc., of the latter, for telephonic purposes. After they have been manufactured, they are simply tangible articles of personal property, and, being sent into this state by their owner for their own profit, they become a part of the general mass of that species of property found herein, and, being within the jurisdiction of this state, should be valued and taxed in the same manner that other property of its class—i. e. as tangible personal property—is valued and taxed by our laws. The Constitution of 1851 (§ 2 of article 12) requires all property to be taxed "according to its true value in money." No reason is apparent why this constitutional rule, without the aid of a legislative declaration on the subject, would not have been a lawful guide to assessing officers and owners of property in valuing the same for taxation whenever the machinery

for taxation should be created and put into operation by law. However this may be, the general assembly at an early day after the adoption of the Constitution, prescribed rules for valuing personal property for taxation, which are embodied in § 2739, Rev. Stat., as follows: "In listing personal property, it shall be valued at the usual selling price thereof, at the time of listing, and at the place where the same may then be; and if there be no usual selling price known to the person whose duty it is to fix a value thereon, then at such price as it is believed could be obtained therefor, in money, at such time and place." The rule of the "usual selling price" unquestionably applies to the great bulk of the tangible property of the state, and is of easy application, and doubtless would have been used where applicable had the legislature kept silent, for its intrinsic merits would commend it to all men charged with fixing the values of property for any purpose whatever. Where this rule cannot be applied, the legislature has declared that the value for taxation should be what "it is believed could be obtained therefor in money." This is not the formula adopted by the framers of the Constitution to express the constitutional rule, and, if there is any difference between the respective meanings of the two sets of words, the legislative phraseology must yield to that of the Constitution. *Exchange Bank v. Hines*, 3 Ohio St. 15, 22. The framers of the Constitution did not contemplate nor intend that an owner of valuable and productive tangible personal property should be able to relieve himself from taxation on account of it by hedging it around with circumstances or conditions that would make it valueless to all the rest of mankind, though highly productive in his hands. Property is taxed in the hands of its owner for the support of the government, which protects and secures him in its enjoyment; and to construe that provision of the Constitution which requires it to be taxed according to its true value in money to mean its value in money to him rather than to another is reasonable. It carries out one manifest purpose of the Constitution in this respect, which is to prevent exemptions in favor of any species of productive personal property. The telephonic instruments involved in this case may have no selling value whatever. In fact, as respects the transmitter, that is conceded by the county auditor. This lack of a selling value results from a circumstance that it could not be put to any valuable use by a purchaser. It would be a mere curiosity—a piece of bric-a-brac—in his hands, unless accompanied with a right to apply it to the uses for which it was created; i. e. that of sending telephonic messages. Therefore, if the selling value of the article—i. e. the value it would possess in the eye of a possible purchaser—is the standard of value for taxation, it should not be assigned any value at all; for in that sense of the phrase it has no value. The respondent, the county auditor, does not contend that these articles had no value, and therefore should not be taxed at all, but insists

that the cost of manufacturing them should be made the standard of value for that purpose. This contention finds no support in the Constitution or statutes of the state, and but little, if any, in the nature of things. In the case of an article just manufactured, sound and unworn, the cost of producing it might be a circumstance of great weight in estimating its value, but in respect of articles more or less worn, or that had been superseded by others better adapted to the same end, or where their production had been cheapened, or, on the other hand, become more expensive, it is manifest that the cost of production might be a very imperfect standard of its value. The legislature, it will be observed, has made no attempt to prescribe the means by which the money value of an article for taxation may be ascertained, nor in any way to limit the inquiry. It has left open to the person who is to perform this duty every avenue that leads to information which, in its nature, bears on the question. The conscientious officer will avail himself of all such information. No fact or circumstance having such bearing will be disregarded by him if called to his attention. That the income-producing capacity of an article is an important factor in determining its value is so obvious as to seem beyond the bounds of controversy. This doctrine was sanctioned in its application to real estate in *State v. Jones*, 51 Ohio St. 513, 37 N. E. 945, and in *Adams Exp. Co. v. Ohio State Auditor*, 166 U. S. 220, 41 L. ed. 977, 17 Sup. Ct. Rep. 604, and no reason is perceived, nor has any been assigned, why a principle so plain and just should not be applied universally to all species of property. This is the first inquiry that a prudent prospective purchaser would make. Other considerations would doubtless receive his attention,—as the original cost, the length of time it would last, the expense of repairs, and the cost of reproduction and the like. None of them would be passed by. Other considerations, no doubt, would occur to a sagacious, thoughtful man. But, without pursuing the question further, we hold that the command of the auditor of state requiring the auditor of Franklin county, the respondent, to consider the earnings or rental of the instrument in question, was lawful, and should have been obeyed by the latter in respect to those that have no "usual selling price."

The fact that an article is the fruit or product of a patent combination or process does not withdraw it from taxation. It is true, no one can make or use the article without the consent of the patentee or his assignee; but when it is made it becomes property, and as such is as completely under the dominion of the state as is an unpatented article. To tax an article protected by a patent is not taxing the process or combination by which it is produced. The proprietor of a patent doubtless has the exclusive right to use the process or combination patented. No one, without his consent, can do so. In this monopoly or right to keep others from its use resides the chief value of the

patent. This right itself is property, often of real and immense value, before an article is made pursuant to it. And this intangible property the states of the Union cannot tax. *People ex rel. Edison Electric Illuminating Co. v. Brooklyn Bd. of Assessors*, 156 N. Y. 417, 42 L. R. A. 290, 51 N. E. 269; *Ex parte Robinson*, 2 Biss. 309, Fed. Cas. No. 11,932; *Com. v. Westinghouse Electric & Mfg. Co.* 150 Pa. 205, 24 Atl. 1107, 1111; *Com. v. Philadelphia Co.* 150 Pa. 527, 27 Atl. 378; *Com. v. Petty*, 96 Ky. 452, 29 L. R. A. 780, 29 S. W. 291. The property in this right, however, is quite different from the property in an article made by the patented process or combination. The value of the article itself is the same whether it remains in the hands of the owner of the patent or has been sold by him to another. The state should not be required to pause, before taxing an article of tangible personal property found in its borders, to ascertain whether it was the fruit of some patented process or combination or not. A mowing machine is taxed at its value in money, although that value may consist largely of a patented combination. It would be impossible to ascertain what proportion of the entire value was due to the patented combination, and, if it could not be taxed upon its entire value, it could not be taxed at all. And this is true of all articles the manufacture of which involves the application of any process or combination covered by a patent; so that, if an article cannot be taxed on the value which accrues to it by reason of its being patented, a large and valuable proportion of the property in the state will be withdrawn from taxation altogether. These views find support in a considerable number of authorities, among which are *Webber v. Virginia*, 103 U. S. 344, 26 L. ed. 585; *Com. v. Central Dist. & Printing Teleg. Co.* 145 Pa. 121, 22 Atl. 841; *Patterson v. Kentucky*, 97 U. S. 501, 503, 24 L. ed. 1115, 1116.

We now come to the contention on the part of the relator that the county auditor should, in valuing the articles in question, give consideration only to their earning capacity, which he placed at \$14 per annum. If it had been conceded by the respondent that \$14 was the net yearly earnings of these instruments, or the evidence had established that fact clearly, and it had further appeared that, without renewal or repairs, those instruments would continue in service at that rental for a great many years,—say for a lifetime,—their money value would be very great, perhaps approximately that which the relator directed the respondent to place upon them. The evidence, however, does not support this contention. The instruments are leased to the Central Union Telephone Company, an Illinois corporation, that owns the telephone plant in operation in Franklin county. While the contract between this corporation and the American Bell Telephone Company, the owner and lessor of the instruments, seems to contemplate perpetuity, nevertheless its continued existence rests on the continuance of conditions in their nature uncertain. The instruments themselves

do not bear a long life. But, above all these, the annual payment of \$14 is not simply a compensation for the use of the instruments. It is also the consideration for other valuable privileges and rights granted or guaranteed to the lessee. It is quite clear that the instructions of the relator in this matter are not only founded on a statute respecting the net income derived from these instruments, but that they also limit the inquiry to this one circumstance, thus making it the sole standard of value, although, as we have shown, other circumstances may, and in this instance did, exist, that bear materially on the question of that value. The county auditor, therefore, was not bound to follow the instructions of the relator in this respect. That the earning capacity of these instruments is a material factor in ascertaining their value, and should be considered, it would seem is too clear for controversy. The difficulty, however, of separating that portion of the yearly payment of \$14, which is to be taken as the rental value, from that portion thereof which is to be taken as compensation for other privileges and rights granted by the contract, is doubtless a serious obstacle to its application to the property involved, but perhaps not unsurmountable. However that may be, the difficulty is not one that falls within the province of this court in this case to overcome. It is a duty which the law devolves on the respondent.

He should have in good faith attempted, pursuant to the instructions of the relator, to ascertain as near as practicable the proportion of the whole sum received by the American Bell Telephone Company from the Central Union Telephone Company that ought to be credited to the use of these instruments; and, having done this, he should have considered these earnings in connection with every other circumstance that came to his knowledge, and that bore on the question, and placed on these instruments their true value in money. The relator seems to have conceived that the valuation placed by the American Bell Telephone Company on these instruments was false within the meaning of § 2781, Rev. Stat., and that the respondent on that account should ascertain the value of these instruments for the five years preceding the current year the instructions were given, and add the penalties provided by that section. It does not appear, however, in the evidence that the returns made by the American Bell Telephone Company during those years were false within the meaning of that section as construed by this court in *Ratterman v. Ingalls*, 48 Ohio St. 468, 28 N. E. 168. Nor does it show that the company failed to return any instrument owned by them in Franklin county, or that they did not act in good faith, and with reasonable care, in valuing the instruments returned. Judgment accordingly.

TENNESSEE SUPREME COURT.

F. D. GRIFFITH, Appt.,
v.
Sam BRACKMAN and Wife.

(97 Tenn. 387.)

1. The maker of a deed of trust in possession may contract in such deed with the trustee that foreclosure of the deed of trust shall create the relation of landlord and tenant between the purchaser and mortgagor, and that upon the latter's default in surrendering possession he may be removed by writ of unlawful detainer.

2. A constructive entry attaches as

soon as title is acquired by a purchaser under a deed of trust containing an agreement by the mortgagor that the relation of landlord and tenant will be created by a foreclosure of the deed.

3. No express reservation of a formal right of re-entry by the purchaser under a deed of trust is necessary where such deed contains a stipulation that a foreclosure thereof shall create the relation of landlord and tenant between the mortgagor and purchaser, and that if the former refuses to surrender possession he shall be removable by the writ of unlawful detainer.

(October 5, 1896.)

NOTE.—Effect of stipulation that vendee or mortgagor shall, on default, become a tenant.

I. In general.

II. Rent.

a. In general.

b. Landlord's lien.

c. Distress

III. Recovery of possession.

IV. Rights of purchaser under trust deed.

I. In general.

Such a stipulation seems invariably to have been valid and enforceable. Most of the cases hold that it is intended for the benefit of the vendor, although one holds that it gives the vendee certain rights including the right to a notice to quit.

Where a contract for purchase of land provides that if the purchaser makes default he shall be considered the tenant at will of the vendor at a specified rent, a mere default by the 40 L. R. A.

purchaser does not, of itself, convert the agreement for a purchase into a tenancy, but some act on the part of the vendor is necessary, and the contract remains binding on the parties until he manifests an intention to terminate it, and until such time the purchaser, or his assignee, may remove trade fixtures placed by him on the premises. *Moore v. Smith*, 24 Ill. 512. This case was overruled on another point in *Smith v. Moore*, 26 Ill. 393.

A stipulation that in case the purchaser fails to pay the first instalment of cotton on the purchase price he shall pay the same amount as rent entitles the purchaser to elect, at or before the time for making the payment, whether it shall be as purchase money or rent, and if he elects to pay it for the former purpose, and makes a proper tender, the vendor's refusal to accept it, and the purchaser's subsequent sale of the cotton to a third person, do not affect such election. *Drum v. Harrison*, 83 Ala. 384, 3 So. 715.

A PPEAL by plaintiff from a judgment of the Circuit Court for Knox County in favor of defendants in an action brought to recover possession of certain real estate. *Reversed.*

The facts are stated in the opinion.

Messrs. Ingersoll & Peyton for appellant.

Messrs. F. M. De Armond and Green & Shields, for appellees:

A forcible entry and detainer is where a person by force or strong hand, etc., enters upon the lands, etc., of another.

Mill. & V. Code, § 4073.

A forcible detainer is where a person enters lawfully, and holds unlawfully by force, etc.

Id. § 4074.

Unlawful detainer is where a person enters by contract, either as tenant or assignee of a tenant, etc., and wilfully and without

force holds over the possession of the landlord.

Id. § 4075.

A party, to be guilty of forcible entry and detainer, must enter into possession of the premises when actually adversely holden.

Lane v. Marshall, Mart. & Y. 255.

A maker of a trust deed remaining in possession of the land up to sale, and not disavowing the right of the trustee to possession, nor holding adversely to the trustee, does not become the quasi tenant of the purchaser, and unlawful detainer does not lie in favor of the purchaser.

Ballow v. Motheral, 5 Baxt. 600.

The trust deed does not provide for re-entry, and the stipulation contained therein is a covenant, and not a condition, for the breach of which an action of damages will lie; but unlawful detainer will not lie.

Sloan v. Cantrell, 5 Coldw. 571.

Where the contract provides that in case of default a cash payment made shall be considered as rent, and the purchaser subsequently agrees that such payment shall be considered as rent, and tells the vendor that he does not want the property, and would as soon specified persons should have it as anybody, he is no longer entitled to a specific performance of the contract of purchase. *King v. Morford*, 1 N. J. Eq. 274.

Where a bond for titles provides that in case of default the vendor may declare the bond forfeited, and declare the purchaser his tenant at will, the latter has, in case of default, the rights of a tenant at will, and will be allowed thirty days after notice, in Iowa, in which to quit, and his possession will not be adverse against the vendor until such notice is received. *Austin v. Wilson*, 46 Iowa, 362.

And one who purchased land as trustee, under an agreement that if he did not within a specified time, less than a year, obtain an order authorizing him to make the purchase, he should hold the premises for a year, and that a cash payment made by him should be considered the rent for that year, does not, by holding over after the end of the year with the expectation of still obtaining the order and completing the purchase, become a tenant from year to year and entitled to the six months' notice to quit to which such a tenant is entitled. *Williamson v. Paxton*, 18 Gratt. 475.

II. Rent.

a. In general.

A stipulation of this kind seems invariably to have been held to give the vendor the right to recover rent in case of the purchaser's default in payment.

Thus, a purchaser of land, under a contract which provides that, on default in payment of purchase-money notes, the purchaser shall be liable on rent notes executed at the same time, falling due shortly after the purchase-money notes, elects, by failing to pay the purchase-money notes when due, to become a tenant of the vendor, and liable on the rent notes. *Block v. Smith*, 61 Ark. 266, 32 S. W. 1070.

And where the contract requires the purchaser to pay the purchase money in annual instalments, keep the buildings insured, and pay all taxes, and provides that in case of failure to perform any of such covenants the vendor is at liberty to declare the contract void, and recover by distress or otherwise all accrued interest as rent, the vendor may recover such rent 49 L. R. A.

where the purchaser makes default. *Stinson v. Dousman*, 20 How. 461, 15 L. ed. 966.

And one who sells land, under an agreement that if the purchaser makes default the vendor may, at his election, treat the purchaser's possession as that of a tenant, and receive a specified amount as rent for the preceding year's occupation, may, at his election, treat the purchaser as a tenant, and recover the rent agreed on in case the purchase is not completed, although, after the time fixed for payment, the land is sold under an existing mortgage, which would have prevented the vendor from thereafter giving a good title. *Dunn v. Tillery*, 79 N. C. 497.

And, where the contract provides that on failure to pay any of the purchase-money notes all previous payment shall be forfeited, and the relation of landlord and tenant shall arise between the parties thereto for one year from January 1st immediately preceding the default, and the purchaser shall pay a specified rent for occupying the premises to the time of default, at which time the rent shall be immediately due and collectible, the vendor, although he waives a failure to pay the full amount of such notes for two successive years, treating the contract meanwhile as in full force, may, on the failure to make the required payment on the third year, insist on the forfeiture and the establishment of the relation of landlord and tenant, and recover the rent fixed for such year. *Nelson v. Sanders* (Ala.) 26 So. 518.

And where the contract provides that the purchaser shall hold the premises from its date as "tenant at sufferance of the vendor," subject to be removed as a tenant holding over in case of default, the purchaser to pay taxes and keep the buildings, fences, and improvements in good repair, the vendor may maintain an action for use and occupation on failure to comply with the condition, and is not confined to remedies for the removal of the purchaser simply. *Wright v. Roberts*, 22 Wis. 161. The court in this case states that the relation of landlord and tenant was created by the contract for the purpose of "sustaining" any remedy to which the existence of that relation was essential.

Where the vendor takes back a mortgage for the unpaid balance of the purchase money, payable in two annual instalments, the entire amount to become due on default in payment of the first note, and after such default the purchasers execute an agreement binding themselves to pay the vendor a specified amount of cotton on or before a specified day, and that

To maintain a suit of forcible entry, the plaintiff must be actually expelled from the premises by force.

White v. Suttle, 11 Humph. 449; *Elliot v. Lawless*, 6 Heisk. 123; *Davidson v. Phillips*, 9 Yerg. 93, 30 Am. Dec. 303.

McAlister, J., delivered the opinion of the court:

This is an action of unlawful detainer, commenced by the purchaser of real estate at a foreclosure sale under the provisions of a deed of trust, against the mortgagors, to recover possession of the premises. The action is based upon the following stipulation in the deed of trust, to wit: "The said party of the first part further agrees that in case of any sale hereunder he will at once surrender possession of the said property, and will from that moment become and be the tenant at will of the purchaser, and removable by process as upon a forcible and

unlawful detainer suit, hereby agreeing to pay the said purchaser the reasonable rental value of said premises after said sale." It is agreed that at the foreclosure sale the plaintiff, F. D. Griffith, became the purchaser of the property; that a deed was duly executed by the trustee to said purchaser; and that demand was made of the mortgagors, Brackman and wife, for the possession of the premises, which was refused, and thereupon this action of unlawful detainer was commenced. Counsel filed a stipulation of agreed facts, and the only question submitted for the determination of the court was whether or not this action could be maintained. The circuit judge heard the cause without the aid of a jury, and pronounced judgment in favor of defendants upon the grounds: "First, that plaintiff, Griffith, had never had any possession of the premises; second, because the clause quoted from the trust deed did not have the effect

such cotton shall be paid as rent, in default of payment for the land purchased, the vendor is entitled to the cotton, where the payment for the land is not made, as against a mortgagee of the crop who knew of the agreement with the vendor. *Thornton v. Strauss*, 79 Ala. 164.

One who executes a bond to convey land on receiving the purchase price, taking back a separate agreement from the purchaser to pay a specified rent in case of default, may, on default, sue out an attachment for rent as against a merchant who took a trust deed on the crop for advances with knowledge of the bond, but without knowledge of the separate agreement, as the merchant relied at his peril on the fact that the bond did not refer to any rent contract. *Bacon v. Howell*, 60 Miss. 362.

Where a trust deed stipulates that if a sale shall be made under its provisions, the mortgagors or their assignees or legal representatives, who may be in possession, shall become from the day of such sale the tenants at will of the purchaser at a specified monthly rent, and will remove at any time thereafter at one month's notice, the relation of landlord and tenant is created between the mortgagor and the purchaser on foreclosure; and the latter is entitled to the summary remedy provided by Mo. Rev. Stat. § 6392, for the collection of past-due rent. *Wade v. McCormack*, 68 Mo. App. 12.

b. Landlord's Lien.

The stipulation above considered also gives the vendor the right to a landlord's lien.

Thus, where the vendee agrees to pay a specified amount of cotton for rent, and surrender the lands on default in paying the purchase-money note at maturity, the relation of landlord and tenant, with all its rights and incidents, referable to the time of making the contract, is created; and the vendor has a lien for rent on all the crops grown on the premises, although not raised by the vendee himself. *Foster v. Goodwin*, 82 Ala. 384, 2 So. 895.

And where a contract for the sale of lands provides that on default in payment of the first instalment of the purchase money the contract of purchase shall end *ipso facto*, and the relation of landlord and tenant shall subsist as though no sale had been contemplated, the vendor is entitled to judgment for the rent agreed on, and to the enforcement of a landlord's lien on the crops; but if the agreement is an absolute sale, the mere fact that the first instalment of purchase money is called "rent"

by the parties will not change their relation to that of landlord and tenant on default in its payment, or give a lien on the crop for its payment. *Quertermous v. Hatfield*, 54 Ark. 16, 14 S. W. 1096.

But where the contract provides for payment of annual instalments on the purchase price, and that in the case of failure for two years in succession to pay such instalments the contract shall be void and the vendees shall pay rent or pay a forfeit to the vendors, the relation of landlord and tenant does not exist until the expiration of such two years; and the vendors are not entitled until then to a landlord's lien on the crops. *Killebrew v. Hines*, 104 N. C. 104, 10 S. E. 159, 251.

c. Distress.

Such a stipulation is also generally held to entitle the vendor to maintain distress proceedings, although notice of an intention to hold as tenant may first be required.

Where a parol contract for the sale of land is made, under which the purchaser goes into possession, with the agreement that if the purchase money is not paid at the end of the year he will pay a stipulated rent, the vendor may maintain distress for the rent after the default without tendering a deed and demanding the purchase money, as such contract is void as one of purchase, but valid as one of leasing for one year. *Vick v. Ayres*, 56 Miss. 670.

Where one goes into possession of land under a parol contract for its purchase at a given price to be paid for in annual instalments on condition that if he is not able to pay for the land he shall pay as rent for each year he occupies it a specified per cent of the price agreed on and taxes, and falls for two years to make any payment either as purchase money or as rent, the relation of landlord and tenant exists between the parties as to the second year's occupation; and a distress warrant sued out by the vendor for the rent due under the contract for that year has, as to the crop of that year, priority over a general judgment of older date against the purchaser. *Reddick v. Hutchinson*, 94 Ga. 675, 21 S. E. 712.

Where the contract provides that, in case of the failure to pay the first instalment at maturity, the purchaser shall pay a specified amount of cotton for rent, the fact that the purchaser removed the greater part of the cotton, and then notified the vendor before the first payment fell due that he would not take

to create the relation of landlord and tenant, but was simply a covenant or agreement that such relation should exist, a breach of which would render defendant liable for damages at law; third, because the plaintiff does not show that defendant was his tenant for any specific time, and was holding over after the expiration of his term; fourth, because there is no provision or stipulation for re-entry to the purchaser in the event of a sale under the trust deed." Plaintiff appealed, and has assigned errors.

Section 4075, Mill. & V. Code, provides, *vic.*: Unlawful detainer is where the defendant enters by contract, either as tenant or as assignee of a tenant, or as personal representative of a tenant, or as subtenant, or by collusion with a tenant, and in either case, wilfully and without force, holds over the possession from the landlord, or the assignee, of the remainder or reversion." Section 4082, *Id.*, further provides, *vic.*: "No notice to quit need be given by the plain-

tiff to the defendant, other than the service of the warrant." It was held by this court in the case of *Ballow v. Motheral*, 5 Baxt. 602, that "the remedy given [by this section] was on behalf of landlords and their assignees, against tenants and subtenants, provided where the relationship had been created by or arose from express contract, and does not apply to other contracts, as mortgagor and mortgagee, vendor and vendee, where in certain phases the relationship becomes assimilated to that of landlord and tenant." Accordingly it was held that "the maker of a deed of trust, remaining in possession of the land up to the sale, and not disavowing the right of the trustee to possession, nor holding adversely to the trustee, does not become the quasi tenant of the purchaser, and this action [unlawful detainer] does not lie in favor of such purchaser, and against the tenant of the maker of the deed." So it was held in *Kuhn v. Feiser*, 3 Head, 82: "The action of forcible or un-

the premises, does not, where no further attempt was made, after giving such notice, to remove any more of the crop, entitle the vendor to sue out a distress warrant, which, in Georgia, is authorized before the rent is due only when the tenant is seeking to remove his goods from the premises. *Oxford v. Ford*, 67 Ga. 382.

Where a mortgage provides that in case of default the mortgagor shall immediately, or at any time thereafter, hold the premises of the mortgagees as a yearly tenant at a specified rent, the latter cannot distrain for rent after a default by the mortgagor without giving him notice of any kind that they intend to hold him as tenant, instead of mortgagor. *Clowes v. Hughes*, L. R. 5 Exch. 160, 39 L. J. Exch. N. S. 62, 22 L. T. N. S. 103, 18 Week. Rep. 459.

And where a mortgage contains a power of sale in case of default of payment, and provides that a sale under such power shall entitle the purchaser to immediate possession of the premises, and any holding of the same by the mortgagor thereafter shall be as tenant of the purchaser at a specified monthly rent, and the purchaser may, at any time, determine such tenancy by giving one month's notice, or without such notice in case two months' rent is due and unpaid, and in either case shall have the right to obtain possession of the premises as in other cases of landlord and tenant, the relation of landlord and tenant exists between such mortgagor and a purchaser under the power of sale, and the latter is entitled, as against one to whom the mortgagor subsequently gives an agricultural lien, to possession of the mortgagor's crops distrained for rent prior to their seizure under such lien, until payment of the rent due is made, under S. C. Gen. Stat. § 1824, providing that no chattels whatsoever on any leased lands, or tenements, shall be liable to be taken by virtue of any execution or any pretense whatever, unless the party at whose suit the execution is sued out shall first pay the landlord all rent due at the time of taking the same. *Brewster v. McNab*, 36 S. C. 274, 15 S. E. 233.

III. Recovery of possession.

The cases also agree in holding that under such a stipulation the vendor, mortgagor, or purchaser on foreclosure may recover possession of the premises.
49 L. R. A.

Thus, the principal case of *GRIFFITH v. BRACKMAN* holds that where a deed of trust provides that in case of foreclosure the relation of landlord and tenant shall thereby be created between the purchaser and the mortgagor, and that upon default of the latter in surrendering possession he may be removed by writ of unlawful detainer, the purchaser on foreclosure may maintain such an action, and no previous entry on his part is required, as under such provision there was a constructive entry that attached as soon as the purchaser acquired title.

And where a deed of trust to a building and loan association provides that on failure of the mortgagors to pay the interest or monthly dues such deed shall remain in full force, and the mortgagors shall be the tenants of the association at a specified monthly rental beginning when the amount due and unpaid shall equal six months' dues and interest, with the right to remain in possession only so long as they pay the monthly dues and interest, and that on failure to pay such interest and dues the association shall have the right to enter and take possession, the mortgagors are tenants of the association for the rent reserved, payment of which shall begin after six months' arrears of dues and interest; and where the association becomes the purchaser on a foreclosure of the trust deed, it may maintain an action of unlawful detainer against the mortgagors as for holding over under a lease. *Equity Bldg. & L. Asso. v. Murphy*, 75 Mo. App. 57.

A title bond agreeing to convey land on specified conditions, among which is one for a cash payment of \$75, is converted into a lease by an indorsement thereon that the vendor shall, at the end of a year, have the right to refuse a deed, in which case the \$75 shall go towards paying rent at the rate of \$6 per month, and the purchasers shall also have the right to let such payment go as rent if they do not wish to buy at the end of the year; and the vendor may recover the land at the expiration of the twelve and one-half months for which such payment would pay the rent. *Barrett v. Johnson*, 2 Ind. App. 25, 27 N. E. 983.

Where a contract for the sale of land contains a stipulation that on the failure of the vendee to pay at maturity he shall pay the customary rent for the use of the land, the parties become

lawful entry and detainer will not lie in favor of a trustee created by a mortgage, or a purchaser under him, neither of whom has had possession of the premises, against a naked trespasser. In such case there is no privity between the trustee or purchaser and the trespasser, and the latter is not the tenant of either." But it will be observed that the facts of this case present a question which did not arise in the cases mentioned, or in any other reported case, so far as we are advised. It is whether or not a mortgagor in possession may not, in advance, contract with the trustee or mortgagee that in the event a foreclosure becomes necessary the relation of landlord and tenant shall thereby be created between the purchaser and the mortgagor, and upon default of the latter in surrendering possession of the premises he shall be removable by the writ of unlawful detainer. We are unable to perceive any sound reason why such a contract, made for the benefit of the purchaser, may not be enforced by him. It

is objected that the action cannot be maintained for the reason that there was no entry on the premises after the purchaser acquired title. We think, in view of the contract embodied in the deed, establishing the relation of landlord and tenant between the mortgagor and the purchaser, there was a constructive entry that attached as soon as the purchaser acquired title. It is further objected that there is no provision in the contract reserving to the purchaser the right of re-entry in the event of a sale under the trust deed. We think this objection is met by the observations already made. The mortgagor expressly stipulated that if he refused to surrender possession he should be removable by the writ of unlawful detainer. In view of such a stipulation, it was not necessary that there should have been any express reservation of a formal right of re-entry.

The judgment will be reversed, and judgment rendered here in favor of plaintiff.

landlord and tenant on failure to pay the purchase money; and the vendor may maintain an action of unlawful detainer against the purchaser. *Ish v. Morgan*, 48 Ark. 413, 3 S. W. 440.

But where the contract provides that in case of default in payments the purchaser shall hold his possession as a tenant at will, a default in payment does not terminate all the rights of the purchaser so as to authorize the vendor to maintain an action of forcible entry and detainer before a justice of the peace to recover possession of the same, although an action in ejectment or other proper proceeding in a court of general jurisdiction might be maintained in which all equities and defenses could be fully adjudicated. *Chicago, B. & Q. R. Co. v. Skupa*, 16 Neb. 341, 20 N. W. 398.

IV. Rights of purchaser under trust deed.

A trust deed or mortgage may also provide that the purchaser on foreclosure or under a power of sale shall sustain the relation of landlord to the mortgagor, and under such stipulation the former may recover rent or the possession of the premises.

Thus, the principal case of *GRIFFITH v. BRACKMAN* holds that a provision in a deed of trust that in case of foreclosure the relation of landlord and tenant shall thereby be created between the purchaser and mortgagor, and that upon the default of the latter in surrendering possession he may be removed by writ of unlawful detainer, is valid and enforceable by such purchaser, and no previous entry on his part is required, as under such provision there was a constructive entry that attached as soon as he acquired title.

And *Equity Bldg. & L. Asso. v. Murphy*, 75 Mo. App. 57, holds that where such a deed to a building and loan association provides that on failure of the mortgagors to pay the interest or monthly dues such deed shall remain in full force, and the mortgagors shall be the tenants of the association at a specified monthly rental beginning when the amount due and unpaid shall equal six months' dues and interest, with the right to remain in possession only so long as they pay such dues and interest, and that on failure to pay the same the association shall

have the right to enter and take possession, the mortgagors are tenants of the association for the rent reserved, payment of which will begin after six months' arrears of dues and interest; and that where the association becomes the purchaser on foreclosure it may maintain an action of unlawful detainer against the mortgagors as for holding over under a lease.

Wade v. McCormack, 68 Mo. App. 12, holds that where a trust deed stipulates that if a sale shall be made under its provisions the mortgagors or their assignees or legal representatives who may be in possession shall become from the day of such sale the tenants at will of the purchaser at a specified monthly rent, and will remove at any time thereafter at one month's notice, the relation of landlord and tenant is created between the mortgagor and such purchaser, and the latter is entitled to the summary remedy provided by Mo. Rev. Stat. § 6392, for the collection of past-due rent.

Where a mortgage contains a power of sale in case of default of payment, and provides that a sale thereunder shall entitle the purchaser to immediate possession of the premises, and that any holding of the same by the mortgagor thereafter shall be as tenant of the purchaser at a specified monthly rent, and that the purchaser may at any time determine such tenancy by giving one month's notice or without such notice in case two months' rent is due and unpaid, and in either case shall have the right to obtain possession as in other cases of landlord and tenant, the relation of landlord and tenant exists between such mortgagor and a purchaser under the power of sale, and the latter is entitled, as against one to whom the mortgagor subsequently gives an agricultural lien, to possession of the mortgagor's crops distrained by him for rent before their seizure under such lien, until payment of the rent due is made under S. C. Gen. Stat. § 1824, providing that no chattels on any leased lands or tenements shall be liable to be taken by virtue of any execution on any pretense whatever, unless the party at whose suit the execution is sued out shall first pay the landlord all rent due at the time of taking the same. *Brewster v. McNab*, 36 S. C. 274, 15 S. E. 233.

J. H. H.

OKLAHOMA SUPREME COURT.

TERRITORY of Oklahoma, *Plff. in Err.*,
v.

T. M. RICHARDSON, Jr.

(9 Okla. 579.)

- *1. A pardon is an act of grace, proceeding from the powers intrusted with the execution of the laws, which exempts the individual upon whom it is bestowed from the punishment which the law inflicts for the commission of a crime. It is a remission of guilt, and a declaration of record by the authorized authority that a particular individual is to be relieved from the legal consequences of a particular crime.
2. The power and authority to grant pardons for offenses against the laws of this territory is by the organic act committed to the governor, and is complete in him. The power to grant pardons is exclusive of the judicial and legislative authority. It is conferred by the United States, and it cannot be lessened by any act of the territorial legislature. When a full and absolute pardon is granted to one by the governor of this territory, it exempts the individual upon whom it is bestowed from the punishment which the law inflicts upon the crime which he has committed, and the crime is forgiven and remitted.
3. A pardon extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.
4. After a pardon has been granted, it is thenceforward and at all times final, notwithstanding the fact that it may not have been granted in pursuance of the regulations provided for in the statutes of the territory.
5. The territorial legislature has no power to impose limitations upon the manner in which the pardoning power shall be used, set up, alleged, or called to the notice of the court as a defense. All that is requisite is that the attention of the court shall be called judicially to the fact that a full and absolute pardon has been granted, and the court before whom the matter is pending will itself determine whether the evidence is sufficient; and when, as in this case, there is no contention on the subject, but the pardon is admitted, it is the duty of the court to discharge the defendant, and dismiss the proceeding against him.
6. In order to impeach a pardon for fraud, it must be done in a direct, and not in a collateral, manner, such as the present proceeding.
7. The fact that a pardon has been granted is available as a protection from any further proceeding in respect to the crime for which the pardon has been extended, at any time or stage of the proceedings before the execution of the sentence.

(February 8, 1900.)

*Headnotes by McATEE, J.

ERROR to the District Court for Kay County to review a judgment in favor of defendant in a prosecution for violating a statute against receiving deposits in a bank knowing it to be insolvent. *Affirmed.*

Statement by McATEE, J.:

On December 16, 1897, the defendant in error was charged by indictment with the offense of receiving a deposit in the First State Bank of Perry, when he knew the bank to be insolvent, and when he was at the time assistant cashier thereof. A demurrer filed by the defendant was overruled, and the plea of not guilty entered. Thereafter, upon the application of the defendant, a change of venue was granted from Noble to Kay county, consent was given by the defendant to the setting of the case for trial, and an application made for an order for witnesses to be subpoenaed in his behalf. When the case was called for trial, the defendant, without leave of court, and without withdrawing his plea of not guilty, filed a motion to dismiss the indictment, on the ground that a pardon had been granted to him on March 30, 1897, by the secretary of the territory, then properly acting as governor, in the absence of the governor himself. Thereafter, on the 28th day of September, 1898, the defendant, by leave of court, filed an amended motion, entitling it "in the nature of a plea in abatement, setting up a pardon," in which he set forth more fully that a free, full, absolute, and unconditional pardon had been granted to the defendant upon the date referred to, and made profert of letters patent by which the pardon had been granted, and in which the offense as charged in the indictment was set forth, and for which the pardon recited that it "granted unto the said T. M. Richardson, Jr., a full, complete, and absolute pardon for all offenses committed or charged against him, growing out of the management or control of the First State Bank of Perry, between the 11th day of June, 1895, and the 16th day of September, 1895, of which he now stands indicted, or for which he may hereafter be indicted, of any and every nature whatsoever, and hereby remitting and releasing unto the said T. M. Richardson, Jr., all penalties incurred or supposed to be incurred for or on account of the management or control of said bank as aforesaid." The pardon was executed by the acting governor, under the great seal of the territory. Upon the hearing of the motion, the plaintiff, by its attorneys, objected to its consideration, for the reasons (1) that the defendant had waived the benefits of the pardon by pleading to the merits, and by taking a

NOTE.—As to encroachment on power of governor in respect to pardons, see *People v. Cummings* (Mich.) 14 L. R. A. 286, and note; *People ex rel. Forsyth v. Monroe County Ct. of Sessions* (N. Y.) 23 L. R. A. 856; *Parker v. State* (Ind.) 23 L. R. A. 859; *Rich v. Chamber-*

lain (Mich.) 27 L. R. A. 573; *State ex rel. Witter v. Forkner* (Iowa) 28 L. R. A. 206.

As to legislative power to grant pardons, see *Singleton v. State* (Fla.) 34 L. R. A. 251, and note.

change of venue and causing the case to be set for trial; (2) that the motion was in the nature of a special plea, with the general issue before the court, and that the matter set up therein should be tried with the general issue; (3) that the pardon was not in fact accepted, and had been procured by fraud and misrepresentation, and without compliance with the laws of the territory with reference to the granting of the same; and (4) that the order should be tried with the general issue, and an opportunity given the plaintiff to show that the attorney general of the territory had acted on behalf of the defendant in procuring the pardon, and had procured the same by misrepresentation and a concealment of facts. Time was given to the plaintiff to file affidavits to substantiate the statement of facts made in their objection to the consideration of the motion, to the 4th day of October following, and upon the hearing of the motion, the court having directed the plaintiff to "substantiate the charges made in court against the secretary of the territory, acting as governor," the counsel for the territory stated that, for the purposes of that motion, he did not wish to be understood as making any charges, or being able to prove any charges. In passing upon the motion, the court sustained the plea of pardon upon the ground that the pardon upon its face showed that it was duly and regularly issued, and had been duly accepted by the defendant. The action was dismissed, and the defendant discharged. The territory objected to the proceeding, and exceptions were reserved.

Mr. S. H. Harris, with **Messrs. H. S. Cunningham**, Attorney General, and **A. R. Museller**, for plaintiff in error:

The court had no authority to entertain the plea in abatement:

1. Because any special plea had been waived by the acts of the defendant in pleading not guilty, taking a change of venue, and consenting that the case be set for trial.

Wharton, *Crim. Pl. & Pr.* 9th ed. §§ 419, 426, 429.

2. The plea in abatement is prohibited by our statute, *Laws of 1893*.

Stanley v. United States, 1 Okla. 336, 33 Pac. 1025.

The pardon was not, in fact, accepted. It was unquestionably held secretly, as it had been obtained in a secret manner, and with the intention to use the same and accept of its provisions if such should become necessary, in order to finally defeat the punishment for the crime committed by the defendant in error.

Ex parte Birch, 8 Ill. 134; 6 Crim. L. Mag. 476; *United States v. Wilson*, 7 Pet. 150, 8 L. ed. 640; *Com. v. Lockwood*, 109 Mass. 323, 12 Am. Rep. 699; *State v. Woolery*, 29 Mo. 300.

Messrs. H. H. Howard, **J. L. Pancoast**, and **James B. Diggs**, for defendant in error:

Our system of pleading leaves but one means by which the defendant in error could judicially inform the court that he had received a pardon and was relying upon the

same for his protection; that is, by a motion setting up said pardon, and that he relied upon the same for his protection. This the defendant in error did.

United States v. Wilson, 7 Pet. 150, 8 L. ed. 640; 4 Bl. Com. p. 401.

No qualifications apply, or by legislative enactment can be made to apply, to the President, or to the governor of any state where the state Constitution makes or provides for no restriction being made by the legislature, or to the governor of any territory.

1 Mes. & P. of Presidents, 181; *Ex parte Garland*, 4 Wall. 377, 18 L. ed. 370; *Re Moore*, 4 Wyo. 98, 31 Pac. 980; *Carlisle v. United States*, 16 Wall. 147, 21 L. ed. 426; *Knote v. United States*, 95 U. S. 149, 24 L. ed. 442; *United States v. Klein*, 13 Wall. 128, 20 L. ed. 519.

Where no such limitations exist pardon must be treated and defined as by the old-time authorities, as "a work of mercy (sometimes of justice) whereby the King (or other executive), either before or after conviction, forgiveth an offense."

Rich v. Chamberlain, 104 Mich. 436, 27 L. R. A. 573, 62 N. W. 584; *Singleton v. State*, 38 Fla. 297, 34 L. R. A. 251, 21 So. 21; *State ex rel. Rogers v. Jenkins*, 20 Wash. 78, 54 Pac. 765; *Re Pardoning Power*, 85 Me. 547, 27 Atl. 463; *Diehl v. Rodgers*, 169 Pa. 316, 32 Atl. 424; *Ex parte Reno*, 66 Mo. 266, 27 Am. Rep. 337.

When the defendant in error produced his pardon in open court, relied upon it as the anchor of his safety, and sought shelter under its protection from further prosecution, the question of his acceptance of said pardon could not call for evidence.

These things, in themselves, constitute acceptance.

Ex parte Powell, 73 Ala. 517, 49 Am. Rep. 71; *Knapp v. Thomas*, 39 Ohio St. 377, 48 Am. Rep. 462; *Ex parte Reno*, 66 Mo. 266, 27 Am. Rep. 337; *DePuy's Case*, 3 Ben. 307, Fed. Cas. No. 3,814; *State v. Baptiste*, 26 La. Ann. 134.

McAttee, J., delivered the opinion of the court:

It is contended by the plaintiff in error that the court had no authority to entertain the plea in abatement, because any special plea had been waived by the act of the defendant in pleading not guilty, taking a change of venue, and consenting that the case be set for trial. In support of this contention, the plaintiff in error cites the various sections of the statute which provide for the pleas on behalf of the defendant, and by which the defense of the defendant may be set up, and upon which the indictment must be set aside, if at all, by the court. Sections 5117, 5118, 5127, and 5133, provide that the only pleading on the part of the defendant is either a demurrer or a plea; that the demurrer and the plea must be put in in open court, either at the time of the arraignment or at such other time as may be allowed to the defendant for that pur-

pose; that there are three kinds of pleas to an indictment, to wit: (1) guilty, (2) not guilty, and (3) a former judgment of conviction or acquittal of the offense charged, which may be pleaded either with or without the plea of not guilty; and that all matters of fact tending to establish a defense other than specified in the third subdivision of § 5127 may be given in evidence under the plea of not guilty.

It is contended by the plaintiff in error that the court should not have sustained the motion of the defendant in error to dismiss the cause, since the statute adequately provides for giving in evidence the pardon under the plea of not guilty, and that the motion of the defendant is not provided for in or by the provisions of the statute here enumerated, and is therefore excluded from use in our procedure. The organic act provides, by § 2, that "the governor . . . may grant pardons for offenses against the laws of said territory, and reprieves for offenses against the laws of the United States until the decision of the President can be known thereon." A pardon is an act of grace, proceeding from the powers intrusted with the execution of the laws, which exempts the individual upon whom it is bestowed from the punishment which the law inflicts for the commission of a crime. This is the definition of pardon as given by Chief Justice Marshall in *United States v. Wilson*, 7 Pet. 150, 8 L. ed. 640, and it has been followed since that time. *Ex parte Wells*, 18 How. 307, 15 L. ed. 421; *People v. Bowen*, 43 Cal. 439, 13 Am. Rep. 148. The effect of a pardon is included in definitions made by other legal writers, the standard authorities, whom we follow. Lord Coke defines a pardon as a "work of mercy, whereby the King, either before attainder, sentence, or conviction, or after, forgiveth any crime, offense, punishment, execution. . . ." 3 Inst. 233. And Bishop says that "pardon is a remission of guilt." 1 Bishop, Crim. Law, § 898. And a pardon is defined in Wharton, Crim. Law, § 591, as a declaration of record by a sovereign that a particular individual is to be relieved from the legal consequences of a particular crime. 17 Am. & Eng. Enc. Law, p. 317.

The power and authority to grant pardons for offenses against the laws of the territory is by the organic act committed to the governor. It is complete in him. It is so provided by the organic act. The power to grant pardons is exclusive of the judicial and legislative authority. It is conferred by the United States, and it cannot be lessened by any act of the territorial legislature. Under the grant in the organic act and the definitions herein recited, when a full and absolute pardon is granted to one by the governor of this territory, it exempts the individual on whom it is bestowed from the punishment which the law inflicts upon the crime which he has committed. The crime is forgiven and remitted, and the individual is relieved from all of its legal consequences. If, after the granting of this authority and jurisdiction to the governor

by Congress, it still remained in the power of the territorial legislature to prescribe the provisions under which the governor must proceed, it would result that the legislature would have the power to lessen the facility and freedom with which the pardon might be granted. The existence of such a power in the legislature is repugnant to the absolute authority in this matter given to the governor by the organic act, by which the pardoning power is completely and wholly vested in him; and it has never been understood, in any of the territories, that the territorial legislature had any authority to prescribe limitations, or to determine in what manner the individual seeking the pardon must proceed in order to be entitled to this act of mercy. The executive authority has not been in any wise controlled by any act of the legislature with reference to this subject, which could be understood as in any manner limiting the authority and discretion of the governor, when he saw fit to exercise it, except as the legislative provisions may have been considered as a regulation of the method of procedure by persons seeking to bring their application for the benefits of the pardoning power before the governor in such a way as to entitle them to be heard.

The power to grant pardons, by the Constitution of the United States (§ 2, art. 2), providing that the "President . . . shall have power to grant reprieves and pardons for offenses against the United States, except in case of impeachment," is in terms of identical scope and force, within the United States, with the provision of our organic act, which provides that "the governor . . . may grant pardons for offenses against the laws of said territory." And the reasoning in *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366, is entirely applicable here. The court there says that, inasmuch as the Constitution provides that the President shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment, the power thus conferred is unlimited, extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment, and that this power of the President is not subject to legislative control, and that Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders. The benign prerogative of mercy imposed in him cannot be fettered by any legislative restrictions. The same reasoning is adopted in the territories with reference to the pardoning power of the governor. It was so held in *Re Moore*, 4 Wyo. 98, 31 Pac. 980, in *State ex rel. Rogers v. Jenkins*, 20 Wash. 78, 54 Pac. 765, in *Re Pardoning Power*, 85 Me. 547, 27 Atl. 463, in *Diehl v. Rodgers*, 169 Pa. 316, 32 Atl. 424, and in *Ex parte Reno*, 66 Mo. 266, 27 Am. Rep. 337. The sum of these decisions is that the power to grant pardons is exclusive, and cannot be exercised or controlled by the legislature.

A part of the contention of the plaintiff

in error is that the pardon was not procured in pursuance of the regulations therefor, as prescribed in the Statutes of 1893; but it will be seen by the authorities here cited, since it is admitted that the pardon was granted as averred, and that it was full and absolute, that thenceforward it was final, notwithstanding the fact that it may not have been granted in pursuance of the regulations provided for in the statutes of the territory. It also follows, from the absolute, unlimited, and final character of the governor's act in granting the pardon, and from his complete and exclusive jurisdiction in the matter, that the territorial legislature has no power to impose limitations upon the manner in which it shall be used, set up, alleged, or called to the notice of the court as a defense. All that is requisite is that the attention of the court shall be called to the fact that a full and absolute pardon has been granted, and the court before whom the matter is pending will itself determine whether the evidence is sufficient; and when, as in this case, there is no contention on the subject, but the pardon is admitted, it is the duty of the court to discharge the defendant, and dismiss the proceeding against him, since the pardon is itself an absolute exemption from any further legal proceedings which could tend to harass the defendant on account of the crime, or alleged crime, which has been the subject of executive clemency in the exercise of the pardoning power. It was said in *Blackstone* that "the King's charter of pardon must be specifically pleaded, and that at a proper time; for, if a man is indicted, and has a pardon in his pocket, and afterwards puts himself upon his trial by pleading the general issue, he has waived the benefit of such pardon." But *Blackstone* himself added, immediately thereafter, that "if a man avails himself thereof, as by course of law he may, a pardon may either be pleaded on arraignment, or in arrest of judgment, or, in the present stage of proceedings, in bar of execution." 4 Bl. Com. p. 401. And, after making this citation from *Blackstone*, in *United States v. Wilson*, 7 Pet. 150, 8 L. ed. 640, Chief Justice Marshall adds that the court, in a case in which the defendant did not avail himself at all of the pardon, says that the matter of pardon, when its benefits are sought, must be in some manner brought judicially before the court, by plea, motion, or otherwise. And he adds: "A court would undoubtedly, at this day, permit a pardon to be used after the general issue. Still, where the benefit is to be obtained through the agency of the court, it must be brought regularly to the notice of that tribunal. . . . The prisoner may avail himself of the pardon by showing it to the court, even after waiving it by pleading the general issue." Any other construction would lead to useless and unwarranted delay and expense. When a pardon is shown and admitted, the defendant is entitled to complete exemption from further annoyance; and, if the trial court had held otherwise, and had undertaken to further detain

the defendant, and impanel a jury upon the general issue, the only result which could have followed would have been that, upon the introduction of the pardon in evidence, and its examination by the court, and its character ascertained as a full and absolute pardon for the offense in question, the court should have forthwith discharged the defendant and the jury.

But it is contended by the plaintiff that he would have had a right to attack the pardon for fraud, or to show that it was not accepted. Upon the latter half of the proposition, it is sufficient that the defendant brought the pardon to the notice of the court in his motion to dismiss; and upon the former proposition it must be held that, in order to impeach for fraud, it must be done in a direct proceeding, and not in a collateral proceeding like this. It has been held, concerning pardons, that they stand upon the same plane with the government's patent for land, with its patent for an invention, with its incorporation of a company, or with the record of a judgment; that, while fraud may vitiate them, and an action may be brought setting either the deed, patent, incorporation, or judgment aside for fraud, it will only be done in a direct proceeding for that purpose. And it has been said that: "a pardon is granted to one who is certainly guilty, sometimes before, but usually after, conviction; and the court takes no notice of it unless pleaded, or in some way claimed by the person pardoned; and it is usually granted by the Crown or by the executive." *State v. Blalock*, 61 N. C. (Phill. L.) 242. In *Rea v. Haines*, 1 Wils. 214, where a pardon granted after issue joined, but before conviction, was not called to the attention of the court until after conviction, it was nevertheless held to be in time, but the defendant was charged with full payment of costs. The plea of pardon may be made after conviction, in response to the question whether the accused has anything to say why sentence should not be pronounced. *Blair v. Com.* 25 Gratt. 850. A pardon may properly be called to the attention of the appellate court where the case is pending on appeal. *Com. v. Lockwood*, 109 Mass. 323, 12 Am. Rep. 699. And this may be done by suggestion of the state's attorney that the defendant has been pardoned, upon which the appeal will be dismissed. *State v. White*, 26 Or. 605, 40 Pac. 229.

The governor having been vested with the pardoning power, and with exclusive authority to hear and determine, and no limitation being imposed upon him that this benign prerogative of mercy shall not be so treated, and that the suggestion that it may be set aside by a court in a collateral proceeding like this, is not to be thought of for a moment. *Knapp v. Thomas*, 39 Ohio St. 377, 48 Am. Rep. 462.

The appeal will therefore be dismissed, and the judgment of the trial court affirmed.

All the Justices concur, except *Hainer*, J., who presided below.

PENNSYLVANIA SUPREME COURT.

Re Estate of William A. PARRY, Deceased.

APPEAL OF Amanda H. BALLANTINE, Exrx., etc., of William A. PARRY, Deceased.

(188 Pa. 33.)

1. A letter of credit in favor of husband and wife, purchased with the husband's money, creates an estate by entireties, so that in case of his death the balance may be drawn by her without accounting therefor to his estate.
2. A sailing yacht is not included in a bequest of "articles of personal use and ornament," in a clause which enumerates clothing, household furniture, pictures, books, etc.

(October 17, 1898.)

APPPEAL by Amanda H. Ballantine from a decree of the Orphan's Court for Philadelphia County charging her with the amount which she had drawn on a letter of credit in favor of herself and her deceased husband after the latter's death. *Reversed in part.*

The facts are stated in the opinion.

Messrs. Charles A. Chase and George S. Graham, for appellant:

The testator bought the letters of credit in question in the joint names of himself and wife, and by his own voluntary act created an estate by entireties which cannot be questioned by anyone except creditors.

A tenancy by entireties arises whenever an estate vests in two persons, they being, when it so vests, husband and wife.

Freeman, *Cotenancy & Partition*, §§ 63, 68; *Gillan v. Dixon*, 65 Pa. 395; *Bramberry's Estate*, 156 Pa. 628, 22 L. R. A. 594, 27 Atl. 405; *Diver v. Diver*, 56 Pa. 106.

The letters of credit in this case were to be held by husband and wife; each had an equal right to draw upon them, and they were bought by the testator with that intention; and the legal result is that they held these letters of credit, choses in action, as an estate by entireties, and upon the death of either, prior to the payment thereof, the survivor takes the whole by right of survivorship.

Donnelly's Estate, 7 Pa. Co. Ct. 196.

The act of obtaining the letters of credit was equivalent to drawing a draft in favor of his wife upon the bankers, and the acceptance of the same by them, thus vesting in her the title to the proceeds.

Coolidge v. Payson, 2 Wheat. 66, 4 L. ed. 185.

The act of Mr. Parry in obtaining these letters of credit in the name of his wife showed an executed gift to her.

Crainford's Appeal, 61 Pa. 52, 100 Am. Dec. 609; *Herr's Appeal*, 5 Watts & S. 494.

Under the words "articles of personal use

and ornament" the carriage which the decedent owned for his own personal use, and also his yacht, which he kept for a like personal use, are included.

Hoopes's Appeal, 60 Pa. 220; *Cole v. Fitzgerald*, 1 Sim. & Stu. 189; *Cornecall v. Cornwall*, 12 Sim. 298.

Messrs. R. Loper Baird and John G. Johnson, for appellee:

The letters of credit, whether in a single or a joint name, do not transfer money; they are a means by which credit is given abroad, so that money can be obtained. The bearer is not bound to receive the money; he may use the letter as he pleases, and contracts an obligation only by receiving the money.

Bouvier, Law Dict. Letter of Credit; 13 Am. & Eng. Enc. Law, p. 239.

Where the letter is not purchased, but is truly an accommodation, and meant to raise a debt on the person accommodated, the engagement is generally to see paid any advances made to him, or to guarantee any draft accepted or bill discounted; and the compliance with the mandate in such cases raises a debt both against the writer of the letter and the person accredited.

Edwards, Bills & Notes, 239; *Dan. Neg. Inst.* 1752, 1755.

Testator understood and intended, by putting money in the joint names, to make it more convenient to get money in case of the absence or sickness of one or the other, and also to enable his wife to get possession of his money in case of his death abroad, that would pay her expenses in traveling home with his body.

Her traveling expenses home with the body could be properly allowed out of it by the court, but the fact of his money being in her possession and control at his death raises no presumption of a gift to her of the money.

McDermott's Appeal, 106 Pa. 367, 51 Am. Rep. 526; *Gracie's Estate*, 158 Pa. 521, 27 Atl. 1083.

If an alleged gift is merely a device or arrangement to subserve a matter of convenience to the donor, and if the wife is merely an agent to meet some supposed or apprehended emergency that may arise, a gift would not be proved. The mere gift of money by the husband to the wife is not a settlement of it as her separate estate.

Parvin v. Capercell, 45 Pa. 89; *McDermott's Appeal*, 106 Pa. 367, 51 Am. Rep. 526; *Gracie's Estate*, 158 Pa. 521, 27 Atl. 1083; *Second Nat. Bank v. Wrightson*, 63 Md. 81; *Taylor v. Henry*, 48 Md. 550, 30 Am. Rep. 486; 14 Am. & Eng. Enc. Law, pp. 570-572.

The decisions in cases where estates by entireties are created are governed and controlled by the donor's intention, in the same manner as in the cases of gifts by the husband to his wife.

Re Albrecht, 136 N. Y. 91, 18 L. R. A. 329, 32 N. E. 632.

NOTE.—As to personal property held by entireties, see *Re Bramberry* (Pa.) 22 L. R. A. 594, and note; also note to *Cole Mfg. Co. v. Collier* (Tenn.) 30 L. R. A. on page 317.
49 L. R. A.

One of the peculiarities of an estate by entireties is that neither husband nor wife can dispose of any part of the estate without the assent of the other, but the whole must remain to the survivor. Where an instrument would create neither a tenancy in common nor a joint tenancy in unmarried persons, it will not create a tenancy by the entireties, though the grantees may be described as husband and wife.

Dexter v. Billings, 110 Pa. 135, 1 Atl. 180; *Young's Estate*, 166 Pa. 645, 31 Atl. 373; *Trimble v. Reis*, 37 Pa. 448.

Delivery is essential to a gift *inter vivos*, and such delivery of possession as makes the disposal of the thing irrevocable. An irrevocable gift must be proved.

Kidder v. Kidder, 33 Pa. 268; *Re Campbell*, 7 Pa. 100, 47 Am. Dec. 503; *Trough's Estate*, 75 Pa. 115; *Williams's Appeal*, 106 Pa. 116.

A gift by a husband to his wife of a deposit in his name must be perfected by delivery; and if he dies before his wife draws the money or has the check accepted, the gift does not take effect.

Linsenberg v. Gourley, 56 Pa. 166, 94 Am. Dec. 51; *Kern's Estate*, 120 Pa. 523, 14 Atl. 435.

The title must pass out of the donor in his lifetime, or it can never reach the donee.

Walsh's Appeal, 122 Pa. 177, 1 L. R. A. 535, 15 Atl. 470.

Where particular chattels are described in a will the subsequent words of general description only pass chattels of a similar kind to those specifically mentioned.

Willis v. Curtois, 1 Beav. 196, 8 L. J. Ch. N. S. 105; *Lippincott's Estate*, 173 Pa. 368, 34 Atl. 58.

Dean, J., delivered the opinion of the court:

On October 14, 1895, with a view to foreign travel, accompanied by his wife, William A. Parry purchased from Drexel & Co. and the Tradersmen's National Bank of Philadelphia two letters of credit, each in the sum of \$10,000. The letters are in the same words, of which this is a copy: "We hereby authorize the bearers, W. A. Parry and Minnie H. Parry, his wife, to value at sight upon Credit Lyonnaise, London, to an amount not exceeding £2,000, or, at their option, upon Credit Lyonnaise, Paris, to the extent of 50,000 francs." The credits were to extend to December 31, 1896. The husband and wife had been on their travels about four months, when he died at Darjeeling, India, on February 8, 1896. At his death there remained a balance unexpended on the letters of credit of \$12,825.34. This was drawn by the widow before she returned to her home in Philadelphia. Before he left home on March 29, 1895, the husband executed a will whereby he bequeathed to his wife absolutely \$20,000, and the income of nearly all the remainder of his estate, which was large, for life, and appointed her and Joseph Hopkinson executors of his will. By their first account filed there was a balance of over \$120,000 for dis-

tribution. At the audit the widow's co-executor claimed she should be charged with the balance, \$12,825.34, unexpended on the letters of credit at the death of her husband. The auditing judge sustained the claim. She filed exceptions. On hearing before the court in banc, but two judges, Ashman and Penrose, sat. One was for affirming the decree of the auditing judge; the other, for reversing. So, the court being equally divided, the decree was affirmed. From that decree we have this appeal by the widow.

The credit was purchased by the husband's money; the wife paid none. The learned auditing judge was of opinion the letters were issued by them jointly, merely as a matter of convenience; that as they represented the husband's money, and there was no evidence of a gift or assignment by him to her, the unexpended balance should be charged against her.

We are clear the writings created an estate, as between husband and wife, by entireties, and such an estate, at common law, goes to the survivor. This estate may be created in a chattel as well as realty; in a chose of action and one in possession. Freeman, Coten. & Par. §§ 63, 68. And, as to choses in action, it is not abolished by the legislation affecting joint tenancy; for an estate that, as to unmarried persons, would be a joint tenancy, as to husband and wife is a tenancy by entireties. Therefore neither the act of March 31, 1812, that of April 11, 1848, nor that of June 3, 1887, applies. This question is fully discussed by our Brother McCollum in *Bramberry's Estate*, 156 Pa. 628, 22 L. R. A. 594, 27 Atl. 405. These letters of credit, on their face, have nothing to distinguish them, in their legal consequences, from a draft drawn in favor of the husband and wife as payees by the American bankers on the foreign ones, or from a certificate of deposit or promissory note to them jointly, all of which have been held to constitute an estate by entireties. It was not an absolute gift to the wife of the whole amount, nor intended so to be. It was an estate in personalty, the value of which to her depended on two contingencies: (1) On her survivorship during the life of the letters; (2) on how much was still payable at his death. Both contingencies happened, and she survived as to so much of the estate as had not been spent.

The fact that they were going abroad, and that this was a convenient method of providing money for their expenses, does not rebut, or even cast doubt on, the intention expressed in the writings. The husband procured to be framed and delivered an instrument which effects certain legal consequences on the happening of certain contingencies. He knew that by means of it either could readily obtain money in foreign countries; that, if both survived to return home, he could receive from the bankers who issued the letters, the estate being personalty, any balance not expended; that, if he died abroad, the surviving wife took all that was left. There is not a spark of evidence

indicating any other intention than that which legally arises on the face of the paper. In fact, he may have, very reasonably, intended that, if he died abroad among strangers, his widow should immediately be possessed of funds sufficient for her necessities and comfort, independent of any provision made for her in his will. Appellees argue that by such construction, if a letter of credit were issued for an indefinite amount, it would enable the widow to sweep the entire estate. We think it highly improbable that any banker would issue a letter of credit for an indefinite amount, which would enable the wife to sweep her husband's entire estate, and perhaps the banker's too; but, if such a letter were issued at the request of the husband, the presumption would be quite strong that he intended his wife should have his entire personal estate in case of his death. However, any improbability as to intention which might possibly be raised by such an extreme case is without weight here, for the husband took the letters for a limited amount, probably not one twentieth of his large estate. We think the court below erred in charging appellant with the sum of \$12,825.34, balance unpaid on the letters of credit at her husband's death.

The testator, in addition to other large bequests to his widow, directs that she shall have "all his clothing, household and kitchen furniture, linen, china, plate, plated ware, jewelry, pictures, engravings, books, brick-a-brac, and articles of personal use and ornament." Under this clause, the widow claimed a sailing yacht owned by testator at his death. The court below did not allow her claim, because, in its opinion, a fair interpretation of this bequest pointed only to an intent to give her such goods and chattels as would be kept in his dwelling house or on his premises, and that the words, "articles of personal use and ornament," did not include the yacht. We think this view correct. The words evidently meant to embrace articles of personal use and ornament in the house like unto those enumerated.

As to the first assignment of error, the decree is reversed, and it is directed the surcharge of \$12,825.34 be stricken off. As to the remaining exceptions it is affirmed, costs of appeal to be paid out of the fund.

Harvey BROWNBACK, *Appt.*,

v.

Burgess, etc., of NORTH WALES.

(194 Pa. 609.)

1. An ordinance providing for the licensing of all persons selling or offering

NOTE.—For right to take orders in interstate business, see *note to Re Spain* (C. C. E. D. N. C.) 14 L. R. A. 97; also *Com. v. Harmel* (Pa.) 27 L. R. A. 388; *South Bend v. Martin* (Ind.) 29 L. R. A. 531; *State v. Gorham* (N. C.) 25 L. R. A. 810; *State v. Wheelock* (Iowa) 30 L. R. A. 429; *Com. v. Myers* (Va.) 31 L. R. A. 379; *Carrollton v. Bazzette* (Ill.) 31 L. R. A. 522; *State v. Coop* (S. C.) 41 L. R. A. 501; and *Laurens v. Elmore* (S. C.) 45 L. R. A. 249. 49 L. R. A.

to sell on the streets, or soliciting orders from house to house, when it makes no discrimination on any ground, is not invalid as to residents of the state on the ground that it works a discrimination against them and in favor of nonresidents, as to whom it may be invalid.

2. A merchant who pays a mercantile license tax in the city where his place of business is, is not, for that reason, relieved from the operation of an ordinance of another municipality in the same state, requiring licenses for all persons who sell goods on the streets or solicit orders from house to house.

(February 12, 1900.)

A PPEAL by defendant from a judgment of the Superior Court reversing a judgment of the Court of Common Pleas for Montgomery County which set aside a judgment of a justice of the peace convicting defendant of violating an ordinance prohibiting unlicensed peddling. *Affirmed.*

The facts are stated in the opinion of the Superior Court by SMITH, J., as follows:

"A prohibition of unlicensed peddling which operates impartially, and without distinction between classes or residents of different civil subdivisions or of different states, is held to be a proper exercise of the police power of the state. *Com. v. Brinton*, 132 Pa. 69, 18 Atl. 1092; *Com. v. Gardner*, 133 Pa. 284, 7 L. R. A. 666, 19 Atl. 550; *Com. v. Harmel*, 166 Pa. 89, 27 L. R. A. 388, 5 Inters. Com. Rep. 89, 30 Atl. 1036. But a prohibition which arbitrarily excepts certain classes or residents of certain localities from its operation is held invalid, as a denial of the equal rights of others. *Com. v. Snyder*, 182 Pa. 630, 38 Atl. 356. The exercise of the police power directly by the legislature and by municipalities under legislative authority stands on the same ground and is subject to the same conditions. If a statute or municipal ordinance is in reality directed only against certain persons who are engaged in a given business, or against certain communities, in such a manner as to discriminate between the persons who are engaged in the same trade or pursuit, in aid of some at the expense of others, 'such statute or ordinance is not a police but a trade regulation; and it has no right to shelter itself behind the police power of the state.' *Sayre v. Phillips*, 148 Pa. 482, 16 L. R. A. 49, 24 Atl. 76. But if the prohibition is directed against the business, by whomsoever undertaken: does not prohibit, but regulates; is reasonable in scope, general in application, and impartial in operation,—it meets all the tests of its validity recognized by our supreme court. *Com. v. Harmel*, 166 Pa. 89, 27 L. R. A. 388, 5 Inters. Com. Rep. 89, 30 Atl. 1036. As

The case of *Titusville v. Brennan* (Pa.) 14 L. R. A. 100, was reversed by the Supreme Court of the United States in *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658.

As to license to peddlers, see also *State v. Richards* (W. Va.) 3 L. R. A. 705, and *note*; *Com. v. Gardner* (Pa.) 7 L. R. A. 666, and *note*; and *Wrought Iron Range Co. v. Johnson* (Ga.) 8 L. R. A. 273, and *note*.

subjects for regulation under the police power, there is no substantial difference between the sale of commodities, with their attendant delivery, from house to house, and the solicitation of orders to be filled by future delivery. The essentials to the validity of a statute or ordinance for their regulation are the same.

"In *Warren v. Geer*, 117 Pa. 207, 11 Atl. 415, it was held that a borough incorporated under the general borough laws had power to pass an ordinance requiring persons selling or soliciting orders from house to house to be licensed. In *Titusville v. Brennan*, 143 Pa. 642, 14 L. R. A. 100, 3 Inters. Com. Rep. 735, 22 Atl. 893, an ordinance forbidding unlicensed sales or solicitation of orders, except sales by sample to manufacturers or licensed dealers of the city, was sustained. While the Supreme Court of the United States held this ordinance invalid so far as it affected interstate commerce, the supreme court of our state has said: 'We do not understand that the decision of the Supreme Court of the United States is binding upon our court, so far as the Titusville ordinance concerns the citizens of this commonwealth. The ordinance, by reason of the reversal, is inoperative only so far as it affects one soliciting orders for a business house in another state.' In *Sayre v. Phillips*, 148 Pa. 482, 16 L. R. A. 49, 24 Atl. 76, an ordinance forbidding unlicensed sales or solicitation of orders, except by residents of the borough, was held invalid by reason of the exception; this being pronounced an attempt to regulate trade in the interest of residents, under pretense of police control. In *Shamokin v. Flannigan*, 156 Pa. 43, 26 Atl. 780, a like ordinance, with an exception substantially similar, was for the same reason held invalid. In considering the principle that governs prohibitions of this kind, the supreme court of our state, in *Sayre v. Phillips*, 148 Pa. 482, 16 L. R. A. 49, 24 Atl. 76, said: 'The ordinance professes to prohibit all persons from engaging in the business of peddling or selling goods from house to house, by sample or otherwise, without a borough license; and it fixes the price of a license at a figure that makes it, as it evidently was intended to make the ordinance, amount to prohibition. So long, however, as it bears upon all persons impartially, it may fairly claim to be a police regulation intended to destroy a business that was regarded as injurious; but at the end of the prohibiting section of the ordinance a proviso may be found which exempts all residents of the borough of Sayre from its operation. This proviso converts the police regulation into a trade regulation. The ordinance, taken as a whole, does not prohibit an injurious business, but an injurious competition. That the resident dealer or peddler may enjoy a larger trade, the nonresident peddler is shut out.'

"In the case before us the ordinance provides for the licensing of all persons selling or offering to sell on the streets, or soliciting orders from house to house. It makes no discrimination on any ground, but bears

upon all persons impartially. In brief, it conforms to all the requirements which in the cases cited have been held essential to the validity of such a provision as a police regulation. As was said in *Com. v. Harmel*, 166 Pa. 89, 27 L. R. A. 388, 5 Inters. Com. Rep. 89, 30 Atl. 1036, of the act of February 6, 1830 (Pamph. Laws, p. 39), prohibiting the peddling of clocks without license: 'It is directed against all persons. It does not distinguish between the citizens of different civil subdivisions of this state, or between citizens of Pennsylvania and those of any other state. It is directed against the business, by whomsoever undertaken. It does not prohibit the business, but regulates it. The regulation is reasonable. It is impartial in its operation. It is general in its application. It meets the tests required by *Millerstown v. Bell*, 123 Pa. 151, 16 Atl. 612, by *Sayre v. Phillips*, 148 Pa. 482, 16 L. R. A. 49, 24 Atl. 76, and by *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347.'

"The argument that the ordinance does not operate uniformly as to all persons, since it discriminates against citizens of Pennsylvania, while inoperative as to nonresidents of the state, and should therefore be pronounced invalid, cannot prevail. It must be remembered that 'the jurisdiction of a state is coextensive with its territory,—coextensive with its legislative powers. Its laws and judicial decrees are paramount over persons and property within this jurisdiction. But they have no extraterritorial force, and the legal presumption is that they were intended to operate within the limits of the state.' *Re Peter Schoenhofen Brewing Co.* 8 Pa. Super. Ct. 141. It follows, therefore, that, in regulating the public business and the affairs of the citizens of this state, the ordinance in question is strictly within the constitutional limitations applicable thereto, and within the powers of our state legislature. If it is injurious to the interests of our own citizens, the remedy for its correction rests with the legislature or the borough council.

"It is not material here that the Philadelphia house from which the purchases were made paid a mercantile license tax in that city. This gave them no greater right under the ordinance than that enjoyed by licensed merchants of the borough. Moreover, while the salesman is described as an agent, it is quite apparent that the nominal principal dealt wholly with him, and not at all with the several purchasers; that practically he was a middleman, buying of the Philadelphia house, and selling to his customers on orders previously obtained. But he and his principal are subject, in common with all others, to the regulation of the business provided for by the ordinance. The objection that this provides for no control or supervision of the business applies with equal force to the prohibitions which have heretofore been held valid, and cannot well be raised in this instance. The judgment of the common pleas is reversed, and the judgment of the justice is reinstated; all costs to be paid by the defendant."

Messrs. M. M. Gibson, G. R. Fox, and N. H. Larzelere, for appellant: Brownback's methods were not within the definition of peddling.

9 Am. & Eng. Enc. Law, p. 308.

A solicitor or agent of a mercantile establishment soliciting orders for goods kept for sale by it, even though he usually carries samples, is not a hawker or peddler.

Davenport v. Rice, 75 Iowa, 74, 39 N. W. 191; *Kansas v. Collins*, 34 Kan. 434, 8 Pac. 865; *King v. M'Knight*, 10 Barn. & C. 734; *Horn v. Com.* 2 Pa. Dist. R. 176; *Com. v. Teller*, 144 Pa. 545, 22 Atl. 922.

Messrs. Montgomery Evans, James B. Holland, and John M. Dettra, for appellee:

The borough of North Wales, under the common law and by virtue of the general borough act of 1851, has ample powers to adopt and enforce police regulations; and soliciting purchases from house to house is within the scope of such regulations, and may be prohibited unless licensed.

Warren v. Geer, 117 Pa. 207, 11 Atl. 415.

The defendant was a peddler.

9 Am. & Eng. Enc. Law, p. 307; *Grafty v. Rushville*, 107 Ind. 502, 57 Am. Rep. 128, 8 N. E. 609; *Sharon v. Hawthorne*, 123 Pa. 106, 16 Atl. 835; *Com. v. Gardner*, 133 Pa. 234, 7 L. R. A. 666, 19 Atl. 550; *Titusville v. Brennan*, 143 Pa. 642, 14 L. R. A. 100, 3 Inters. Com. Rep. 735, 22 Atl. 893; *Sayre v. Phillips*, 148 Pa. 482, 16 L. R. A. 49, 24 Atl. 76; *Rothermel v. Meyerle*, 136 Pa. 250, 9 L. R. A. 366, 3 Inters. Com. Rep. 315, 20 Atl. 583; *Com. v. Harmel*, 166 Pa. 89, 27 L. R. A. 388, 5 Inters. Com. Rep. 89, 30 Atl. 1036; *Com. v. Snyder*, 182 Pa. 630, 38 Atl. 356; *Com. v. Dunham*, 191 Pa. 73, 43 Atl. 84.

Per Curiam:

We concur with the superior court in the disposition of this case. The reasons for the decision of the court are so well and so convincingly expressed in the opinion that we feel we could add nothing to them, and we therefore affirm the judgment of the superior court on the opinion filed.

The judgment of the Superior Court is affirmed.

SOUTH CAROLINA SUPREME COURT.

LAURAGLENN MILLS, Appt.,
v.

A. F. RUFF, Resp't.

SAME, Appt.,
v.

A. FRIEDHEIM et al., Respts.

SAME, Appt.,
v.

W. L. RODDEY, Resp't.

(.....S. C.....)

A set-off by a stockholder of a debt due him from the corporation cannot be made in an action against him by a creditor of the corporation under Rev. Stat. 1893, § 1500, providing that the stockholders shall be jointly and severally liable to the creditors of the corporation in an amount not exceeding 5 per cent of their stock, in addition to their share or shares, since there is no mutuality in the claims.

(March 22, 1900.)

APPREAL by plaintiff from judgments of the Common Pleas Circuit Court for York County in favor of defendants in proceedings to recover the statutory liability of defendants as stockholders in an insolvent corporation. *Reversed.*

NOTE.—As to necessity of mutuality in claim attempted to be set off, see *Sperb v. McCoun* (N. Y.) 1 L. R. A. 490; and *Howes v. United States* (Ct. Cl.) 5 L. R. A. 66.

As to set-off between corporation and stockholder generally, see *Merrill v. Cape Ann Granite Co.* (Mass.) 23 L. R. A. 313, and note on page 316.

49 L. R. A.

The facts are stated in the opinion.

Mr. William J. Cherry, for appellant:

A stockholder in a corporation chartered under the general incorporation act of 1886 cannot set off a debt due him by the corporation against his statutory liability to creditors.

Parker v. Carolina Sav. Bank, 53 S. C. 584, 31 S. E. 673; *Hall v. Klink*, 25 S. C. 356, 60 Am. Rep. 505.

The stockholder cannot, after notice of a suit, defeat the suing creditor by paying the claim of another creditor, or a demand due by the corporation to himself.

Thompson, Liability of Stockholders, §§ 351 et seq., and 424; *Hall v. Klink*, 25 S. C. 357, 60 Am. Rep. 505; *Thompson v. Meisner*, 108 Ill. 362; *Thebus v. Smiley*, 110 Ill. 316; *Jones v. Wiltberger*, 42 Ga. 575; *Cole v. Butler*, 43 Me. 404.

The debts are not mutual and in the same right. The creditor sues in his own right, and not by or through the corporation; and the statute under which the Globe Cotton Mills is incorporated does not authorize or permit any such set-off or defense.

Parker v. Carolina Sav. Bank, 53 S. C. 593, 31 S. E. 673; *Efrd v. Piedmont Land Improv. & Invest. Co.* 55 S. C. 87, 32 S. E. 758; *Thompson, Liability of Stockholders*, § 386; *Morse, Banks & Banking*, 500; *Jones v. Wiltberger*, 42 Ga. 575; *Cole v. Butler*, 43 Me. 404; *Ingalls v. Cole*, 47 Me. 540; *Thompson v. Meisner*, 108 Ill. 362; *Buchanan v. Meisner*, 105 Ill. 639; *Thebus v. Smiley*, 110 Ill. 316; *Hobart v. Gould*, 8 Fed. Rep. 57; *Witters v. Sowles*, 32 Fed. Rep. 130.

A creditor who is also a stockholder cannot bring an action at law against a single stockholder to collect his statutory liability.

Individual liability is made as direct and unconditional for the 5 per cent as for the subscribed stock itself.

Bird v. Calvert, 22 S. C. 297.

Appellant could not be called on to adjust the equities between the several stockholders, and the court would not have called in other stockholders had respondents demanded it in their answers.

Pom. Rem. & Rem. Rights, § 420.

Messrs. Wilson & Wilson, for respondents:

A stockholder who is a creditor of the corporation may himself maintain an action against another stockholder on his statutory liability.

Hall v. Klinck, 25 S. C. 348, 60 Am. Rep. 505; 3 Thomp. Corp. § 3125.

This right of set-off exists against a single creditor who brings an action at law for his sole benefit.

3 Thomp. Corp. § 3790; 14 Am. & Eng. Enc. Law. p. 295; 23 Am. & Eng. Enc. Law, p. 846; *Mathex v. Neidig*, 72 N. Y. 100; *Agate v. Sands*, 73 N. Y. 620; *United States Trust Co. v. United States F. Ins. Co.* 18 N. Y. 190; *Garrison v. Howe*, 17 N. Y. 458; *Wheeler v. Millar*, 90 N. Y. 353; *Boyd v. Hall*, 56 Ga. 563; *Wellcs v. Stout*, 38 Fed. Rep. 807.

McIver, Ch. J., delivered the opinion of the court:

The appeals in the three cases above stated, involving the same question, were heard and will be considered together. The actions were brought by the plaintiff, as a creditor of the Globe Cotton Mills, an insolvent corporation, to recover from the defendants, severally, 5 per cent of the amount of the stock held by the defendants, respectively, in said insolvent corporation, under a provision in the charter of such corporation which reads as follows: "That each stockholder in any such corporation shall be jointly and severally liable to the creditors thereof in an amount, besides the value of his share or shares therein, not exceeding 5 per cent of the par value of the share or shares held by such stockholder at the time the demand of the creditor was created," etc.; the balance of the section not being pertinent to the present inquiry. Section 1500, Rev. Stat. 1893. Each of the defendants answered, setting up, among other things, the defense, by way of set-off, that the Globe Cotton Mills was indebted to each of them in an amount exceeding the amount of plaintiff's demand. To such defenses the plaintiff demurred in each of the three cases, upon the ground that the indebtedness of the Globe Cotton Mills to the defendants, respectively, cannot be pleaded as a defense, by way of set-off, to the demand of the plaintiff. These demurrers were overruled by the circuit judge in a short order, giving no reasons; and the plaintiff appeals in each of the cases upon the grounds set out in the record, which need not be set out here, as the sole question presented for the decision of this court is whether a stockholder in a corporation, who is also a creditor of such corporation, can set up, by way of de-

fense, his claim against the corporation, to an action at law brought by a creditor of such corporation, who is not a stockholder, to recover from him the amount of his statutory liability. So far as we are informed we have no case in this state which decides this particular question, and the authorities elsewhere are not in harmony. We must therefore rest our decision upon reason, aided by such authorities elsewhere as seem to us to be the better founded in reason.

It is conceded that if this were an action on the equity side of the court, in the nature of a creditors' bill, the right of set-off here claimed could not be allowed, under the authority of *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 31 S. E. 673; and *Efrid v. Piedmont Land Improv. & Invest. Co.* 55 S. C. 87, 32 S. E. 758, besides other cases that might be cited. But it is contended that the rule does not apply to a case like this, where a single creditor of an insolvent corporation brings an action at law against a single stockholder of such corporation to recover the amount of his liability fixed by the statute. We are unable to perceive any sufficient reason for the distinction claimed. At common law the stockholders of a corporation could not be made liable individually for the debts of such corporation. But the growth of these artificial bodies has become so great, and their powers so extensive, that the legislature has deemed it necessary, when asked to confer upon an association of persons corporate powers, to accompany the grant of such powers with such qualifications and conditions as are supposed to be necessary for the protection of individual citizens,—especially creditors of corporations. One of these conditions is that the persons composing such a corporation (the stockholders) shall become liable individually for the debts of the corporation, to the extent prescribed by the charter of such corporation. Now, what are the rights conferred upon a creditor of the Globe Mills by the charter of that corporation? This question can be answered in the language of this court in the case of *Hall v. Klinck*, 25 S. C. at page 356, 60 Am. Rep. 511, where the court was considering the scope and effect of another charter, practically the same as that of the Globe Mills, so far as it related to the provision making stockholders liable for the debts of the corporation to the extent prescribed. There the court said: "It seems to us that the intention of the legislature, as derived from the language used in the charter now under review was to protect the interest of creditors, and not stockholders, of the corporation, by affording the former a cheap and expeditious mode of enforcing the payment of their debts; thus insuring, as far as practicable, the utmost good faith and the most prudent management on the part of those interested in corporations, which by virtue of associated capital, energy, and brains, necessarily acquire large advantages over the individual citizen. If the liability secured by this act could only be enforced by a proceeding in equity, oftentimes tedious and expensive, it would

amount to a practical denial of the security intended to be afforded, in many cases; for creditors holding small demands would be deterred, by the expense and delay which they would have to encounter, from availing themselves of the remedy provided." Hence it was held in that case that there was no error on the part of the circuit judge in holding that the plaintiff could maintain an action at law against a single stockholder to recover the amount due him by the charter. If, therefore, such an action can be maintained, then it must, in the absence of any provisions to the contrary in the charter (and there is nothing of the kind here), be governed by the same rule as would apply to any other action at law on an ordinary money demand. One of these well-settled rules is that in such an action, to entitle the defendant to plead a set-off as a defense, the claims must be mutual; and here the essential element of mutuality is entirely wanting, for it is not pretended that the plaintiff owes defendant anything, but the defendant is seeking to escape a liability imposed upon him by statute, by showing that this insolvent corporation, from which plaintiff has been unable to obtain payment of its claim, owes him a debt. In other words, the proposition relied upon by defendants in support of their claim amounts practically to this: That a stockholder of an insolvent corporation, when sued by a creditor of such corporation for the liability imposed upon each stockholder by the terms of the charter of the corporation, may avoid such liability by showing that the corporation is indebted to him in an amount exceeding the plaintiff's claim. Such a proposition does not commend itself to our approval,—especially when, in many cases, such a proposition, if approved, would defeat the very object of the statutory provision, which, as we have seen, was intended "to protect the interest of creditors, and not stockholders." If it should be said, as has been said in some of the cases, that to refuse to allow a stockholder, when sued by a single creditor, to plead as a defense, by way of set-off, that the corporation is indebted to him, would sometimes operate inequitably as between the defendant in such a case and the other stockholders, the answer may be found in the case just cited, where the court, in referring to this point, used the following language: "If the remedy given operates harshly or inequitably as between the stockholders themselves, it is for them, and not the creditors, to invoke the aid of that tribunal which has the power to adjust the equities amongst themselves,"—citing *Ogilvie v. Knox Ins. Co.* 22 How. 380, 16 L. ed. 349. See also a similar view thrown out by Denio, J., in *Garrison v. Howe*, 17 N. Y. 458,—one of the cases cited by appellant in its argument here. On the other hand, it may be said that to allow a defense by way of set-off in a case like the present would in some cases result in giving the stockholder, who is likewise a creditor of an insolvent corporation, a preference over all the other creditors; for it would not be difficult to conceive of a case

in which a stockholder who is also a creditor of an insolvent corporation might be able to obtain satisfaction in full of his claim against such corporation, if he is allowed to set off such claim as a defense to an action brought by an outside creditor to recover from a stockholder the amount of his statutory liability, while all the other creditors would be able only to obtain a small percentage of their claims.

We will next proceed to notice some of the authorities which have been cited on the one side and on the other of the question upon which these appeals turn: First, as to the cases which are cited to sustain a different view from that which we have adopted. Our attention has been specially invited to the case of *Mathez v. Neidig*, 72 N. Y. 100, in which it was held that "an action at law cannot be maintained against a stockholder who is also a creditor to an amount equal to his stock [meaning, no doubt, the amount for which he may be made individually liable under the statute], for the reason that he has an interest in the fund sued for, and it cannot be known but that the whole fund is sufficient to pay all the debts. No accounting can be had, because the proper parties are not before the court. . . . Nor is it strictly an offset at law, but it is a defense to this form of action, in the nature of an equitable offset based upon the equitable rights of the defendant to the fund sought to be taken from his possession, without the necessary facts appearing to enable the court to determine the extent of those rights." In that case the court concludes that the defendant in such a case may preserve his equities, as between himself and the other stockholders, by bringing an action for accounting, in accordance with the suggestion of Denio, J., mentioned above. In *Mathez v. Neidig*, Church, Ch. J., bases his conclusion upon *Garrison v. Howe*, 17 N. Y. 458, and *United States Trust Co. v. United States F. Ins. Co.* 18 N. Y. 199 (referred to as the *Empire City Bank Case*), and also upon the ground that "stockholders have the same right to deal with the corporation that other persons have, and, as creditors, they are entitled to the same measure of protection." But at the same time he recognizes the fact that, under the doctrine he contends for, there is danger that officers of the corporation might make preferential payments to favored creditors, and thus work injustice to others. In view of our own case of *Hall v. Klinck*, 25 S. C. 356, 60 Am. Rep. 505, we do not think that the case of *Mathez v. Neidig* affords any obstacle to the adoption of the conclusion which we have reached: for that case, as well as the other New York cases cited, proceeds upon a view of a statute imposing individual liability upon the stockholders of an insolvent corporation,—just the opposite of that which has been taken in this state of such a statutory provision: for, as has been shown, our court has, in *Hall v. Klinck*, held that such a statutory provision is intended for the protection of the interests of creditors, and not stockholders, while the New York courts

seem to consider that at least one of the purposes of such a statutory provision is to protect the interests of the stockholders, and to enforce the equities between them, notwithstanding the conceded danger that in so doing the stockholder who is also a creditor may obtain an unjust preference over the other creditors. We need not, therefore, consider in detail the other New York cases cited to sustain the conclusion reached by the circuit judge in this case. The case of *Welles v. Stout*, 38 Fed. Rep. 807, cited by respondents' counsel, seems rather to sustain our view, for it is there said: "If the facts pleaded show that the claim [referring to that relied on as a set-off] amounts only to a debt due from the bank arising out of the ordinary relation of debtor and creditor then no facts exist entitling the holder of such a claim to a preference in payment over the other general creditors; and in such cases the stockholder cannot avail himself of the right to set off a debt due him from the bank, for that would be giving him an undue preference at the expense of the other creditors." In the case of *Boyd v. Hall*, 56 Ga. 563, also cited by counsel for respondent, it was held that even in equity a stockholder who has recovered a judgment against the corporation may set off the amount of the same in an action brought by a creditor to make him liable individually in proportion to his stock. This, being in conflict with our own cases of *Parker v. Carolina Sav. Bank* and *Efrd v. Piedmont Land Improv. & Invest. Co.* above referred to, affords no authority here.

We next proceed to notice some of the cases cited by appellant's counsel which sustain our view: In *Thompson v. Meisser*,

108 Ill. 359, the question with which we are concerned seems to have been fully considered; and the court there lays down the following proposition, sustained, as it is said, "by a decided weight of authority:" "That, in an action by an outside creditor of the corporation to enforce this personal liability against a stockholder, the latter cannot set off a debt due from the corporation to himself;" citing a number of cases. So, in *Buchanan v. Meisser*, 105 Ill., at page 643, it is said: "It is quite clear that, to an action at law brought by a creditor of the corporation against a stockholder under this section, the stockholder cannot plead, as a set-off, an indebtedness of the corporation to himself, because such indebtedness is in no sense that of the party suing; and debts, to be set off at law, must be mutual and between the same parties." To the same effect see *Thebus v. Smiley*, 110 Ill. 316, and *Hobart v. Gould*, 8 Fed. Rep. 57, where it is said: "But if he [speaking of a stockholder who is also a creditor of the corporation] could set off his claim as a creditor against his liability as a stockholder, he might be paid in full, while the other creditors would receive only a part of the amount due them."

It seems to us, therefore, that, both upon principle and authority, the demurrer to the answers should have been sustained, and that the circuit judge erred in holding otherwise.

The judgment of this court is that the orders appealed from be reversed, and that the cases be remanded to the circuit court for such further proceedings as may be necessary.

TENNESSEE SUPREME COURT.

NASHVILLE STREET RAILWAY, *Appt.*,

v.
J. O. GRIFFIN.

(.....Tenn.....)

1. A rule of a street-railway company requiring passengers to board the cars within the station, and compelling one who boards a car without the station to pay fare, even though he has previously paid a fare within the station, is a reasonable regulation for facilitating the transfer of passengers and the despatch of cars; but it must be enforced in a reasonable manner.

NOTE.—For regulation of street railway as to payment of fare or use of transfers, see *Hefron v. Detroit City R. Co.* (Mich.) 16 L. R. A. 345; *Pine v. St. Paul City R. Co.* (Minn.) 16 L. R. A. 347; *Moriey v. Snow* (Mich.) 41 L. R. A. 817; and *O'Rourke v. Citizens' Street R. Co.* (Tenn.) 46 L. R. A. 614.

As to ejection from street car for refusal to pay fare, see also *Mahoney v. Detroit Street R. Co.* (Mich.) 18 L. R. A. 335; *Sprenger v. Tacoma Traction Co.* (Wash.) 43 L. R. A. 706; and *Adams v. Union R. Co.* (R. I.) 44 L. R. A. 273.

40 L. R. A.

2. The mere starting of a car upon its journey, by the conductor, with knowledge that a person has boarded the car without the station, after paying fare within the station, is not an acceptance of such person as a passenger, or a waiver of a rule of the street-railway company requiring passengers to pay fare and board cars within the station, and compelling one who has boarded a car without the station to pay a fare although he has already paid his fare on entering the station.

3. The ejection for refusal to pay a second fare, of a passenger who, after paying fare within a station, has boarded a car that has left the station and is standing a few feet outside of it, and who would otherwise have to wait twenty minutes for another car, is an unreasonable and arbitrary enforcement of a rule of the company requiring passengers to board the cars within the station, or pay another fare if they board them beyond the station limits, and will subject the company to liability for injuries sustained in consequence of the ejection, where the conductor knew that he had already paid fare at the station.

4. Punitive damages may be awarded for injuries sustained in consequence of an

ejection from a street car for refusal to pay fare, where the ejection was unwarranted and arbitrary, causing serious injuries to the passenger, who shortly afterwards suffered from an attack of pneumonia, the severity of which was, to some extent, due to his injuries and the condition of his system in consequence thereof.

(January 27, 1900.)

A PPEAL by defendant from a judgment of the Circuit Court for Davidson County in favor of plaintiff in an action brought to recover damages for the alleged unlawful ejection of plaintiff from defendant's cars. *Affirmed.*

The facts are stated in the opinion.

Mr. R. F. Jackson for appellant.

McSsrs. M. B. Howard and Stokes & Stokes for appellee

Wilkes, J., delivered the opinion of the court:

This is an action for damages for personal injuries sustained by the plaintiff as the result of being ejected from a car of the Nashville Street Railway. There was a trial before a jury, and verdict and judgment for \$2,500, and the street-car company has appealed and assigned errors.

The plaintiff entered the transfer station of the road through a turnstile on College street, paying the usual 5 cents fare, to take a car for South High street, where he lived. He entered a High street car. There is a conflict of evidence as to the point where this was done. Plaintiff insists that he entered the car when it was in the transfer station, while the road insists that he did not enter it until after it pulled out from the station proper into an open space between it and the shops. Both contentions are quite strongly supported by testimony. The contention of the road is that he ran through the transfer station room proper, and caught up with the car in the open space, where it had stopped temporarily for the conductor, who had stepped into a side room after water. It is also insisted that, when he ran out of the station house, the watchman notified him that, if he boarded the car after it had left the station, he would have to pay an additional fare. The conductor was notified by the watchman that the boy had run out from the transfer station and entered the car on the outside, and to collect another fare from him. The check agent, whose business it was to register the persons who entered the cars in the station house, and to punch a ticket so as to show the number of persons who had so entered, had punched a ticket for three persons, and when the conductor returned and came to his car he saw the ticket punched for only three persons, while four were on the car. He rang the bell, and started his car, and at once went to the plaintiff and demanded his fare. Plaintiff stated that he had already paid, and would not pay again, when the conductor told him he would have to pay or get off, explaining to him the rule of the company that persons

were not allowed to enter the cars beyond the line of the station house without paying fare, although they had already paid a fare in order to enter the station, but that he could return to the station house and take the next car without paying any additional fare. The passenger declined to pay any additional fare, or to leave the car and return to the station, and the conductor, with the assistance of the motorman, put him off the car. The plaintiff resisted and, after he was put off, got on the car again, which in the meantime had moved up a short distance, and had reached the car shed, but had not left the inclosure or premises of the company, and had not reached the street. At this point he was again put off by the conductor and several other company employees who came to his assistance. There is some conflict as to how the ejection was accomplished. All parties agree that it was by force and over a stubborn resistance. The plaintiff insists that he was treated in a rough, rude manner, and with violence and force, and, after he had been removed from the car, was pushed violently into a pit 4 feet deep at that point, which was used by the company as a place where the employees could go under the cars and wipe them off and arrange the electrical appliances. He insists that in consequence of being thrown into this pit, and as a result of the rough and violent usage, he was seriously and permanently injured. The road, while conceding the ejection by force, contends that only so much was used as was necessary under the circumstances, and that the plaintiff was not thrown or pushed into the pit, but fell into it himself in his violent efforts to resist the ejection and get back upon the car. The road also insists that he was not seriously injured, but pretended to be so. Both these theories are quite strongly supported by testimony, and were submitted to the jury and urged upon its consideration by able counsel. There are virtually but two errors assigned: One, that the verdict of \$2,500 is excessive; and the other, that the court wrongly instructed the jury, and refused to give in charge certain propositions which were requested.

These propositions criticised are, in substance, that if the plaintiff boarded the car after it left the transfer station, and if the conductor, when he boarded his car between the transfer station and car shed, rang the motorman to proceed before approaching the plaintiff for his fare, this would not constitute a waiver of the rule and regulation requiring a passenger to pay an extra fare if he got on the car after it left the station: for the conductor would have the right to assume that the plaintiff would observe the rule in this respect when his fare was applied for. In this connection he was also asked to charge that if the jury found, from the evidence, that defendant road had a rule requiring passengers to board the cars in the transfer station proper, and if they failed to do so, and should enter the car after it left the station, they would either have to pay another fare, or leave the car and re-

turn to the station and take the next car, such a rule would be reasonable, and should be observed by the passenger. This was declined by the court as unnecessary and not applicable to the facts in the case. It will thus be seen that upon this feature of the case the court declined to pass upon the reasonableness or unreasonableness of the rule, because, in the opinion of the trial judge, the defendant, by starting its car on its journey with knowledge of plaintiff's method of boarding it, and with the further knowledge that as a fact he had paid his fare, waived its right to enforce the rule against him, and accepted him as a passenger. In other words, it is said that this charge is error because the conductor might properly start his car upon the assumption that, when he approached the passenger for his fare, he would pay it and that he would conform to the rules of the company and pay another fare, as he had been warned he would have to do while on his way out of the transfer station to enter the car. The insistence is that the court should have charged the jury that the rule was a reasonable one, and must be complied with, and, if not complied with, the plaintiff had no right to ride, and might be ejected. It is also said that the trial judge to some extent invaded the province of the jury when he stated that the starting of the car was a waiver of the rule, and an acceptance of the passenger. As to the latter contention, it is evident that the charge could only apply upon the theory, advanced by the road itself, that the passenger entered the car after it left the station, because, if he entered before it left, there could be no question of his acceptance and right to ride. In this view of the case, the assumption of the court, if error at all, was not injurious to defendant, as it was based upon the theory of the road that the entry was made outside the station.

It is also said that the signaling of the car to move and the application for the fare were virtually made at the same moment, and before the car had progressed more than a few feet, and before it left the station, and that mere starting of the car should not, under these circumstances, be held to imply the acceptance of the passenger and a waiver of the rule. We are of opinion the criticism of the appellant as to the charge of the court and the refusal to charge the special request are well taken. We are of opinion that it was error to charge that the mere starting of the car upon its journey with the knowledge of the method of plaintiff in boarding it, and that he had paid his fare, was an acceptance of the plaintiff as a passenger and a waiver of the rule as to him. In the first place, the starting of the car and demanding the fare were so nearly simultaneous that the car progressed only a short distance before the fare was demanded and refused and the car was stopped for plaintiff's ejection. In the next place, the conductor may have very well assumed that plaintiff would pay the fare, as he had been notified he would have to do, and, acting on this as-

sumption, started the car, in order that other passengers might not be delayed. If the plaintiff had been the only person on the car, there would have been more strength in the position taken; but there were other persons on the car, whose rights and convenience were also to be considered and protected, and it was not improper that the conductor should start the car and trust to arranging with plaintiff his right of passage without detaining other passengers.

We are also of opinion that the court erred in not charging the special request to the effect that the rule of the company requiring passengers to enter the cars while in the station house was a reasonable one. It is apparent that it was a rule which greatly facilitated the transfer of passengers and despatch of cars. It did away entirely with the necessity of passengers carrying tickets, and made their right of passage depend entirely upon whether they had entered the cars in the station house. Whether entering by another car or line, or through the turnstile, the passenger was subjected to no further trouble than simply getting upon a car upon the line he intended to travel; and so restricting the right to enter the cars to those only who had entered the station, and from it entered the cars, relieved the road from the trouble and annoyance of tickets and stoppage outside of the station house, and facilitated the running of the cars and transfer of passengers. We think, therefore, the court should have charged this proposition embodied in the special request. But, while this is true, the court should have said, in addition, that, although the rule may be reasonable in itself, it must also be enforced in a reasonable manner, so as to carry out the objects and purposes of the rule. *Louisville & N. R. Co. v. Turner*, 100 Tenn. 213, 43 L. R. A. 140, 47 S. W. 223. Now, we have, upon the defendant's own theory, this state of facts. The plaintiff, a mere boy nineteen years of age, had entered the station through the turnstile, paying the regular fare which entitled him to ride on any of the lines converging in that station. When he entered, he saw that the High street car, which he intended to ride upon, had started out of the station house proper, but had stopped immediately beyond the station line, and only a few feet from it, and within the company's inclosure. He knew that, unless he entered that car, he would be required to wait twenty minutes, and, seeing it standing waiting, he went beyond the station house proper a few feet and entered it. Now, conceding that the rule was a reasonable one, was it a reasonable enforcement of it to expel this plaintiff from the cars when it was known to the watchman and conductor that he had paid his fare and entered the station house for the purpose of taking this very car? It seems that there can be only one answer, and it is that the arbitrary enforcement of the rule to the extent of ejecting the passenger from the car, and compelling him, after he had entered one car, in which there was plenty of room, to leave it, and return

to the station, and wait for another car, was an unreasonable and arbitrary enforcement of the rule. Now, if the car had not stopped and afforded him the opportunity to enter it, he could not have required it to do so to enable him to board it. But all the purposes of the rule had been met and subserved, and the employees of the company knew it. To arbitrarily enforce the rule in such case could subserve no good purpose, but would make it an instrument of oppression by the mode of its enforcement. We are of opinion, therefore, that, while the errors complained of exist, they are immaterial under the facts of this case, and that the case should turn upon the manner in which it was attempted unreasonably to apply the rule under these special circumstances, which under ordinary circumstances was reasonable and proper. The error of the trial judge is not, therefore, reversible.

The only other assignment of errors it is material to mention is that the verdict and judgment are excessive in amount. The charge of the court as to the measure of compensatory damages is not complained of. The trial judge said, upon the subject of punitive damages: "If you find for the plaintiff, and also find that the conduct of defendant's servants was wanton, reckless, or malicious, you would have the right, besides damages compensatory, to award vindictive or punitive damages, or what is commonly known as 'smart money.'" We do not understand that this charge is excepted to as incorrect, but the contention is that it is not a case for punitive damages, and that the amount given is far in excess of compensation for the actual injuries received. The extent of the injuries received is a matter of much controversy in the evidence. It appears that the plaintiff fell into a pit some 4 feet deep. It appears that his hip was injured by the fall, and the passage of blood from him indicated unmistakably internal injuries. He is shown to have been somewhat feeble and subject to fits. He was taken with pneumonia a short time afterwards, and came near dying, and there is testimony that the severity of the attack was to some extent due to the injuries he had received and the condition of his system in consequence of them; but we are of opinion that, under the pleadings, facts, and charges in this case, the jury were warranted in giving punitive damages. We look upon the ejection of the plaintiff under the circumstances as entirely unwarranted and arbitrary. It was done, according to the proof in a rough, rude, insulting and violent manner. There is testimony tending to show that several employees combined and co-operated to put him off; that it was done at a place which was not safe; and some of the witnesses state, in substance, that he was pushed or thrown over into the pit. As he was at best but a weak man, and capable of only limited resistance, and had opposed to him several men, it would seem that he could have been held and handled in a way that would not have injured him or

subjected him to such indignities as he suffered, notwithstanding his resistance.

It being a proper case, in our opinion, for punitive damages, we are not disposed to disturb the verdict, and the judgment of the court below is affirmed, with costs.

Aaron WATSON and Wife, *Appts.*,
v.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY.

(.....Tenn.....)

1. A condition printed on the return part of a round-trip excursion tickets: "Not good for return passage unless stamped by joint agent at" the place of departure,—is a reasonable regulation by the carrier.
2. A sale of round-trip excursion tickets at reduced rates is itself sufficient to put a purchaser upon inquiry, and affect him with notice of unusual terms and conditions attached to the use of such ticket.
3. That the purchaser of a round-trip excursion ticket is unable to read or write, and is not specially notified of the requirements and conditions upon which the tickets are sold, does not relieve him from the necessity of complying with a condition printed on the return portion of the ticket, requiring it to be stamped by the agent of the company on the day of departure.
4. The fact that other passengers are allowed to travel upon round-trip excursion tickets without having them stamped as required by a rule of the company does not abrogate the rule or relieve a purchaser of such a ticket from the duty to comply with the condition, unless such violations of the rule were so frequent as to amount to a custom, and to mislead the purchaser.

(January 20, 1900.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Williamson County in defendant's favor in an action brought to recover damages for wrongful ejection from defendant's train. *Affirmed.*

The facts are stated in the opinion.

Messrs. Hearn, McCorkle, & Lane for appellants.

Messrs. Charles M. Burch, J. W. Judd, and John H. Henderson, for appellee:

The selling of tickets at one-half fare en-

NOTE.—As to failure to stamp return coupon of round-trip ticket, see also *Northern P. R. Co. v. Pauson* (C. C. A. 9th C.) 30 L. R. A. 730.

For notice to passenger of condition on ticket, see *note* to *Potter v. The Majestic* (C. C. A. 2d C.) 23 L. R. A. 746. (It should be noted that the *Potter* Case was reversed by the Supreme Court of the United States in 166 U. S. 375, 41 L. ed. 1039, on the ground that the conditions on the back of the steamship ticket were not part of the contract.) See, further, *Louisville & N. R. Co. v. Turner* (Tenn.) 43 L. R. A. 140.

For other cases as to round-trip tickets, see also *Wightman v. Chicago & N. W. R. Co.* (Wis.) 2 L. R. A. 185; and *Kansas City, M. & B. R. Co. v. Riley* (Miss.) 13 L. R. A. 38.

titled the carrier to attach conditions, as was done in this case, and they were not in violation of law; and the purchase and use of the ticket created a contract in and of itself, by which both parties were bound.

4 Elliott, Railroads, § 1601; Hale, Bailm. 512, 513; *Central Trust Co. v. East Tennessee, V. & G. R. Co.* 65 Fed. Rep. 332; *Pennington v. Philadelphia W. & B. R. Co.* 62 Md. 95; *Bowers v. Pittsburg, Ft. W. & C. R. Co.* 158 Pa. 302, 27 Atl. 893; *Louisville & N. R. Co. v. Turner*, 100 Tenn. 224, 43 L. R. A. 140, 47 S. W. 223; *Howard v. Chicago, St. L. & N. O. R. Co.* 61 Miss. 194; 2 Fetter, Carr. Pass. § 299, p. 980; *Quimby v. Boston & M. R. Co.* 150 Mass. 365, 5 L. R. A. 846, 20 N. E. 205; *Rogers v. Kennebec S. B. Co.* 86 Me. 261, 25 L. R. A. 491, 29 Atl. 1069; *Fonseca v. Cunard S. S. Co.* 153 Mass. 553, 12 L. R. A. 340, 27 N. E. 665.

As between the conductor on the train from which she was ejected and the plaintiff in error, the ticket was conclusive of her right to ride on that train.

To the conductor on that train the ticket presented without the stamp was no ticket, and he had no right to accept it in that condition.

4 Elliott, Railroads, § 1594; Hale, Bailm. pp. 510, 511; *Frederick v. Marquette, H. & O. R. Co.* 37 Mich. 342, 26 Am. Rep. 531; *Poulin v. Canadian P. R. Co.* 6 U. S. App. 298, 17 L. R. A. 800, 52 Fed. Rep. 197, 3 C. C. A. 23; *New York, L. E. & W. R. Co. v. Bennett*, 6 U. S. App. 95, 50 Fed. Rep. 496, 1 C. C. A. 544; *Peabody v. Oregon R. & Nav. Co.* 21 Or. 121, 12 L. R. A. 823, 26 Pac. 1053; *Western Maryland R. Co. v. Stocksedale*, 83 Md. 245, 34 Atl. 880; *McGhee v. Reynolds*, 117 Ala. 413, 23 So. 68, 3 Am. Neg. Cas. 511, note 1; *Mosher v. St. Louis, I. M. & S. R. Co.* 127 U. S. 390, 32 L. ed. 249, 8 Sup. Ct. Rep. 1324; *Houston & T. C. R. Co. v. Arey*, 18 Tex. Civ. App. 457, 44 S. W. 894; *Louisville, N. A. & C. R. Co. v. Wright*, 18 Ind. App. 125, 47 N. E. 491.

Wilkes, J., delivered the opinion of the court:

This is an action for damages for ejecting the wife of plaintiff Aaron from one of the passenger trains of the defendant company. There was a trial before the court and jury, and verdict and judgment for the road, and plaintiffs have appealed and assigned errors. The facts, so far as necessary to be stated, are that the plaintiffs had bought what are termed in this record "excursion" or "Centennial" tickets from Franklin, Tennessee, to Nashville, Tennessee, and return. These tickets were sold at a reduced rate of one-half fare and were intended for both direct and return passage. The tickets had several coupons attached,—one being for passage to Nashville; another for transportation to the Centennial Grounds from the Union Depot at that city; another for admission to the Centennial Grounds. Immediately following the latter, and in bolder print than the ticket generally had upon it, was the following notice: "To purchaser: Return part of this ticket must be stamped by the joint

agent at Nashville, Tenn., on day of departure, to make it valid for passage." Following this notice was a coupon for passage from the Centennial Grounds to the Union Depot, and another for return from Nashville to Franklin. Upon the body of the return ticket were the words, plainly printed, "Not good for return passage unless stamped by joint agent at Nashville, Tenn." Upon the back was indicated the place at which the joint agent should stamp the date of return, and directions were given to the joint agent as to how the ticket should be stamped and punched for the return. The tickets were not signed, nor were they required to be, and it was not required that the holder should be identified, further than that the ticket should be stamped as indicated. The purchasers of these tickets were negroes, who could neither read nor write, and the provisions and stipulations of the tickets were not explained to them by the agent who sold them the tickets. The purchasers rode on these tickets to Nashville, and visited the Centennial Grounds and other places, and, when ready to return, entered the cars at the South Nashville Depot, and not at the Union Depot, where the joint agent could be found. These tickets were not stamped, had not been presented for that purpose to the joint agent at Nashville, and were not inspected by any employee of the road when the parties entered the train to return home. A crowd of passengers boarded the cars at the same time, and there is evidence that a brakeman or assistant conductor announced, in a loud tone to the crowd as they entered the train, that tickets would not be good for return unless they were stamped, and plaintiff Aaron replied, "Mine are all right," referring to tickets held by himself and wife. The plaintiffs were carried some 1 ½ miles, and, when it was ascertained that their tickets were not stamped, they were put off the train by the conductor's assistant, upon their refusal to pay fare. Not having any money to pay it with them, they were compelled to walk back to Nashville, and, after having their tickets stamped, they went to Franklin by a later night train.

While quite a number of errors are assigned, both as to the admission of testimony, and the charge of the court, and the refusal to give special requests, we think there is nothing material in them, except as hereinafter indicated; and the case turns upon the question whether the requirement that the ticket be stamped in order to validate it was reasonable, and, if so, was a compliance with that requirement indispensable to the use of the ticket, and should the rule be enforced as against these parties who were unable to read or write, and were given no special information or instruction as to the conditions printed on the tickets when they were purchased? The court, in effect, charged the jury that the railroad company had the right to make and enforce a reasonable rule in reference to the sale and use of its special-rate tickets, and its application to the traveling public, and that it was for the court to determine whether a rule was rea-

sonable or not, and that a rule requiring a return ticket to be stamped, validated, or the identity of the purchaser established, when such sale was based upon a reduction of fare, and the ticket sold for a special purpose or occasion, would be a reasonable rule, and no other notice of the requirement or rule need be given than the matter printed or written upon the ticket to that effect; that the fact that the ticket was sold at reduced rates, and for a special purpose and occasion, would be sufficient challenge to the passenger to require him to ascertain the conditions, without having his or her attention called specially to them by the agent, and the fact that the purchaser could not read or write would not change the rule; and that the requirement for stamping in this case was reasonable, and if not complied with, and the ticket was not stamped, nor any effort made to have it stamped, then the plaintiffs would not have the right to ride upon it, and the railroad employees would have the right to eject them unless they should pay fare, and the company would not be answerable for damages unless the act of putting them off was accompanied by rudeness, violence, unnecessary force, and acts of indignity not warranted by the facts. This charge presents the real matter of controversy in the case upon the merits. While the exact question here presented was not involved in the case of *Louisville & N. R. Co. v. Turner*, 100 Tenn. 214, 43 L. R. A. 140, 47 S. W. 223, it was to some extent considered. It was held in that case that a sale of a railroad ticket at the usual full fare, and not for a special occasion, entitled the purchaser to a full and unlimited right of passage, and that a mere printing of conditions upon the face or back of such ticket, attempting to limit this right, would not have that effect, and would not carry notice to the purchaser of the condition and requirement, unless his attention was called to it, or it was known to him and assented to by him. This holding was based upon the theory that when a passenger purchases a ticket for transportation from one point to another over the road of a public carrier, and pays full or regular ordinary fare, the ticket is not intended as a contract in itself, but as a mere token, or the evidence of a contract which the law creates, and which lies behind the ticket. In such case the law makes the contract, and regulates the reciprocal rights and duties of both carriers and passengers, and the ticket is a mere token that such contract exists, and that under it the passenger is entitled to be carried to and from the points named, without regard to a time limit printed upon it. The ticket itself, however, is not presumed to set out the terms of the contract, and the passenger is not required or expected to look to it for any stipulations or conditions different from what the law imposes. This rule we consider to be beneficial alike to carrier and passenger, and well supported by the great weight of authority in this and other states. *Louisville & N. R. Co. v. Turner*, 100 Tenn. 214, 43 L. R. A. 140, 47 S. W. 223, and authorities there cited. In such cases of or-

inary tickets, the ticket is not the evidence of the terms of the contract of passage, and not conclusive of the right to passage, but only a token that the ordinary contract implied by law has been entered into. *O'Rourke v. Citizens' Street R. Co.* 103 Tenn. 124, 46 L. R. A. 614, 52 S. W. 875. It was further said, *arguendo*, in the *Turner Case* that tickets might be sold at reduced rates upon special occasions, and reasonable conditions and limitations might be annexed to their use when known to the purchaser, and assented to by him orally or in writing, and, when so sold at reduced rates for special occasions, this was sufficient to put the purchaser upon inquiry, and affect him with notice that some special terms and conditions should be expected and looked for, and the fact of buying such ticket when the passenger had the option to buy the regular ticket at usual rates was sufficient to put him on guard, and affect him with notice of unusual terms attached to its use, and this, we think, is a correct rule. *Elliott, Railroads*, § 1593, and note, citing cases. It is not indispensable that the ticket contract should be signed by the purchaser if he had notice of the terms, or was put upon inquiry, and assented to the requirement or conditions. *Ray, Negligence of Imposed Duties*, § 144. We are of opinion the rule requiring the return ticket to be stamped in order to be valid is reasonable, and should have been complied with. *Mosher v. St. Louis, I. M. & S. R. Co.* 127 U. S. 390, 32 L. ed. 249, 8 Sup. Ct. Rep. 1324; *Boylan v. Hot Springs R. Co.* 132 U. S. 146, 33 L. ed. 290, 10 Sup. Ct. Rep. 50; *Edwards v. Lake Shore & M. S. R. Co.* 81 Mich. 364, 45 N. W. 827; *Ray, Negligence of Imposed Duties*, § 144.

The reason for requiring the tickets to be stamped at Nashville was stated to be that passengers might not be able to buy them at reduced rates upon the assumption that they were going to Nashville, and then use them to intermediate stations, where the usual and regular fare would be greater than the special rate or fare to Nashville, and the object and purpose of the special rate was to induce persons to attend the exposition at Nashville in large numbers, which would compensate the road for the reduction in fares, and this, we think, is a valid and sufficient reason for the rule. It is said with much force, and insisted upon with great earnestness, that, even if such a rule be reasonable and enforceable in ordinary cases, still it cannot be enforced as to persons who can neither read nor write, and who are not specially notified of the requirements and conditions upon which the tickets are sold and to be used, and it is stated that a large proportion of the population of the country cannot read or write, and especially is that true as to negroes; that it is a matter of common knowledge that negroes are ignorant, and unable to read or write, as a general rule, and these passengers belonged to that race and class, and this fact, being apparent, imposed on the agent a duty of giving them proper information and explana-

tion. It will be seen at a glance that this contention presents a serious question, and one which must largely affect railroad travel in those districts of our country where the negro population is found and other uneducated people reside. If the public carriers of the country are required to inform themselves whether passengers or shippers can read or write, and, if they cannot, then all conditions and requirements and rules are to be explained orally to them, it would impose a task upon such carriers that might become very burdensome to carriers and annoying to passengers, and interfere materially with the despatch of business, both as to passengers and freights; and the rule must perhaps be logically extended further, so as to throw upon the railroads the duty of discriminating between the intelligent, who can easily comprehend the conditions and requirements, and others not so well informed, and not so apt to grasp all the details of the contract into which they are entering; and likewise passengers who do not understand our language would be debarred from accepting any special rates, as the terms and conditions could not be explained to them either in writing or orally, unless the railroad employees should be versed in the use and knowledge of different tongues, or the tickets should be printed in different languages. We are cited to two cases bearing upon this feature of the controversy; the first being the case of *Mauritz v. New York, L. E. & W. R. Co.* 23 Fed. Rep. 765, and the second the case of *Camden & A. R. Co. v. Baldauf*, 16 Pa. 67. The first of these cases involved the effect of a notice limiting the liability of the road for baggage, which was printed on the face of the ticket. The purchasers of the tickets were foreigners, and could not speak, read, or understand the English language, and no explanation or information that a value limit was placed on their baggage was given them by any employee of the road. The tickets were third class, and sold at reduced rates, and contained other conditions besides the limitation of value upon the baggage. None of the special conditions and limitations were known as a matter of fact by the purchasers. It was, in substance, held that because of this inability to read or understand the writing upon the tickets the purchasers were not affected with notice of the provisions contained therein, and were not bound by the special terms and conditions printed on the ticket, in the absence of any explanation of the same. It was also said that limitations as to liability for baggage could not be expected upon the ticket for passage fare, and hence would not be noticed. The latter case of *Camden & A. R. Co. v. Baldauf*, reported in 16 Pa. 67, is also a case in which there was an attempt to limit the liability of the carrier for baggage by general published notice and printed matter upon the ticket. It was held that such limitation of liability could be enforced if there was a special contract to that effect, but that the terms must be plain, and fully known to the purchaser. In this case the purchasers were Germans, and could not read or under-

stand the English language. The court held, in general terms, that the carrier might limit its liability if it could show clearly that the party with whom it was dealing was fully informed of the terms and effect of the notice, and that the exemption rested upon the ground of a contract, expressed or implied, between the parties. The court said, in substance, it would be absurd to hold the company not liable on the ground that a special contract existed when the purchaser was undoubtedly ignorant of its terms; that, if the ticket is made the evidence of contract, it must be in a language the purchaser could understand, or the terms of the contract must be explained to the purchaser. It will be observed that both of these cases involve a limitation of liability of the carrier, while the case at bar simply involves a question of the reasonableness and enforcement of a rule relating to the general conduct of the road's business, and the effect of a noncompliance therewith, and does not in any way relate to a limitation of liability, nor a provision concerning the same.

The theory upon which unusual terms in excursion tickets are upheld is that: (1) They are sold at reduced rates of fare, and not at the usual or ordinary rates. (2) They are sold for special occasions, and not for ordinary and unlimited use. (3) By accepting such ticket when he has the option to purchase the usual and ordinary ticket, the passenger enters into a contract with the carrier different from that implied by law upon the purchaser of an ordinary ticket at full rates of fare. (4) The purchaser is bound in such cases by the terms of the contract. He is entitled to its advantages of reduced fare, and is bound by reasonable regulations for its use.

But the question recurs, Is such contract binding upon a party who cannot read or write, and who is not specially notified of its terms when he purchases, and can he in such cases be held to have assented to the terms and entered into the contract? We are of opinion that it is equally important to hold carriers responsible according to the terms imposed by law in the sale of ordinary tickets at the usual rates, when the terms of the contract are dependent entirely upon the law, and not upon contract, as it is to permit them, for reduced rates or other valuable considerations, to make reasonable special contracts for carriage of passengers or property as may be agreed on with the passenger or shipper, and it is as much the duty of the court to enforce the contract made by the parties in the latter case as it is to enforce the contract made by the law in the former case. It is equally for the benefit of the carrier and the public that the right to make these special contracts, when reasonable, should be upheld and enforced. Large numbers of passengers take advantage of excursion rates who would otherwise not be able or willing to travel at all. People of limited means most generally avail themselves of these reduced fares, and do so with the full expectation that they will be subjected to requirements and inconveniences

that they would not meet on ordinary occasions when paying full fare. On the other hand, carriers reap a benefit from them in increased travel, with increased receipts, though not the usual profits. It is not consistent with public policy to so restrict and hamper the use of such tickets as to prevent the running of excursions and the granting of such rates. To do so would be to deprive persons of limited means of the opportunities for travel which they desire. It would fall most heavily upon the class to which the plaintiff belongs,—a class which, it is matter of common knowledge, generally avail themselves of such opportunities.

Under the record in this cause, there can be no doubt that the plaintiffs knew they were purchasing excursion tickets for a special occasion, and at greatly reduced rates. The plaintiff Aaron, before he entered the cars at Franklin, remarked to a fellow passenger who had bought a regular ticket that he ought to have bought one like his, as it was cheaper. It is evident that it was a matter of common information, and known to these parties in a general way, that their tickets were not the ordinary tickets, good for one passage in one direction, but that they were round-trip tickets, and had annexed to them some conditions and requirements not pertaining to ordinary tickets, though they did not and could not get that information from the tickets alone, because they were unable to read or write. They made no attempt to learn their terms and requirements. It is not shown that the road misled or deceived them, or withheld any information asked for by them. It appears from the record that at and about this time large crowds were daily thronging the cars, of just such people as the plaintiff Aaron and his wife, nearly all using excursion tickets, bound for the same destination, and crowding the cars to their full capacity. It is apparent how impracticable it would be, and what a serious obstacle it would prove to travel, to require that the terms and conditions of each ticket should be fully explained to each purchaser, nor could it be required that all the intending passengers should be collected together, and orally instructed at one time; and, if it should be held that agents must instruct illiterate persons when they present themselves to purchase tickets, the burden would still remain upon the carrier, whenever a controversy arose, to prove that the agent did give such instruction to each particular purchaser, and when there are scores and hundreds of excursionists this would prove unreasonably burdensome, and practically impossible. From the evidence of Kidd, the conductor, and the other employees upon this train, it appears that colored excursionists during the Centennial and on this occasion thronged the trains, until, in the language of the witness, they looked like clouds of blackbirds, and it was impossible to enforce any rules or preserve any order among them when they

were attempting to enter the cars. He describes them as pushing, crowding, rushing, and running over each other, until it was impossible to restrain them sufficiently to require them to present their tickets for inspection before entering the cars. Upon such occasions, the rules and precautions taken by the carrier to insure the safety and proper reception of passengers became unusually irritating and annoying to them, and difficult of enforcement. We think the most reasonable and the safest rule in cases like the present is that foreshadowed and outlined in the case of *Louisville & N. R. Co. v. Turner*, that when the purchaser buys a ticket at less than the usual fare he is put upon notice that he may expect unusual conditions and special rules, and if he have the misfortune to be unable to read or write the burden is upon him either to make that fact known to the agent, or to ascertain from someone who can read what are the terms and conditions of his ticket, and when it appears, as it does from the proof in this case, that he has actual notice of some terms and conditions, it does not matter that he cannot read or write, or learn of such terms from the face of his ticket. We are convinced from the record that these complainants, as a fact, knew that their tickets must be stamped in order to be valid for return passage, even though they could not read or write and, having accepted and used the tickets, they were bound to comply with the rule, and, in the absence of such compliance, were not entitled to passage on such tickets, and their ejection was not unlawful or actionable.

Upon a motion for a new trial, it was shown that several persons did use return tickets which were not stamped, and this, it is argued, shows an unjust discrimination against the plaintiffs, and an abandonment of the rule, and upon this newly-discovered testimony a new trial should have been granted. It does not appear that there was any intention to discriminate between passengers, and such fact is not stated in the affidavits. There might have been, so far as we can know, reasons for not enforcing the rule upon certain days, and putting it in force on others. The rush and crowd may have prevented the conductor from enforcing the rule rigidly, and some persons may have been overlooked. But the fact that other passengers, and even these plaintiffs had been allowed to travel without having their tickets stamped on other occasions would not abrogate the rule, unless it was so common or frequent as to amount to a custom or an abandonment of the rule, and to mislead the passenger. It is not shown that these parties knew of such instances. On the contrary, it affirmatively appears they did not. The mere fact that unstamped tickets had been received on other occasions or from other passengers does not establish the custom nor affect the rule. *Hill v. Syracuse, B. & N. Y. R. Co.* 63 N. Y. 101; *Stone v. Chi-*

cago & N. W. R. Co. 47 Iowa, 82, 29 Am. Rep. 458; *Wakefield v. South Boston R. Co.* 117 Mass. 544; *Dietrich v. Pennsylvania R. Co.* 71 Pa. 432, 10 Am. Rep. 711.

For the reasons indicated, we are of opinion there is no error in the verdict and judgment of the court below, and it is affirmed, with costs.

TEXAS SUPREME COURT.

SAN ANTONIO & ARKANSAS PASS
RAILWAY COMPANY

v.
SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY.

(.....Tex.....)

A telephone company organized under Rev. Stat. (1891) art. 642, subd. 8, providing that a corporation may be formed to construct and maintain "a telegraph and telephone line," which statute as it formerly read provided for a corporation to maintain "a telegraph or a telephone line," is entitled to exercise the power of eminent domain under Rev. Stat. (1871) art. 699, giving such power to corporations created for the purpose of constructing and maintaining "a magnetic telegraph line."

(February 8, 1900.)

QUESTIONS certified by the Court of Civil Appeals for the Third Supreme Judicial District for the opinion of the Supreme Court, which arose upon an appeal by defendant from a judgment granting to plaintiff the right to condemn a right of way for telephone purposes along defendant's railway line. *Answers returned in favor of appellee.*

The facts are stated in the opinion.

Messrs. Baker & Ross and Robson & Duncan for appellant.

Messrs. McLaurin & Wosencraft for appellee.

Brown, J., delivered the opinion of the court:

The court of civil appeals for the third supreme judicial district has certified to this court the following statement and questions: "The appellee is authorized to do business in Texas as a telegraph and telephone company, and is putting in operation a long-distance telephone system to and from different towns in the state of Texas. The appellee brought this action to have condemned certain portions of the right of way adjoining the appellant's railway line, for the purpose of planting and running its telephone poles, upon which, it appears from the evidence, it proposes to place telephone wires for the purpose of operating a long-distance telephone system. Electricity is an agent used in the operation of both long-dis-

tance telephone and electric telegraph lines. In connection with the above facts, we certify to the supreme court, for its answer, the following questions: "First. Do the statutes that relate to the exercise of the right of eminent domain in condemnation proceedings conferred upon telegraph companies apply to telephone companies, and authorize a like procedure by telephone companies? Second. If the above question is answered in the negative, then did the appellee have the right to institute and maintain the condemnation proceedings in question by reason of the fact that it was also authorized to construct telegraph lines as well as telephone lines? And in this connection it is well to state that we find that the line sought to be established and erected upon the appellant's right of way by the appellee was to be used as a long-distance telephone line."

To the first question we answer, "Yes." The following articles of the Revised Statutes were enacted by the legislature in the year 1871:

"Art. 698. Corporations created for the purpose of constructing and maintaining magnetic telegraph lines are authorized to set their poles, piers, abutments, wires and other fixtures along, upon, and across any of the public roads, streets, and waters of this state, in such manner as not to incommode the public in the use of such roads, streets, and waters.

"Art. 699. Such companies are also authorized to enter upon any lands, whether owned by private persons in fee or in any less estate, or by any corporation, whether acquired by purchase or by virtue of any provision in the charter of such corporation, for the purpose of making preliminary surveys and examinations with a view to the erection of any telegraph lines, and from time to time to appropriate so much of said lines as may be necessary to erect such poles, piers, abutments, wires, and other necessary fixtures for a magnetic telegraph, and to make such changes of location of any part of said lines as may from time to time be deemed necessary, and shall have a right of access to construct said line, and, when erected, from time to time, as may be required, to repair the same, and may proceed to obtain the right of way and to condemn lands for the use of the corporation in the manner provided by law in the case of railway corporations."

At that time telephones had been recently invented, and were not generally known, and it cannot be supposed that the legislature had telephones in mind when it used the word "telegraph." However, the fact that

NOTE.—As to right of corporation organized under an act to incorporate and regulate telegraph companies to operate and condemn a route for a telephone, see *State, Duke, Prosecutor, v. Central New Jersey Teleph. Co.* (N. J.) 11 L. R. A. 684.
49 L. R. A.

the telephone was not then in contemplation of the legislature does not control the construction of article 642, subd. 8; for, if the language used is broad enough to embrace a subsequently developed method, the later invention might be controlled by the pre-existing law, as if it had been in existence at the time the law was made. *Atty. Gen. v. Edison Teleph. Co.* L. R. 6 Q. B. Div. 254, 255. The term "telegraph" has been held in the following cases to include telephones: *Franklin v. Northwestern Teleph. Co.* 69 Iowa, 97, 28 N. W. 461; *Iowa Union Teleph. Co. v. Oskaloosa Bd. of Naturalization*, 67 Iowa, 250, 25 N. W. 155; *Wisconsin Teleph. Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828; *State, Duke, Prosecutor, v. Central New Jersey Teleph. Co.* 53 N. J. L. 341, 11 L. R. A. 664, 21 Atl. 460; *Atty. Gen. v. Edison Teleph. Co.* L. R. 6 Q. B. Div. 244; *Northwestern Teleph. Exchange Co. v. Chicago, M. & St. P. R. Co.* 76 Minn. 334, 79 N. W. 315. Each of the cases holds that the word "telegraph," when used in a statute, includes the telephone; but the two cases of *Atty. Gen. v. Edison Teleph. Co.* and *State, Duke, Prosecutor, v. Central New Jersey Teleph. Co.* are the most directly in point. The former case was based upon this state of facts: In England there were statutes providing that "the post-master general shall have the exclusive privilege of transmitting messages or other communications transmitted or intended for transmission by any wire . . . and any apparatus connected therewith for the purpose of telegraphic communication, or by any other apparatus . . . for transmitting messages or other communications by means of electrical signals." *Atty. Gen. v. Edison Teleph. Co.* cited above. In that case the court said: "The result of the definition seems to be that any apparatus for transmitting messages by electric signals is a telegraph, whether a wire is used or not, and that any apparatus of which a wire used for telegraphic communication is an essential part is a telegraph, whether the communication is made by electricity or not." The telephone company was organized to operate a telephone system in the city of London, and, under the law previously cited, the attorney general brought an action claiming that it was in violation of the statute of the kingdom, and the question turned upon whether or not the telephone was within the meaning of the act in relation to the telegraph. The court held the telephone to be embraced in the law. That case was very similar in its nature to this. The government was exercising its sovereign power in controlling and appropriating to itself the property of the citizen,—the telephone,—or, at least, the use of it, as is done in the case of eminent domain, where the right of way is taken for the use of the government, or by its authority, for public use by a corporation or a natural person. The same rules of construction, therefore, we think would apply in this case as in that. Upon a very elaborate discussion and philosophical examination of the question, the court held that the term "telegraph" was "wide" enough to include the 49 L. R. A.

telephone, and the government was entitled to control its operation within the kingdom.

In *State, Duke, Prosecutor, v. Central New Jersey Teleph. Co.* before cited, the telephone company was organized under the general law of the state of New Jersey, which authorized the organization of telegraph companies, but did not specifically authorize the organization of telephone companies. The company undertook to construct its line, and to condemn the right of way therefor. The question arose as to the validity of its incorporation and its right to condemn property. The court in that case held that the term "telegraph," as used in the statute, included "telephone," and that the charter granted to a telephone company under the general law authorizing the incorporation of telegraph companies was valid. A statute of that state making the laws regarding "telegraphs" applicable to "telephones" was invoked, but its validity being questioned, the court disregarded it, and put the decision squarely upon the provisions of the law concerning telegraph companies.

Counsel for appellant claim that the Supreme Court of the United States decided in the case of *Richmond v. Southern Bell Teleph. & Tele. Co.* 174 U. S. 761, 43 L. ed. 1162, 19 Sup. Ct. Rep. 778, that "telephone" was not embraced in the word "telegraph," and that a telephone company was not entitled to the privileges granted by the act of Congress of 1866, which granted certain privileges to telegraph companies. It is true the court so held, but it was not upon the construction of the words "telegraph" and "telephone," but upon the conclusion reached that, under the then existing circumstances, Congress did not have in mind the telephone when it enacted the law granting the privilege to telegraph companies, for the reason that at the time the act was passed telephones were not known to the members of the national legislature. The opinion of the court is, however, pregnant with the thought that, if the telephone had then been in common use, the decision might have been different. However that may be, we do not consider that case applicable here. Upon good authority and sound reasoning, we can safely say that the phrases "magnetic telegraph lines" and "any telegraph lines" found in arts. 698, 699, Rev. Stat., are broad enough to include the "telephone," if the legislature so intended in the enactment of the statute now in force, authorizing the creation of "telegraph and telephone" corporations. Inquiry is not directed to the intent of the legislature when articles 698 and 699 were first enacted, but we seek the legislative intent in the year 1891, when the law concerning private corporations was amended by the present provision.

A brief history of legislation upon this subject will aid us in construing the statute now in force. Articles 698 and 699, which grant to telegraph companies the right to condemn right of way for erecting their lines, etc., were enacted as sections 53 and 54 of the general incorporation law first passed at the session of 1871, and afterwards

re-enacted in the year 1874. The 10th subdivision of § 4 of the original act provided that a corporation might be formed for "the construction and maintenance of a telegraph line," no mention being made of the telephone. Articles 698 and 699 have remained in force, since their enactment, as parts of the general incorporation law, and the provision for incorporating a telegraph company, before quoted, continued until the year 1885, when it was amended so as to read, "the construction and maintenance of a telegraph or a telephone line," in which form it continued until the year 1891. It will be observed that, in the act last quoted, "telegraph" and "telephone" are not only used disjunctively, but the article "a" is so placed before each as to show distinctly the intent to separate them, and to authorize the construction of one or the other, not both. In the year 1891 the legislature amended article 566 of the Revised Statutes, and in the 8th subdivision authorized the creation of a corporation for "the construction and maintenance of a telegraph and telephone line," which is the law in force at this time. The change in the form of expression is so marked as to indicate with certainty a change in the policy of the legislature with reference to telegraph and telephone lines. A change of language in a material respect is held to show an intent to change the meaning of the law. *James v. Patten*, 6 N. Y. 9, 55 Am. Dec. 376; *Lehman v. Robinson*, 59 Ala. 240; *Rich v. Keyser*, 54 Pa. 89. Between the enactment of the first statute upon the subject and the one last cited a period of twenty years elapsed, during which time great progress was made in scientific development in both telegraphing and telephoning. During this period of time many of the courts of the land determined, in accordance with scientific opinion on the subject, that the word "telegraph" is a comprehensive term, which includes the telephone system. We can see in the changes of the law what progress had been made in the public mind, as reflected in these various statutes. At first the telephone was not mentioned; then the expression was such as to show that the relation between the telegraph and the telephone was not appreciated perhaps not comprehended, at that time, by the legislators; and finally that body gave expression to the conclusion reached by the courts that the broader term, "telegraph," includes "telephone," as a method of communication by means of electricity, and in order to facilitate the construction and use of these aids, we might say necessities, to the business and convenience of the public, the law was so changed that "a telegraph and telephone line" might be constructed and operated, using the one or the other, or both, under the same charter provisions. The change in the law of 1885 by the amendment of 1891 consists in substituting the copulative conjunction "and" for the disjunctive "or," and in omitting the article "a" after the conjunction. By this change of the sentence, the meaning of the law is manifestly changed so that the words

"telegraph" and "telephone," as adjectives, are applied to the one object, "line." The structure of this sentence indicates that the legislature understood that "telegraph" and "telephone" were closely related in meaning and in fact so consistent with each other that the two words were used to express different modes of accomplishing the one purpose,—the transmission of messages by means of electricity. As the law now stands, it must be construed either to authorize and require of the incorporated company to construct both a telegraph and a telephone system upon one line, or that they are expressions of different methods of carrying out the common purpose of telegraphing; that is, that the telegraph includes the telephone system. If we place the former construction upon the sentence, holding that "a telegraph" and "a telephone" are different, when a company organized to construct "a telegraph and telephone line" shall undertake to secure a right of way it can condemn for the use of telegraphic purposes alone; and being bound, if it erects a telegraph line, to also construct a telephone, the corporation would be without power to use the right of way for the telephone line, because, under that construction, the authority to condemn would be restricted to the "telegraph," and the erection of the telephone upon right of way condemned for a telegraph line would be an additional burden, not authorized by law, and the corporation would be without power to acquire right of way for a telephone, without which it could not conduct its business. This would be an absurd consequence, which shows the construction not to be legitimate. The interpretation which confers upon telephone corporations the rights granted to telegraph corporations harmonizes every provision of the law upon the subject of telegraph and telephone, and is consistent with the well-known history of the times in which these statutory provisions were evolved.

We conclude that, when the legislature of 1891 enacted the law in its present form, it intended to express that "telephone" was within the broad meaning of "telegraph," and that corporations formed under subd. 8, art. 642, Rev. Stat. are "created for the purpose of constructing and maintaining magnetic telegraph lines," and are authorized by article 699 to condemn right of way for their lines. Article 745, Rev. Stat., requires foreign corporations to procure permits to do business in this state, prescribing what they must do to procure the permits, and, with reference to such as may comply, enacts: "Such corporations on obtaining such permits shall have and enjoy all of the privileges conferred by the laws of this state on corporations organized under the laws of this state." Thus the state adopts the foreign corporation upon the terms stated in the law, and makes it equal to domestic corporations. Language could not be more comprehensive, and is ample to embrace the

right of condemnation. It would be a mockery to give the corporation permission to construct and maintain "a telegraph and tel-

ephone line," and at the same time deny to it the use of the only means by which it could exercise the privilege granted.

VIRGINIA SUPREME COURT OF APPEALS.

NEW YORK, PHILADELPHIA, & NORFOLK RAILROAD COMPANY, Impleaded, etc., *Plff. in Err.*,

v.

E. F. CROMWELL.

(.....Va.....)

The loss of perishable freight on account of lack of proper refrigeration, when shipped in refrigerator cars, renders the railroad company liable to the shipper, although the cars were leased by the railroad company from a transportation company, which agreed to keep them properly refrigerated.

(March 22, 1900.)

ERROR to the Law and Chancery Court for the city of Norfolk to review a judgment in favor of plaintiff in an action brought to recover for injury to fruit in defendant's possession for transportation because of failure to properly refrigerate the cars. *Affirmed.*

The facts are stated in the opinion.

Messrs. Borland & Wilcox for plaintiff in error.

Messrs. Heath & Heath, for defendant in error:

It was the duty of the plaintiff in error—a duty imposed upon it by the law—to use proper cars for the safe conveyance of the freight it had undertaken to carry, and to see to it that those cars were properly iced and kept iced, and it cannot escape from any liability arising out of a failure to perform this duty by saying that it had delegated its performance to someone else.

The California Fruit Transportation Company and its employees were, in law, the servants and employees of the plaintiff in error. Their negligence, or the negligence of either of them, as to any matters involving the preservation and safety of the berries from and after their receipt and during their transportation, was the negligence of the plaintiff in error.

The law will not permit a railroad company, engaged in the business of carrying freight for hire, through any device or arrangement with a refrigerator car company whose cars are used by the railroad company and constitute a part of its train, to evade the duty of seeing to it that the cars thus employed are properly constructed and properly iced and kept iced, if the preservation

and safety of the freight which the railroad company has undertaken to carry depend upon such proper construction and icing.

Norfolk & W. R. Co. v. Lipscomb, 90 Va. 137, 20 L. R. A. 817, 17 S. E. 809; *Pennsylvania Co. v. Roy*, 102 U. S. 457, 26 L. ed. 144; *Louisville & N. R. Co. v. Dies*, 91 Tenn. 177, 18 S. W. 266.

Defendant cannot excuse itself from liability to the plaintiff for failure so to do by saying that the cars belonged to some other company which had undertaken to supply suitable cars and to see to it that the same were properly refrigerated. It knew, or ought to have known, that the goods which it had accepted and undertaken to carry were perishable, and that the law imposed upon it the duty to use diligence to guard and preserve them.

Merchants' Despatch Transp. Co. v. Cornforth, 3 Colo. 280, 25 Am. Rep. 757; *Ogdensburg & L. C. R. Co. v. Pratt*, 22 Wall. 123, 22 L. ed. 827; *Great Western R. Co. v. Hawkins*, 18 Mich. 427; 2 Wood, Railway Law, p. 1582, §§ 429, 430.

It should have inspected the freight and the tanks during the trip from Norfolk to Philadelphia, and done whatever was necessary for the protection of the goods.

Beard v. Illinois C. R. Co. 79 Iowa, 518, 7 L. R. A. 280, 44 N. W. 800.

Harrison, J., delivered the opinion of the court:

E. F. Cromwell instituted this action against the California Fruit Transportation Company and the New York, Philadelphia, & Norfolk Railroad Company, alleging a joint liability upon the defendants, and seeking to recover damages alleged to have been sustained by him in consequence of their failure, as common carriers, to transmit with due care certain strawberries intrusted to them for the Philadelphia and Boston markets.

It is a well-established common-law rule that in all actions of contract the plaintiff must prove his contract against as many persons as he alleged it, and he must recover against all or none. This principle has been modified by statute. Code, § 3395. We are not, however, called upon to decide whether or not the case at bar comes within the provision of the statute, as the parties have taken it from under the operation of the common law by the following agreement:

"The court certifies that the foregoing evi-

NOTE.—As to liability of carrier for loss of perishable freight on account of lack of proper refrigeration, see *Beard v. Illinois C. R. Co.* (Iowa) 7 L. R. A. 280.

As to liability for loss of perishable goods by freezing, see *Fox v. Boston & M. R. Co.* 49 L. R. A.

(Mass.) 1 L. R. A. 702; and *Pierce v. Southern P. Co.* (Cal.) 40 L. R. A. 350.

As to liability of initial carrier for loss of perishable freight on connecting line, see *Colfax Mountain Fruit Co. v. Southern P. Co.* (Cal.) 40 L. R. A. 78.

dence, which is hereby made a part of bill of exceptions, is all that was introduced upon the trial of this cause. And the court further certifies that after the jury had retired they returned into court, and the foreman asked the court whether the jury could find against one of the defendants, and not against the other. Before the judge had responded to said inquiry, one of the counsel who was engaged in the trial—all the counsel for all parties being then present—stated that, by agreement of counsel, they could find either against both or one of the defendants, or against the plaintiff; and thereupon the judge stated to the jury that, by consent of counsel for all parties, they could find against both or either defendant, or against the plaintiff."

After the jury were informed of this agreement of counsel, they brought in a verdict in the following words: "We, the jury, find for the plaintiff against the New York, Philadelphia, & Norfolk Railroad Company, and assess his damages against said defendant at \$816.04. And we find for the defendant the California Fruit Transportation Company." The court refused to set this verdict aside, and gave judgment in accordance therewith.

While insisting that neither is liable, the plaintiff in error relies chiefly upon the contention that, as between itself and the California Fruit Transportation Company, the latter is liable. The judgment in favor of the California Fruit Transportation Company has been allowed to pass unchallenged. No writ of error has been asked for or obtained to the judgment in its favor. The plaintiff in error having agreed that the jury might find against either defendant, and the California Fruit Transportation Company not being a party before this court, we are not at liberty to enter upon a consideration of the controversy as to which of the two defendants is primarily liable.

The only question presented by the record before us is as to the liability of the plaintiff in error to the defendant in error; in other words, Would the plaintiff in the court below have been entitled to the judgment complained of, if the plaintiff in error had been sued alone?

The California Fruit Transportation Company is an Illinois corporation that furnishes what are known as "refrigerator cars." These cars are constructed with ice tanks holding several tons of ice, and are specially used in the transportation of fruits, vegetables, and other perishable articles. The plaintiff in error, doubtless in order that it might compete with other railroads similarly equipped, employed these refrigerator cars for the use of shippers of perishable freight over its line. The strawberries in question were delivered to and put in two of these refrigerator cars, which were then transferred to the road of the plaintiff in error, where they formed a part of its train. As the strawberries were delivered to the refrigerator cars, the receipt of that company would be given for the number of crates delivered; each receipt showing on its face

that the consignment was subject to the conditions of the railroad company's bill of lading. There was no bill of lading, except that given by the plaintiff in error; and all the freight charges, including the extra charge for the use of the refrigerator cars, were paid to the plaintiff in error. It was necessary that these cars should be properly refrigerated, and kept in that condition until the fruit reached its destination, and it clearly appears that the damage sustained by the defendant in error resulted from a failure to perform that duty.

In the case of *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. ed. 141, a passenger occupying a Pullman car was injured by a berth falling and striking him on the head. He instituted suit against the railroad company, and recovered judgment for \$10,000 for the injuries sustained. The defense relied on was that the sleeping car in which the accident occurred was owned by the Pullman Palace-Car Company, a corporation of the state of Illinois; that holders of railroad tickets were entitled to ride in said sleeping cars, provided they also held sleeping-car tickets; that the Pullman Palace-Car Company, and it only, issued tickets for sale, entitling passengers to ride in its sleeping cars, and that such tickets were sold at offices established by the Pullman Car Company; that the Pullman Car Company employed persons to take charge of its cars, and the latter, while in use, were in the immediate charge of a conductor and a porter employed by that company; and that such conductor and porter were the only persons who had authority to manage and control the interior of said cars, and the berths and seats and appurtenances thereto. The lower court instructed, as part of the law of the case, that if the car in which the accident occurred composed a part of the train in which the plaintiff and other passengers were to be transported upon their journey, and the plaintiff was injured while in that car, without any fault of his own, and by reason either of the defective construction of the car, or by some negligence on the part of those having charge of the car, then the defendant was liable. This view of the law was upheld by the Supreme Court Justice Harlan saying in part:

"As between the parties now before us, it is not material that the sleeping car in question was owned by the Pullman Palace-Car Company, or that such company provided at its own expense a conductor and porter for such car, to whom was committed the immediate control of its interior arrangements. The duty of the railroad company was to convey the passenger over its line. In performing that duty, it could not, consistently with the law and the obligations arising out of the nature of its business, use cars or vehicles whose inadequacy or insufficiency for safe conveyance was discoverable upon the most careful and thorough examination. If it chose to make no such examination, or to cause it to be made; if it elected to reserve or exercise no such control or right of inspection, from time to time, of the sleeping cars

which it used in conveying passengers, as it should exercise over its own cars,—it was chargeable with negligence or failure of duty. The law will conclusively presume that the conductor and porter assigned by the Pullman Palace-Car Company to the control of the interior arrangements of the sleeping car in which Roy was riding when injured exercised such control with the assent of the railroad company. For the purposes of the contract under which the railroad company undertook to carry Roy over its line, and in view of its obligation to use only cars that were adequate for safe conveyance, the sleeping-car company, its conductor and porter, were, in law, the servants and employees of the railroad company. Their negligence, or the negligence of either of them, as to any matters involving the safety or security of passengers while being conveyed, was the negligence of the railroad company. The law will not permit a railroad company, engaged in the business of carrying persons for hire, through any device or arrangement with a sleeping car company whose cars are used by the railroad company, and constitute a part of its train, to evade the duty of providing proper means for the safe conveyance of those whom it has agreed to convey."

Recognizing the higher duty due by common carriers to passengers, we are of opinion that the principles announced by the Supreme Court in this case are applicable to the case at bar. The employment of a common carrier, whether it be to carry passengers or freight, is a public employment; and

the duty he owes as such is a public duty, calling for the exercise of a high degree of care, which should not be lightly or negligently performed.

The California Fruit Transportation Company, for a consideration, furnished its cars to the plaintiff in error. These cars were agencies or means employed by the plaintiff in error for carrying on its business and performing its duty to the public as a common carrier, one of which was to provide suitable cars for the safe and expeditious carriage and preservation of the freight it undertook to carry. A railway company cannot escape responsibility for its failure to provide cars reasonably fit for the conveyance of the particular class of goods it undertakes to carry by alleging that the cars used for the purposes of its own transit were the property of another. The undertaking of the plaintiff in error was to properly care for and safely carry the fruit of the defendant in error, and it is immaterial that the cars in which they were carried were owned by the California Fruit Transportation Company, or that such company undertook to ice said cars or to pay for the ice. As between the plaintiff in error and defendant in error, the California Fruit Transportation Company and its employees were the agents of the plaintiff in error. So far as the defendant in error was concerned, the plaintiff in error was under the same obligations to care for the fruit that it would have been had the refrigerator cars belonged to it.

For these reasons, *the judgment is affirmed.*

WEST VIRGINIA SUPREME COURT OF APPEALS.

George W. HALL, *Appt.*,
v.

W. V. VERNON *et al.*

(.....W. Va.....)

***Partition of oil and gas** owned by co-owners separate from the surface cannot be decreed, except by sale and division of the proceeds. A judicial partition thereof by assignment of the oil and gas under sections of the surface is void.

(*Brunnon, J., dissents.*)

(December 2, 1899.)

APPEAL by plaintiff from a decree of the Circuit Court for Wirt County in chancery in a suit brought to annul a decree partitioning certain real estate as having been procured by fraud. *Reversed.*

The facts are stated in the opinions.

Mr. V. B. Archer, for appellant:

Fraud in procuring a decree of partition will be relieved against in equity.

*Headnote by the COURT.

NOTE.—For partition of mineral property under surface of land, see also *Byers v. Byers* (Pa.) 39 L. R. A. 537.
49 L. R. A.

DeLouis v. Meek, 2 G. Greene, 55, 50 Am. Dec. 491.

A defendant may, without filing an answer, have an injunction dissolved where there is no equity in the bill.

Zoll v. Campbell, 3 W. Va. 226; *Ludington v. Tiffany*, 6 W. Va. 11.

Upon a motion to dissolve an injunction before answer of the defendant, all the allegations of the bill must be taken as true.

Peatross v. McLaughlin, 6 Gratt. 64; *Baltimore & O. R. Co. v. Wheeling*, 13 Gratt. 41; *Shirley v. Long*, 6 Rand. (Va.) 764.

The practice in partition by bill in equity requires notice to be given by the commissioners to all parties of the time and place of meeting for the purpose of executing the decree, and it would be a travesty on justice to allow commissioners without notice to execute a decree of partition.

17 Am. & Eng. Enc. Law, p. 769, title *Partition—Commissioners—Their powers and duties*; *Doubleday v. Newton*, 9 How. Pr. 71; *Simpson v. Simpson*, 59 Mich. 71, 26 N. W. 285; *Corliss v. Corliss*, 8 Vt. 373; *Brokaw v. McDougall*, 20 Fla. 212; *Row v. Row*, 4 How. Pr. 133; *Ware v. Hunnewell*, 20 Me. 291; *Freeman, Co-tenancy & Partition*, 2d ed. § 523; *Gooch v. Green*, 102 Ill. 507; *Carter v. Carter*, 5 Munf. 108.

Partition of mining interests can only be made by a sale of the whole interests and a division of the proceeds.

Oil is a mineral, and constitutes part of the freehold, and is real estate.

Williamson v. Jones, 39 W. Va. 231, 25 L. R. A. 222, 19 S. E. 436; *Gill v. Weston*, 110 Pa. 312, 1 Atl. 921; 15 Am. & Eng. Enc. Law, p. 607, title *Mines and Mining*, subtitle *Partition*.

The mere fact of joint ownership of a mine does not give a right to partition.

Aspen Min. & Smelting Co. v. Rucker, 28 Fed. Rep. 220; *Conant v. Smith*, 1 Aik. (Vt.) 67, 15 Am. Dec. 669; *Hughes v. Devlin*, 23 Cal. 501; *Dall v. Confidence Silver Min. Co.* 3 Nev. 531, 93 Am. Dec. 419.

Partition cannot be made in kind; it must be by sale and division of the proceeds.

Bainbridge, Mines, 155; *Lenfers v. Henko*, 73 Ill. 405, 24 Am. Rep. 263; *Wild v. Milne*, 26 Beav. 504; *Adam v. Briggs Iron Co.* 7 Cosh. 361; *Seauvard v. Malotte*, 15 Cal. 305; *Hughes v. Devlin*, 23 Cal. 501; *Kemble v. Kemble*, 44 N. J. Eq. 454, 11 Atl. 733.

The court will set aside and quash the return of commissioners of partition when the partition has been made upon wrong principles, or in disregard of the rights of the parties, or where there is great and evident inequality in the division.

Hay v. Estell, 19 N. J. Eq. 133; *Henrie v. Johnson*, 28 W. Va. 190; *Haulenbeck v. Cronkright*, 26 N. J. Eq. 159.

Messrs. Van Winkle & Ambler, for appellees:

Mineral rights can be partitioned.

Freeman, Cotenancy & Partition, § 433.

Tenants in common cannot be compelled to drill in common. A court of equity may allot to each his rights.

Williamson v. Jones, 43 W. Va. 562, 38 L. R. A. 694, 27 S. E. 411.

Messrs. Casto & Fleming, also for appellees:

Appellant had two years in which to take an appeal from the decree confirming the report of the commissioners appointed to partition the oil, gas, and mineral interest in said tract of land in the chancery cause of *W. V. Vernon and George Hall v. Caroline Ackley*, widow, and others, heirs-at-law of *Thomas W. Ackley*, deceased, defendants.

W. Va. Code, chap. 135, § 3; *Buster v. Holland*, 27 W. Va. 510.

The negligence of appellant and his counsel in giving that cause proper attention in the court below can afford no excuse for the bringing of this suit.

Appellant cannot be heard to assail the decrees in the former suit by the suit under consideration.

2 *Beach, Modern Eq. Jur.* § 880, and footnotes; *Fisher v. McNulty*, 30 W. Va. 187, 3 S. E. 593.

Fraud is never presumed, and the party alleging and relying upon it must prove it.

Cooley, Torts, 2d ed. p. 556; *Goshorn v. Snodgrass*, 17 W. Va. 717; 1 *Greenl. Ev.* § 80.

The doctrine that the only way partition of mining interests can be made is by a sale

of the whole and a division of the proceeds is at variance with the letter and spirit of our statute upon the subject of partition of lands of tenants in common.

W. Va. Code, chap. 79, §§ 1-5.

Under a statute providing that when two or more persons hold lands, tenements, or hereditaments as cotenants, in which one or more of them have an estate of inheritance, etc., any one of them may apply for a partition, cotenants of a right to mine may apply and have their property partitioned.

Freeman, Cotenancy & Partition, 2d ed. § 435; *Merced Min. Co. v. Fremont*, 7 Cal. 317, 68 Am. Dec. 262; 15 Am. & Eng. Enc. Law, p. 509.

The right to minerals reserved is a right to land; but a right to work mines is an easement.

Hartford & S. Ore Co. v. Miller, 41 Conn. 112.

In California a miner's interest in mines situate upon the lands of the United States is a freehold estate.

Merritt v. Judd, 14 Cal. 64.

Dent, P., delivered the opinion of the court:

The decree of partition in this case did not pretend to divide the solid minerals in the land, as none were shown to exist; and such a partition as was made would be inequitable and unjust if any such solid minerals existed, for it divided the land into twelve narrow strips, and allotted to each of the three owners several of these strips alternately, so that each owner's mineral properties were divided into several distinct strips, separated from each other by the strips belonging to the others. This would destroy the value of the solid minerals, for each party would have to work each tract of his separated minerals separately, instead of having them in one compact body. This decree is nothing more than a decree to divide the carbon oil, volatile minerals, gas, and gaseous vapors supposed to be or that might exist under the land in controversy by imaginary lines drawn over the surface of the land. Equity is natural justice. It is equality. It never does a vain thing, or enforces a void or impossible contract. Men may divide the moon by imaginary lines, but equity will not enforce their contract. They may divide the water in a well or in a brook, or the game in the forest, or the fishes in the sea, but equity will afford them no such relief. "Oil and natural gas are minerals, in the view of the law; but, because of their peculiar attributes, they, as the subject of property, differ from other minerals. . . . Out of possession, there is no property in them. . . . They are not capable of distinct ownership in place, owing to their liability to escape from the place where they may be temporarily confined without necessarily any interference on the part of the owner of the soil, or others claiming through him under whose land they may be found. Like water, they are not the subject of property, except in actual occupancy, and a grant of them passes nothing for which ejectment

will lie. . . . Oil and gas cannot, while in the ground, like the solid minerals, be the subject of an estate distinct from that in the soil." *Barringer & A. Mines & Mining*, pp. 30, 31. A grant to the oil and gas passes nothing for which ejectment will lie. It is a right, not to the oil in the ground, but to the oil the grantee may find. *Dark v. Johnston*, 55 Pa. 164, 93 Am. Dec. 732. So the reservation of the oil and gas is not of the oil and gas in the ground, but of the oil and gas the grantor or his assigns may find and reduce to possession, with the exclusive right to search therefor. Natural gas is incapable of being absolute property, and is the subject of qualified property only. *Wood County Petroleum Co. v. West Virginia Transp. Co.* 28 W. Va. 210, 57 Am. Rep. 659. "A grant or reservation of oil or gas in certain land passes an incorporeal right only. This arises, as has been above explained, from the nature of oil and gas, which is such that a corporeal interest in them in place cannot be created." *Barringer & A. Mines & Mining*, p. 78. "There cannot be any property in rock or mineral oil, nor can title thereto be devoted or acquired, until it has been taken from the earth." *Shepherd v. McCalmont Oil Co.* 38 Hun, 37. Oil and gas grants and reservations are incorporeal hereditaments, which are entire and indivisible at law, though they may be made divisible by the terms of the grant. *Funk v. Haldeman*, 53 Pa. 229. From these authorities it is plain that a reservation or grant of oil and gas privileges is a mere incorporeal hereditament, which is indivisible, because a division of the right would create new rights, to the prejudice of the owner of the soil, and because, so long as the oil and gas remain in place, they are incapable of allotment according to quantity and quality. *Smith v. Cooley*, 65 Cal. 46, 2 Pac. 880. In the case of *Kumble v. Kumble*, 44 N. J. Eq. 454, 11 Atl. 733, it was held that "a partition of lands containing mineral deposits cannot be ordered if the location, extent, and value of such deposits cannot be ascertained." *Boston Franklinite Co. v. Condit*, 19 N. J. Eq. 394; *Grubb v. Bayard*, 2 Wall. Jr. 81, Cas. No. 5,849. If such is the case with solid minerals, how absurd it is to even talk of partitioning in kind oil or gas of whose existence, quantity, and location the court is in entire ignorance. And, if three owners of such a right can have partition in kind, they can transfer their interests to others without regard to numbers, until they would be of such multitude that an attempted partition in kind would entirely destroy the use of the surface to the owner of the land, and yet there exist neither oil nor gas to be partitioned. Such a partition as was attempted to be made in this case was a mere nullity, as it partitioned nothing; and yet it operates as a cloud on plaintiff's rights, in fraud of which it was procured by the defendant Vernon. It being so plainly in excess of the powers of a court of equity, it was proper to set it aside on motion, petition, or in any other way its illegality could be presented to the court

from which it was procured, without the necessity of resort to an appeal. It was not only voidable, but void, because it undertook to accomplish the impossible. Equity never undertakes to divide the unseen or invisible, but only that which it can see and measure so as to produce equality. Air, gas, water, and oil are not susceptible of partition in kind, independent of land, either when hidden beneath the surface or floating above it, but only when reduced to actual possession and control. Neither are the rights and privileges to acquire possession of these fugitive substances susceptible of partition in kind, but they may be sold, and the proceeds thereof divided. The land under which the oil and gas is supposed to exist may be partitioned in such manner among the co-owners of the surface as to effect a division of the gas and oil privileges, but not in the manner attempted in the present decree. *Boston Franklinite Co. v. Condit*, 19 N. J. Eq. 394.

None of the authorities referred to in Judge Brannon's dissenting opinion in this case support the position that the attempted partition is justifiable. On the contrary, they are directly to the reverse. Nor have I been able to find any that do, after the most diligent search. In *Freeman Cotenancy & Partition*, § 435, it is said: "But where the interest sought to be partitioned is not a distinct right of property in the mines, but a mere license to mine in the lands of another, it is indivisible, because a division of the right would create new rights, and would prejudice the owners of the soil, and because, so long as the minerals and ores which are the subject of the servitude are in place, unwashed and unsevered from the soil, they are incapable of allotment according to quantity and quality, relatively considered." References by the author; *Hughes v. Devlin*, 23 Cal. 505; *Lenfers v. Henke*, 73 Ill. 405, 24 Am. Rep. 263. In *Barringer & A. Mines & Mining*, p. 64, it is said that "mining rights are indivisible (that is, nonpartible in kind), but they may be assigned as a whole." The author refers to *Rutland Marble Co. v. Ripley*, 10 Wall. 339, 19 L. ed. 955, to sustain this position. Where land is leased with the exclusive privilege of boring for oil and gas, the lessee takes a corporeal interest in the land, and a different rule prevails from that where there is a sale of the surface, and a reservation of the oil and gas. The latter is, as heretofore shown, an incorporeal interest, and amounts to the mere grant of a right or privilege nonpartible in kind. Plaintiff is a joint owner of the oil and gas, but has no interest in the surface, except with his co-owners, likewise co-tenants in the surface. He has the indivisible right with them to bore wells for the extraction of oil and gas, but has no separate right to enter on the lands at any place to bore for oil or gas. So that, when the court by its anomalous partition undertook to divide the oil and gas by imaginary lines over the surface, it could not confer on plaintiff the right to enter on the divisions assigned to him, for this right he did not possess, nor was he en-

titled thereto; and any of the cotenants of the surface have the legal right to prevent him from so doing. *Williamson v. Jones*, 43 W. Va. 502, 38 L. R. A. 694, 27 S. E. 411. Hence the effect of the court's decree, if permitted to be of any force, was to take away and destroy plaintiff's reserved rights to the oil and gas. Thence its nullity; for if plaintiff had no separate right to bore for oil and gas, he had the right to demand his share of the oil and gas brought to the surface by his co-owners, notwithstanding the decree. The decree, therefore, was nothing more than an absolutely void cloud, that hindered him from the enjoyment of his interest in the oil and gas produced by his co-owners in the exercise of their indivisible right to produce the same. For this he could not sue in ejectment, and his only adequate remedy was by an appeal to a court of equity, which could nullify the void decree, and at the same time restore to him his dispossessed rights. While it is true that a court of equity has jurisdiction to determine what property is partible, it has no jurisdiction to partition property which is nondivisible, and thus entirely destroy it; for in attempting to do so it exceeds its jurisdiction, and renders its decree void. It ceases to be a court of equity, and becomes a court of inequity, inequality, and injustice. It assumes a jurisdiction over property not given to it either by common statute or constitutional law, in violation of the natural and reserved rights of the individual, and its decrees are nullities, and binding on no person. "If a court grants relief which under no circumstances it has any authority to grant, its judgment is to that extent void." 1 Freeman, Judgm. § 120c. Under no circumstances had the court the authority to grant this decree attempting to partition an indivisible right. *Norfolk & W. R. Co. v. Pinnacle Coal Co.* 44 W. Va. 574, 41 L. R. A. 414, 30 S. E. 196. Although the court have jurisdiction of the subject-matter and the person, yet, if it grants relief which under no circumstances it has the authority to grant, its judgment is void. *Fithian v. Monks*, 43 Mo. 502. The decree was both physically and legally impossible.

The decree in this case should be reversed, the decree of partition vacated as a nullity, and the cause remanded for further proceedings according to principles governing courts of equity.

Brannon, J., dissenting:

Hall brought a suit in equity against Vernon and others in the circuit court of Wirt county, alleging that a tract of 1,103 acres of land was, as to the surface, owned by Messrs. Doneho and Vernon, and that they had divided the surface; that the tract contained oil; that Messrs. Doneho, Vernon, and Hall owned the minerals in it, each a third; and that in a suit brought by Hall and Vernon against Doneho and others some years before there had been a decree of partition of the mineral ownership into lots 40 rods wide,

and running to the exterior of the tract, which decree the bill in this case alleged had been obtained through fraud of Vernon, and it sought to annul the decree. The bill alleged that Vernon under this decree was taking oil from the lots assigned him, and using tanks, machinery, etc., belonging to all three persons, in his operations. The bill asked (and it was granted) an injunction restraining Vernon from operating oil wells on the tract, and from selling oil produced thereon, and restraining the pipe-line companies from paying Vernon for oil, or giving him certificates for oil deposited with them. A decree dissolved the injunction so far as it related to the land or the partition assailed, the court holding that the decree of partition had not been obtained by fraud. Hall appealed.

A majority of the court are of opinion that the decree of partition is void, and constitutes a cloud over Hall's title, which a court of equity will dispel by setting aside the decree. They take this position on the ground that oil and gas are fugitive, and that co-owners of them, not owning the surface, have a mere right to explore for them, and that it is impossible to partition the same in kind, owing to the nature of oil and gas, and that a court cannot be called on to do an impossible thing, and has no jurisdiction to partition such a right by allotting gas and oil under certain sections of the surface. They hold that partition can be made only by sale and division of proceeds. Counsel cites the following authorities for that view: *Gill v. Weston*, 110 Pa. 312, 1 Atl. 921; *Freeman, Cotenancy & Partition*, § 436; 15 Am. & Eng. Enc. Law, p. 607; *Aspen Min. & Smelting Co. v. Rucker*, 28 Fed. Rep. 220; *Conant v. Smith*, 1 Aik. (Vt.) 67, 15 Am. Dec. 669; *Bainbridge, Mines*, 155; *Lenfers v. Henke*, 73 Ill. 405, 24 Am. Rep. 263; *Kemble v. Kemble*, 44 N. J. Eq. 454, 11 Atl. 733.

I am of the opinion that there may be partition of oil and gas owned in fee separate from the surface, by allotting it by sections of the surface. True, one may not get any oil; but the chance is equal for all,—the best that can be done to avoid the sale of the property from its owners, which they have right to develop separately, as they have right to a partition in kind, if possible. Oil in place is realty, and therefore partition may be had of it where the tract is of considerable area. *Freeman, Cotenancy & Partition*, §§ 433, 435; *Hughes v. Devlin*, 23 Cal. 501; *Barringer & A. Mines & Mining*, p. 54; *Rutland Marble Co. v. Ripley*, 10 Wall. 339, 19 L. ed. 955. Also, I think that, as equity has jurisdiction in partition, it can determine whether the subject is partible or not, and that, even if the decree be erroneous, it is not void in a legal sense.

The decree dissolving the injunction is reversed, and the cause is remanded, with directions to the circuit court to enter a decree setting aside the decree of partition and perpetuating the injunction, and to proceed further as to matters of personal property before it.

J. M. CHILDERS *et al.*

v.

S. H. NEELY, *Appt.*

(.....W. Va.....)

- *1. Where tenants in common or joint tenants of an oil lease or mine unite and co-operate in working it, they constitute a mining partnership.
2. When members of a mining partnership cannot agree in management, those having a majority interest control its management in all things necessary and proper for its operation.
3. A sale of his interest by a member of a mining partnership to another member or a stranger does not dissolve the partnership, as in ordinary partnerships.
4. If loss come to the firm by the culpable negligence or breach of duty or wrongful conduct, or diversion of the social property from the firm's business to other business, by one member, he is personally accountable therefor in an accounting between the members.
5. Partners have a lien on the social property for advances or balance due them, after debts; but if they have divided the property or product of the business, giving each his share in severalty, and separating it from the balance, no such lien exists on the property or product so actually divided. Such is the case with "division orders" in oil mining.
6. If a bill is filed by a member of a co-partnership for dissolution and account, and cause is shown for dissolution, there should be a decree of dissolution and full account, not one allowing the partnership to continue its business, and making only a partial account, and decreeing on its basis in favor of one against another member for a balance on such partial account, leaving assets untouched by the account.
7. When cause is shown for dissolution of a partnership, and the members are discordant and at ill will, and the partnership hopeless of prosperity. It should be dissolved, and a receiver and manager appointed. Instead of leaving its assets and business wholly in the possession and control of one member, excluding the other.
8. Equity, as a general rule, does not entertain a bill for account between partners unless a dissolution and winding up are asked, and cause therefor shown. Then there should be dissolution and full final account.

(November 28, 1899.)

A PPEAL by defendant from a decree of the Circuit Court for Tyler County partially settling the accounts of an alleged partnership and denying defendant further participation in the concern. *Reversed.*

The facts are stated in the opinion.

Mr. F. L. Blackmarr, for appellant:

An injunction will be dissolved at the hearing of a motion to dissolve, on the bill and answer sworn to, if the answer fully, fairly, plainly, distinctly, and positively denies the allegations of the bill on which the injunc-

tion was granted, and if the material allegations of the bill are not supported by proof other than the affidavit verifying the truth of the allegations.

Hayzlett v. McMillan, 11 W. Va. 464; *Cox v. Douglass*, 20 W. Va. 175; W. Va. Code, chap. 125, § 59; *Jarrett v. Jarrett*, 11 W. Va. 630; *Arbuckle v. McClanahan*, 6 W. Va. 101; *Bronson v. Vaughan*, 44 W. Va. 406, 29 S. E. 1022.

One tenant in common is not liable in assumpsit to his cotenant for the expense of repairs, on joint estate, incurred by the latter, without the request of the former.

Wiggin v. Wiggin, 43 N. H. 561, 80 Am. Dec. 192.

There must be a previous request to join in making the repairs.

11 Am. & Eng. Enc. Law, p. 1105; 4 Am. & Eng. Enc. Law, p. 8.

Childers and Ramey, by their negligence, caused the damage to the boilers, and the loss or repairs thereof should be borne by them.

11 Am. & Eng. Enc. Law, p. 1108.

Messrs. Robert McEldowney and G. M. McCoy for appellees.

BRANNON, J., delivered the opinion of the court:

Childers and Ramey filed a bill in equity in the circuit court of Tyler against Neely, praying that a partnership between them be dissolved, an account taken "of all its accounts, dealings, and transactions whatever," and that a manager be appointed to take charge of the property. The business was oil production. Neely admitted the joint enterprise, but denied the partnership; and he joined in request for account, and did not resist a dissolution if a partnership. The decrees made a partial account, decreed its balance against Neely, and denied him further participation in the partnership, and he appealed.

This case raises an interesting and important subject in this mining state; that is, whether, and when, joint tenants or tenants in common, jointly operating for oil, are partners, or merely co-owners. The bill asserts a partnership, while Neely denies it: asserting that it is a case, not of partnership, but co-ownership.

In two leases of town lots for oil and gas purposes, Childers owned a one-fourth interest; Ramey, a three-eighths interest; Neely, a three-eighths interest. They were so far joint tenants. They agreed to develop the lots for oil, but made no written articles of partnership,—in fact, no oral express formation of a partnership. They simply, by an indefinite understanding, agreed to develop their common property, each giving his skill, paying his share of outlay proportionate to his ownership, and getting his share of the product proportioned to such ownership. I use the word "product," instead of "profits," because there was no contract explicit on this point to distinguish product from profit. "Partnership must be distinguished from the joint management of property owned in

*Headnotes by BRANNON, J.

NOTE.—On the question, What constitutes a mining partnership?—see *Reed v. Meagher* (Colo.) 9 L. R. A. 455.

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common. Where two parties own a chattel, and make a profit by the use of it, they are not partners, without some special agreement which makes them so." T. Parsons, Partn. § 76. Two heirs or other co-owners of a farm, jointly farming it for profit, are not partners. There is a peculiar partnership called a "mining partnership," partaking partly of the nature of an ordinary trading or general partnership, on the one hand, and partly of a tenancy in common, on the other. It is an important question to those engaged in the oil and other mining business whether each one is jointly and severally liable for all the doings of every or any other of the associates in the venture, as in ordinary trading partnerships. What is a mining partnership? 15 Am. & Eng. Enc. Law, p. 609, says: "When tenants in common of a mine unite and co-operate in working it, they constitute a mining partnership." Many authorities there cited thus define it. See the California case of *Skillman v. Lackman*, 83 Am. Dec. 96, and note discussing it fully; *Lamar v. Hale*, 79 Va. 147. Mere co-working makes them partners, without special contract. *Barringer & A. Mines & Mining*. Courts of equity take jurisdiction of them as if general partnerships. 2 Collyer, Partn. chap. 35. Of course, owners of mines, oil leases, or farms can by agreement make an ordinary partnership therein; but where tenants in common of mines or oil leases or lands "actually engage in working the same, and share, according to the interest of each, the profit and loss, the partnership relation subsists between them, although there is no express agreement between them to become partners or to share the profits and losses." *Duryea v. Burt*, 28 Cal. 569. The presumption in such case would be that of a mining partnership, rather than an ordinary one, in absence of an express agreement forming an ordinary general partnership. Perhaps the case of *Butler Sav. Bank v. Osborne*, 159 Pa. 10, 28 Atl. 103, and other cases in that state cited in *Bryant, Petroleum & Natural Gas*, 283, would justify the inference that the parties operated as tenants in common; but the current of authority elsewhere recognizes the inference of mining partnerships. That state does not recognize such a partnership. Justice Field said in *Kahn v. Central Smelting Co.* 102 U. S. 645, 20 L. ed. 267: "Mining partnerships, as distinct associations, with different rights and liabilities attaching to their members from those attaching to members of ordinary partnerships, exist in all mining communities. Indeed, without them successful mining would be attended with difficulties and embarrassments much greater than at present." One leading distinction between the mining partnership and the general one is that the general one has, as a material element of its membership, the *delectus personarum* (choice of person), while the other has not. Those forming an ordinary partnership select the persons to form it, always from fitness, worthiness of personal confidence; but we know such is not always or often the case in oil ventures. It is because of this *delectus*

personarum that the law gives such wide authority of one member to bind another by contracts, by notes, and otherwise. One is the chosen agent of the other. Hence, when one member dies or is bankrupt, or sells his interest to a stranger, even to an associate, the partnership is closed, one chosen member is gone, the union broken, because he may have been the chief dependence for success, and the newcomer may be an unacceptable person, who would entail failure upon the firm. In the mining partnership those occurrences make no dissolution, but the others go on; and, in case a stranger has bought the interest of a member, the stranger takes the place of him who sold his interest, and cannot be excluded. If death, insolvency, or sale were to close up vast mining enterprises, in which many persons and large interests participate, it would entail disastrous consequences. From the absence of this *delectus personarum* in mining companies flows another result, distinguishing them from the common partnership, and that is a more limited authority in the individual member to bind the others to pecuniary liability. He cannot borrow money or execute notes or accept bills of exchange binding the partnership or its members, unless it is shown that he had authority; nor can a general superintendent or manager. They can only bind the partnership for such things as are necessary in the transaction of the particular business, and are usual in such business. *Charles v. Eshleman*, 5 Colo. 107; *Skillman v. Lackman*, 23 Cal. 198, 83 Am. Dec. 96, and note; *McConnell v. Denver*, 35 Cal. 365, 95 Am. Dec. 107; *Jones v. Clark*, 42 Cal. 181; *Manville v. Parks*, 7 Colo. 128, 2 Pac. 212; *Condon v. Olds*, 18 Mont. 487, 46 Pac. 201; *Judge v. Brasicell*, 13 Bush, 67, 28 Am. Rep. 185; *Waldron v. Hughes*, 44 W. Va. 126, 29 S. E. 505. In fact, it is a rule that a nontrading partnership, as distinguished from a trading commercial firm, does not confer the same authority by implication on its members to bind the firm; as, e. g. a partnership to run a theater or other single enterprise only. *Pease v. Cole*, 53 Conn. 53, 55 Am. Rep. 53, 22 Atl. 681; *Deardorf v. Thacher*, 78 Mo. 128, 47 Am. Rep. 95; *Smith, Merc. Law*, 82; T. Parsons, Partn. § 85; *Pooley v. Whitmore*, 10 Heisk. 629, 27 Am. Rep. 733. A mining partnership is a nontrading partnership, and its members are limited to expenditures necessary and usual in the particular business. Bates, Partn. § 329. Members of a mining partnership, holding the major portion of property, have power to do what may be necessary and proper for carrying on the business, and control the work, in case all cannot agree, provided the exercise of such power is necessary and proper for carrying on the enterprise for the benefit of all concerned. *Dougherty v. Creary*, 30 Cal. 290, 89 Am. Dec. 116.

These principles settle much of this case. The demurrer was properly overruled, because there was a partnership, and equity only has jurisdiction to settle partnership accounts. 5 Am. & Eng. Dec. Eq. 74; 17 Am. & Eng. Enc. Law, p. 1273.

Neely excepted to the commissioner's report of settlement because of the allowance to Ramey of an expenditure advanced by Ramey of \$369.75, as excessive, and because for repairs on two boilers without his consent. If the parties were mere joint tenants, consent would be necessary. *Ward v. Ward*, 40 W. Va. 611, 29 L. R. A. 449, 21 S. E. 746. But, being partners, as above stated, a partner has power to order necessary repairs. Besides, Ramey owned a majority interest. The boilers were burnt badly, and it seems that this outlay, though large, is proven, and was necessary and usual in such a business, and, if unattended with other circumstances, would be clearly allowable under principles above stated. The commissioner reports that the injury to the boilers came from neglect of the pumps; but much evidence tends to show that Ramey, without consent of Neely, removed the boilers off the ground owned by the firm, upon a lease of Ramey and Childers, in which Neely had no interest, and used them with another boiler in boring and operating wells thereon in connection with these wells of the firm, in Neely's absence, and put too much work upon them, with inadequate supply of water, which, likely, by heavy firing, caused the burning of the boilers. If this is so, how can Ramey expect pay for this outlay? Would so serious an injury have occurred to the boilers had this improper use of them not been made? We cannot say so with certainty, but it seems not likely. Ramey has no just claim to be repaid expenditure for repairs caused by himself,—the diversion of the firm property to his own work, from the work of the firm. Losses from neglect of duty or bad faith of a partner, or breach of duty, or breach of a partnership agreement, or improper diversion of its property to purposes foreign to its business, will be charged to him, in accounting. 17 Am. & Eng. Enc. Law, p. 1217; 1 Collyer, Partn. § 312; Story, Partn. § 169; T. Parsons, Partn. § 151. Ramey does not deny such use.

The exception for the \$239.75 allowed Ramey for three eighths of expense seems not well taken, and was properly overruled. The commissioner reports that Neely should be allowed nothing for such use of the boilers for business of Childers and Ramey outside the legitimate firm business, yet allows him \$100 therefor. We are unable to say that such sum is not correct in amount, and will have to sustain the commissioner as to it.

Neely excepted because the commissioner reported that he was not entitled to any allowance on the claim made by Neely, that by reason of the use of the firm's boilers in boring and operating wells of Childers and Ramey on adjoining leases owned by them, in which Neely was not interested, the two wells of the firm, which had been bored before the others were, and were paying wells, were often shut down and unproductive, while those other wells were going on, and that by reason of want of water and steam, and the inadequacy of the engines to run all the wells, five or six in number, the production of the firm's wells was diminished. The 49 L. R. A.

commissioner says that Neely suffered no appreciable injury thereby. If injured at all, it was appreciable, and to be estimated. Ramey states, in short, that Neely was not entitled to a cent on this score. Neely's evidence is distinct that he was there numerous times, and found these two wells still. He swears to a large loss from this cause. He furnishes considerable evidence to sustain him in some loss from this score, and it seems that equity should make some compensation for it. There is evidence that Ramey, when asked why the wells were shut down, said that he had a larger interest in the other wells. Ramey (having bought out Childers' interest, and Neely being absent almost all the time of operation) had sole charge. The commissioner bases his opinion of no injury to Neely from pipe-line reports, which are not before us; but it does seem from the evidence that the firm business was neglected, and loss to it accrued therefrom to an appreciable extent, for which some compensation should be made. It is difficult to say what should be allowed on this account, it being a thing of only approximate estimate; and still it seems an allowance should be made, as Ramey is claiming for outlay, and himself controlled the business.

When this suit was brought, Childers and Ramey obtained in it an injunction enjoining the pipe-line companies transporting the firm's oil from paying Neely for his share of the oil to which he was entitled under his division orders, and enjoining Neely from any further participation in the partnership, and from selling his share of the oil; thus taking from him the wells and their proceeds, and leaving Ramey in sole charge of them. Neely complains that the court refused to dissolve this injunction. His counsel says there was no right to it, as the bill charged no insolvency. The bill, however, did charge that Neely had failed to contribute his part of the expense of the business, and that Ramey and Childers had made large outlays therefor, and that Neely had refused to make settlement, and was largely indebted to his associates from the transactions of the partnership. This justifies the injunction, if the oil of Neely were social assets, as partners, in advancing for expenditures for the partnership, have lien on partnership property for advances. *Skillman v. Lachman*, 23 Cal. 198, 83 Am. Dec. 109; *Duryea v. Burt*, 28 Cal. 570; T. Parsons, Partn. § 402, note. But this lien is only on partnership property, while distinctly such; for it is the law that if there is a separation or division of the property, or part of it, there is no lien. If two partners consign goods for sale, and direct the consignee to carry the proceeds to the account of each, and it is done, neither partner has any lien on the share of the other in those proceeds, though it would have been otherwise if they had remained part of the common property. 2 Lindley, Partn. § 683; 1 Collyer, Partn. § 109, note. Now, these partners agreed to have division orders when they began business (that is, the pipe lines to give each a certificate of his share of the oil committed to them, which was a

product of the wells); and this effected a separation of that product, making each one's share his several property, and severing it from the social property, if it was such at any moment. There being no lien, there was no justification for the injunction. It perhaps disabled Neely from paying as the bill demanded of him.

There is another error in the proceeding. The bill demanded a dissolution. It showed abundant cause, and the evidence shows abundant cause, of dissolution. The bill charges that the plaintiffs and Neely made a settlement to a certain date, but that they had been unable to get Neely to make a settlement since then; that he was violent and abusive, had threatened them with violence, and declared he would have nothing more to do with them; that he would not contribute to expenses; that bills remained unpaid; and that because of the unsatisfactory condition of the business, and the "disagreements, dissensions, and disaffections between the partners, the property and business were suffering." The evidence shows these disagreements and dissensions. Thus, it was plain that the business was hopeless of success and prosperity, and the interests of all parties demanded absolute dissolution at the hands of the law. Reconciliation, harmony, and success were utterly beyond hope. 17 Am. & Eng. Enc. Law, p. 1104. Therefore the court should have decreed dissolution absolute, and directed an account of the partnership, and wound it up. But it decreed no dissolution, but, on the contrary, suffered the partnership still to subsist, and, indeed, go on in the sole hands and management of Ramey, excluding Neely therefrom, and decreed that the settlement by the commissioner should only apply to its date, leaving it open to future account. The decree perpetuated the injunction, forever prohibiting Neely from participation in the business, and provided that when he should pay \$487.15 found due from him, and costs, the injunction should cease. That excellent, very late work, containing the leading late decisions in equity in America and England, the American and English Decisions in Equity, with elaborate notes collecting decisions (vol. 5, p. 52), lays down the rule that equity can only entertain

jurisdiction for an account when it can make a final decree in the suit; citing *Randolph v. Kinney*, 3 Rand. (Va.) 394. That work (p. 109) says: "As a general rule, a bill for accounting between partners which does not also seek a dissolution of the partnership will not be maintained."—citing cases,—among them, *Coville v. Gilman*, 13 W. Va. 314, in which Judge Green fully sustains this position. *T. Parsons, Partn.* § 206; 2 *Lindley, Partn.* 948. If ever there were cases which, by bill and proof, called for dissolution and final account, not partial, this is one. And, besides the showing of bill and proof, a petition for rehearing alleged that Ramey had sold the boilers. The evidence so shows. This would charge Ramey to credit of Neely. There was partnership property in Ramey's hands. There could only one adequate relief be given,—dissolution, sale of the property entire, and full account. But no provision was made for dissolution, sale, or full account—only a partial settlement and decree against Neely for the sum found by it. The bill alleged that the property could not be divided in kind. If the injunction applied to property belonging to the firm, on which a lien rested for the other partners, it would be proper to continue it until final account and decree. *Robrecht v. Robrecht* (W. Va.) 34 S. E. 801. But Neely's share of the oil was his separate property. And I do not see why he should, without cause, be excluded from participation, letting Ramey have sole control. A receiver, impartial between them, was proper, under the circumstances. "If no dissolution is sought, a receiver and manager will not be appointed; but, with a view to a dissolution or winding up, a receiver and manager will be appointed, if there are any such grounds for the appointment as are sufficient in other cases, or if the partners cannot agree as the proper mode of working the mines until they are sold." *Collyer, Partn.* § 381.

Therefore we dissolve the injunction, reverse the decree, overrule the demurrer to the bill, and remand for further proceedings as herein indicated, and further according to principles governing courts of equity in such cases.

NEW YORK COURT OF APPEALS.

Sidney H. CARNEY, Sr., Appt.,
v.

NEW YORK LIFE INSURANCE COMPANY, Resp't.

(162 N. Y. 453.)

1. A contract for the employment dur-

NOTE.—Time for which contracts of employment may be made on behalf of corporation by its officers, directors, and agents.

I. Contracts of permanent employment. II. Other contracts of employment.

I. Contracts of permanent employment.

No case seems to have been previously decided in which the power of the president of a corporation to make a contract of employment for life has been raised.

ing life of a person to act in a medical capacity for a life insurance company is not within the authority conferred upon the president and actuary by a by-law empowering them to "appoint, remove, and fix the compensation of each and every person, except agents, employed by the company, where the members of the board of trustees.

The main case holds that the president and actuary have no power to make such a contract under a by-law empowering them to "appoint, remove, and fix the compensation of" all employees of the company except agents, where the members of the board of trustees, to whom

to whom the management and control of the corporation are given, hold office only for four years each.

2. The meaning of a by-law, and its reasonableness, are questions for the court, and not for the jury, when there is no dispute as to the facts.

(April 17, 1900.)

APPPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a trial term for New York County dismissing a complaint brought to recover damages for breach of a contract for personal services. *Affirmed.*

The facts are stated in the opinion.

Messrs. Harriman & Fessenden, for appellant:

The powers of officers who are in executive charge of a corporation are very extensive,

the management and control of the corporation are given, hold office for four years only.

And the earlier case of *Beers v. New York L. Ins. Co.* 66 Hun, 75, 20 N. Y. Supp. 788, which is an action against the same company, holds that the trustees themselves, as they held office for four years only, had no power to employ a person for life, thus taking away the management of the business from the policy holders. The court also holds that the trustees had no such power because the by-laws provided that all employees should be employed by other officers specified. Another ground for the decision was that the person employed for life was the president of the board of trustees, and as such was present and presiding at the meeting at which the resolutions for hiring him were passed.

The power of division superintendent of a railroad to make a contract for permanent employment has been considered in a few cases in Michigan, and the rule has been established that they have no implied power to make such a contract.

Thus, *Brighton v. Lake Shore & M. S. R. Co.* 103 Mich. 420, 61 N. W. 550, holds that it was proper for the court below to allow the jury to find that two division superintendents of a railroad, who represented the company on the settlement of a claim for personal injuries, had authority to make an agreement that an injured employee should be employed at a specified salary for life or during his ability and disposition to perform the duties of his position. But the ground for this decision, as stated in *Maxson v. Michigan C. R. Co.* 117 Mich. 218, 75 N. W. 459, was that authority from, and ratification by, the company was shown by the fact that a sum of money was also paid to such employee as part of the settlement.

And *Maxson v. Michigan C. R. Co.* 117 Mich. 218, 75 N. W. 459, *supra*, holds that a division superintendent of a railroad, subject to the supervision of the general superintendent and the president and directors, has no implied power to bind the company by an agreement to give employment for life to an employee in settlement of a claim for personal injuries, and that one claiming under such a contract has the burden of proving the original authority of the superintendent, or ratification by the company.

Stearns v. Lake Shore & M. S. R. Co. 112 Mich. 651, 71 N. W. 148, holds that a division superintendent has authority to agree with one having a contract during life or ability, that if he does not like a new service undertaken by him he may return under the old agreement. 49 L. R. A.

and cover the entire ground of the corporate transactions, including transactions outside the powers ordinarily vested in them *ex officio*.

Martin v. Webb, 110 U. S. 7, 28 L. ed. 49, 3 Sup. Ct. Rep. 428; *Fifth Nat. Bank v. Navassa Phosphate Co.* 119 N. Y. 256, 23 N. E. 737; *Davies v. New York Concert Co.* 36 N. Y. S. R. 816, 13 N. Y. Supp. 739; *Conely v. Collins*, 119 Mich. 519, 44 L. R. A. 844, 78 N. W. 555.

In case of an appeal like this, such facts as could properly have been proved under the allegations of the complaint, when supported by reasonable implication and fair intendment, must be accepted as true.

Flynn v. Brooklyn City R. Co. 158 N. Y. 493, 53 N. E. 520.

The word "appoint" was not used in the limited sense of "designate."

If, from the by-law or any circumstance

The grounds for such holding were that the superintendent was the one with whom the employee was required to deal, and that such agreement did not amount to a new contract, but was in effect granting an indefinite leave of absence.

As to contracts for permanent employment generally, see *Carnig v. Carr* (Mass.) 35 L. R. A. 512, and *note*.

II. Other contracts of employment.

The power to make shorter contracts of employment depends largely on the officer making the contract, and the authority conferred on him under the by-laws.

Directors.

The board of directors of a corporation may enter into a special contract for the employment of a clerk for a year, which will be binding on the corporation, notwithstanding a provision of the by-laws that all clerks shall be employed "during the pleasure of the board." *Martino v. Commerce F. Ins. Co.* 15 Jones & S. 520.

President.

The president seems to have implied power to make a contract of employment for one year. Thus, the president of a street railway company has apparent power to employ a cashier and book-keeper for the term of one year, and the employee is not bound by any by-laws restricting the powers of the president unless he had notice of them. *Trawick v. Peoria & Ft. C. Street R. Co.* 68 Ill. App. 156.

And in *Hand v. Clearfield Coal Co.* 143 Pa. 408, 22 Atl. 709, the court stated that there was no denial in the evidence that the president of the defendant coal company was authorized to employ for a year an assistant to the president, the whole question at issue being the right to discharge him before the end of the year.

And *Ceeder v. H. M. Loud & Sons Lumber Co.* 86 Mich. 541, 49 N. W. 575, holds that the president of a lumber manufacturing company in the active management of its business has power to employ sawyers for the season, where there is no limitation of his power as to employment, and no authority in regard thereto has been conferred on anyone else.

Vice president.

The vice president does not seem to have, as

shown, there was conferred a power to "employ," then, in making the contract in question, the president and actuary were within their authority when the facts and circumstances are taken into account.

When directors act in good faith and without fraud and collusion, their action is conclusive upon the corporation. If it is deemed to be too extensive a power to be vested in the directors, and dangerous to the rights of stockholders in the possibilities of fraud, it is for the legislature to interfere and prescribe regulations.

Beveridge v. New York Elev. R. Co. 112 N. Y. 23, 2 L. R. A. 648, 19 N. E. 489.

This contract is no longer executory on plaintiff's part, and the corporation is estopped to deny the original want of power in itself to make it, or in the two officials who made it on behalf of their principal.

Messrs. William B. Hornblower,

such, power to make a contract of employment for a year or longer.

Thus, the first vice president of a railroad company has no apparent authority to employ a general passenger and ticket agent for one year by virtue of such position, nor under a by-law giving him general charge of the passenger and freight traffic, and providing that the officers of such department shall be appointed by him subject to the president's approval, and that they may be removed by him at pleasure; nor under a by-law providing that the vice president shall have such functions as lawfully appertain to such office. *Missouri, K. & T. R. Co. v. Faulkner*, 88 Tex. 649, 32 S. W. 883, reversing (Tex. Civ. App.) 31 S. W. 543.

The above case also holds that the employee was chargeable with notice of the limitation on the vice president's power contained in the by-law conferring power to contract with him.

And *Camacho v. Hamilton Bank Note & Engraving Co.* 2 App. Div. 360, 37 N. Y. Supp. 725, an appeal from which was dismissed without opinion in 158 N. Y. 663, 52 N. E. 1123, holds that the vice president and general manager of a corporation has no implied authority to employ one for three years at a large salary so as to bind the corporation, merely because he has been in the habit of employing and discharging ordinary servants for short periods, and that such employment is not ratified by the fact that the president saw the employee rendering services.

But *Lewis v. Albemarle & R. R. Co.* 95 N. C. 179, holds that the vice president and superintendent of a railroad, who have charge of extending the road, have implied authority, where the president and directors live in a distant state, to employ a civil engineer for such length of time as may be necessary, even though the vice president has no authority to hire a permanent engineer, and that the person so employed could recover for the time during which he was under the control of the corporation,—especially where the president and directors ratified his employment by receiving reports from him and paying checks drawn for his compensation.

Secretary.

The secretary of a foreign corporation whose by-laws give him the general supervision of the business affairs, with full power to make and execute contracts, and to whom the entire management of the business is left, with the concurrence of the president, has apparent power 49 L. R. A.

George W. Hubbell, and Andrew Hamilton, for respondent:

The policy of the law under which this corporation was organized is that every four years its board of trustees may be wholly changed; that five of its members may be compelled to retire at the end of any one year at the wish of the policy holders, and that by this means the policy holders shall have the ultimate control of the manner in which the business of the company shall be conducted, and determine who shall be the agents, employees, and servants of the corporation. Of this right the board of trustees cannot deprive the policy holders by making contracts which will extend for long periods of years beyond their terms of office.

Beers v. New York L. Ins. Co. 66 Hun, 75, 20 N. Y. Supp. 788.

Even if the board of trustees have the power to make such a contract, the officers of

to employ a collector for one year, notwithstanding a by-law of which the latter has no knowledge, requiring all contracts to be authorized by resolution, and those involving a liability of \$50 or more to be signed by the president as well as by the secretary, where no meeting of the directors has ever been held.

General manager.

For cases where the general manager is also president, vice president, or secretary, see the preceding cases.

The weight of authority seems to be to the effect that the general manager may make a contract of employment for one year.

Thus, the general manager of a corporation whose president and directors live in a distant state has the right to employ an attorney by the year. *Luce v. San Diego Land & Town Co.* (Cal.) 37 Pac. 390.

The employment of a foreman for a year, by the general superintendent of the business of a paper company who has the general management of the business, hires and discharges employees, and who is required by the by-laws to perform such duties as the trustees may direct, is not unauthorized as a matter of law. *Peck v. Dexter Sulphite Pulp & Paper Co.* 164 N. Y. 127.

The general manager of a manufacturing corporation employed for five years, under a contract providing that he is to be in all things under the direction and control of the board of directors, who may cancel his employment at any time if they decide that it is best to discontinue the business, may bind the corporation by a contract for the employment of a laborer for one year, where the directors have never taken any action limiting his power, and he has been held out as general agent with power to hire and discharge men, and the person employed has no knowledge of any restrictions upon his power. *Stahlberger v. New Hartford Leather Co.* 92 Hun, 245, 36 N. Y. Supp. 708.

Notice of a by-law providing that no officer except the board of directors shall have authority to make contracts for service for the period of a year is not chargeable to one who is employed for a year by the general manager, who has been given absolute charge of its business at the place where the contract is made. *Moyer v. East Shore Terminal Co.* 41 S. C. 300, 25 L. R. A. 48, 19 S. E. 651.

But *Smith v. Co-operative Dress Assn.* 12 Daly, 304, holds that the general manager of a corporation engaged for one year only, who

the company have no express or implied power to do so.

Camacho v. Hamilton Bank Note & Engraving Co. 2 App. Div. 369, 37 N. Y. Supp. 725; *Smith v. Co-operative Dress Assn.* 12 Daly, 304; *Bright v. Canadian International Stock Yard & Abattoir Co.* 83 Hun, 482, 32 N. Y. Supp. 71; *Alexander v. Cauldwell*, 83 N. Y. 480; *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135, 9 L. R. A. 708, 25 N. E. 264; *Adriance v. Roome*, 52 Barb. 411; *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 287, 19 Am. Rep. 181; *De Bost v. Albert Palmer Co.* 35 Hun, 386.

The president of a corporation has no authority, as such, to make contracts binding upon the corporation, except as to matters arising in the ordinary course of the business of the corporation.

Blen v. Bear River & A. Water & Min. Co. 20 Cal. 602, 81 Am. Dec. 132, and note; *Mount Sterling & J. Turnp. Road Co. v. Looney*, 1 Met. (Ky.) 550, 71 Am. Dec. 491, and note; *Wait v. Nashua Armory Assn.* 66 N. H. 581, 14 L. R. A. 356, 23 Atl. 77; 2 Cook, Stock & Stockholders, § 716; *Murray v. C. N. Nelson Lumber Co.* 143 Mass. 250, 9 N. E. 634.

employs and discharges all employees without interference from the president or directors, has no apparent authority to bind the corporation by a special contract of employment for a year, so as to make it liable in case of the employee's discharge, although such employment might warrant a recovery for services already actually performed. The principal ground for this holding seems to be that the manager himself was employed for one year only.

Other agents.

One hired for the remainder of a season by the principal foreman of a copper-smelting company, who for nine years has hired and discharged all men employed in the business at the place, and who has not been limited as to hiring, is justified in supposing that such foreman had authority to make the contract, although no employment other than by the day is shown to have been made, where many of the men so employed had worked throughout the season. *Tunison v. Detroit & L. S. Copper Co.* 73 Mich. 452, 41 N. W. 502.

The assistant to the chief inspector of the department of admissions of the World's Columbian Exposition with power to hire men had apparent authority to hire a ticket seller for the entire six months during which the exposition was open, where he had authority to furnish the person employed with a pass book for the entire six months, and to require him to give a bond, and pay \$30 for his uniform by deducting \$5 each month from his salary until the end of his term, when the \$30 was to be repaid. *World's Columbian Exposition v. Richards*, 57 Ill. App. 601.

One employed to work for a corporation for a year, by a person in the office of the corporation assuming to employ hands, has the right to rely on his authority to make such contract, where he has no notice of any limitation on such authority; and he is not affected by private instructions from the manager that no laborer shall be employed for a longer time than 49 L. R. A.

Haight, J., delivered the opinion of the court:

The action was brought to recover damages for a breach of contract of employment. The plaintiff's counsel, in his opening, repeated the allegations of his complaint, which were, in substance, that in December, 1869, the president and actuary of the defendant entered into an oral contract with the plaintiff, by the terms of which he was to enter the employment of the defendant in a medical capacity, and that such employment should continue during his life; that for the first year his salary should be \$5,000, the second year \$5,500, and the third year \$6,000, and that it was to remain at that figure until changed by the parties; that pursuant to such contract, he entered the employment of the defendant, which continued until the year 1895, with a salary which was increased from time to time until it reached \$12,000 per annum; and that on the 20th day of June, 1895, he was wrongfully discharged. The complaint further alleged that the board of trustees had adopted a by-law which was in force at the time of the making of the contract in 1869, by which the president and actuary were empowered

one day. *Cox v. Albany Brewing Co.* 56 Hun, 489, 10 N. Y. Supp. 213.

A decision to the same effect was reached on a prior appeal in the same case, reported in 2 Silv. Sup. Ct. 590, 6 N. Y. Supp. 841.

And *Applebee v. Albany Brewing Co.* 34 N. Y. S. R. 671, 12 N. Y. Supp. 576, holds that one in charge of the office of a brewing company, who has hired a great many men for the company, and who, after hiring them, sends them to the superintendent to be assigned to their work, has apparent authority to employ a hand for a year.

In *Boogher v. Maryland L. Ins. Co.* 6 Mo. App. 592, which gives only a digest of the decision, it is stated that the authority of a special agent of an insurance company to employ a general agent for a year cannot be shown by evidence of a custom among such companies to employ such agents by the year, and that one claiming to have been so hired by a special agent with limited powers has the burden of proving the contract of employment and the agent's authority to make it.

In a subsequent decision in the same case, 8 Mo. App. 533, it is held that the fact that the manager in an insurance company had power to employ and remove agents did not show his authority to employ an agent for a year.

An employment agent authorized by the foreman of a lumber company to employ a "blacksmith and handy man" at specified monthly wages has authority to employ a blacksmith for a reasonable length of time, depending on the nature of the work, the time of year it is usually prosecuted, and the length of time it will probably take to complete it, and three months is not, as matter of law, an unreasonable length of time for such employment. *Drohan v. Merrill & R. Lumber Co.* 75 Minn. 251, 77 N. W. 957.

This note does not cover cases involving the authority of different officers or agents to make contracts of employment regardless of the time of such employment. J. H. H.

"to appoint, remove, and fix the compensation of each and every person, except agents, employed by the company." He demanded as damages \$168,000. The answer denied that the contract was for life, and alleged that it was void.

It is claimed that the alleged contract was void under the statute of frauds, and, further, that it was a contract which neither the executive officers nor the board of trustees had the power to make, under the authority of *Beers v. New York L. Ins. Co.* 66 Hun, 75, 20 N. Y. Supp. 788; but passing, without determining, these questions, we are of the opinion that the plaintiff has no cause of action, for other reasons, which may be briefly stated. The by-law alluded to must be given a reasonable interpretation. We may assume that the power given to appoint was intended to include the power to employ, and to agree upon the compensation that should be paid; but in assuming this we cannot believe that the board of trustees, in adopting the by-law, intended to invest the executive officers named with the power to enter into unreasonable contracts as to the term of employment. Under the statute, the board of trustees consisted of twenty individuals, whose terms of office continued for four years, five being elected each year. The management and control of the corporation was given to the trustees. In construing the action of the board in adopting the by-law in question we must assume that they had in mind the provisions of the statute fixing their terms of office, and that, at the ex-

piration of that period, other persons may be chosen in their places, upon whom would rest the responsibility of the conduct and management of the business of the company; and that they had no right to interfere with the powers of future boards of trustees by imposing upon them unreasonable contracts. This provision of the statute may properly be taken into consideration by the court in determining whether the contract is reasonable. Having in view the provisions for the election of new officers upon whom would be cast the responsibility of the management of the company, and the evident purpose of the statute that the hands of the future officers should not be tied, or their action unreasonably hampered, we think the contract in question must be held to be unreasonable, and one not contemplated by the by-law, and, consequently, one that should not be executed. In this case there is no dispute as to the facts, and, consequently, the questions arising with reference to the meaning of the by-law, and as to whether the contract is reasonable, is for the court, and not for the jury. *Wright v. Bank of the Metropolis*, 110 N. Y. 237, 249, 1 L. R. A. 289, 18 N. E. 79; *Mead v. Parker*, 111 N. Y. 259, 262, 18 N. E. 727; *Sullivan v. New York & R. Cement Co.* 119 N. Y. 348, 355, 23 N. E. 820; *Colt v. Owens*, 90 N. Y. 368.

The judgment should be affirmed with costs.

Parker, Ch. J., O'Brien, Bartlett, Martin, Vann, and Landon, JJ., concur.

WISCONSIN SUPREME COURT.

John GATZOW, *Resp.*,
v.

Henry G. A. BUENING *et al.*, *Appts.*

(.....Wis.....)

1. The failure to make any objection to the collected jury waives objections to the improper exclusion of questions to individual jurors.
2. An action for damages for conspiracy is not within the provision of Rev. Stat. § 4222, subd. 5, requiring notice within one year after the event as a condition of an action for injury to the person.
3. Failure to object to the maintenance of an action without having given the notice required by Rev. Stat. § 4222, subd. 5, to be given within one year after the injury, except by objection to evidence on the trial, is a waiver of the failure to give the notice, as the statute does not make this a condition of the right, but only a limitation on the remedy.
4. A complaint which sets forth a conspiracy to commit a wrong and acts pur-

suant thereto, resulting in injury to the plaintiff, states a case in tort, and not for breach of contract, although the wrong done was in violation of a contract.

5. A by-law of a liverymen's association which binds the members not to do business with any person who does not patronize its members exclusively, and prevents any of them from letting a hearse to a private party for a funeral where the undertaker in charge of it is reputed to patronize nonunion members, or to any person whose family for the occasion patronize a nonunion livery, is unlawful as against public policy.
6. The denial of a special verdict to which the moving party has an absolute right under Rev. Stat. § 2858, cannot be justified by the court's attempting to shift upon counsel the duty of preparing the form of the special verdict, and by counsel's failure to do so before the argument to the jury is commenced.
7. The trial court is not bound, on request for a special verdict, to submit to the jury questions covering uncontroverted facts.

NOTE.—For boycott or combination by dealers or persons engaged in business to injure rivals, see *Bohn Mfg. Co. v. Northwestern Lumbermen's Assn.* (Minn.) 21 L. R. A. 337; *Jackson v. Stanfield* (Ind.) 23 L. R. A. 588; *Macanley v. Tierney* (R. I.) 37 L. R. A. 455; 49 L. R. A.

Brewster v. C. Miller's Sons (Ky.) 38 L. R. A. 505; *Hartnett v. Planter's Supply Assn.* (Mass.) 38 L. R. A. 194; *Doremus v. Hennessy* (Ill.) 43 L. R. A. 797; and *Boutwell v. Marr* (Vt.) 43 L. R. A. 803.

8. **Compelling the withdrawal of a hearse and carriages from a funeral** just at the time when they were wanted, in pursuance of an unlawful by-law of a liverymen's association* which prohibited doing business with any person who did not deal exclusively with its members, will justify an award of exemplary damages, where the act was done with full knowledge of the situation and for the purpose of demonstrating the power of the association to punish liverymen for doing business in an independent way, and to punish other persons for dealing with nonunion liverymen.
9. **An instruction in an action for a conspiracy, that damages are of three kinds, actual, compensatory, and exemplary, and which proceeds to distinguish between actual and compensatory damages, and to say that the jury must at least find for the actual damages, is erroneous, but the jury should be told that compensatory damages may be recovered, and then instructed as to the elements of such damages.**
10. **No damages for injury to feelings can be recovered in an action for conspiracy in pursuance of which the hearse and carriages were taken away from a funeral just at the time when they were needed, since there is no physical injury with which the injury to feelings is connected.**

(February 27, 1900.)

A PPEAL by defendants from a judgment of the Superior Court for Milwaukee County in favor of plaintiff in an action brought to recover damages for alleged conspiracy to prevent the use of hearses and carriages by nonassociation persons. *Reversed.*

Statement by **Marshall, J.:**

Action for damages for injuries caused by an alleged unlawful conspiracy and acts done pursuant thereto. The complaint stated its substance as follows: July 30, 1897, plaintiff employed and paid defendant Schubert, a liveryman, for the services of a hearse and carriage for use at the funeral of the former's four-year-old child, which was to be buried from his residence in the city of Milwaukee, Wisconsin, on the 1st day of April, 1897. The hearse and carriage, with teams and drivers, as agreed upon, were sent to plaintiff's residence and there properly located in front of such residence to await the termination of the funeral services therein. Defendants entered into an agreement to deprive plaintiff of the use of the hearse and carriage and to cause them to be taken away from his residence at about the instant they would be needed to convey the child's body and attending friends to the grave side. Such agreement was entered into with a malicious design to humiliate and injure plaintiff, which was fully accomplished. Just as the funeral services at the house were over, and the coffin containing the child's remains about to be placed in the hearse, defendants, pursuant to the agreement above stated, caused the drivers of the hearse and carriages to take the vehicles away, leaving plaintiff to resort to such means as he might be able to procure to continue the funeral. When such occurrence took place there was a large number of people in attendance at the 40 L. R. A.

funeral, to whom plaintiff was unable to explain the rude breaking up of the funeral arrangements. The conduct of the defendants, as aforesaid, caused plaintiff great humiliation and mental distress, to his damage in the sum of \$5,000, besides the loss of \$8 paid for the use of the vehicles.

Defendant Schubert denied all the allegations of the complaint regarding an agreement between himself and Buening, or any agreement, to deprive plaintiff of the hearse and carriage, or either of them, or any design to maliciously or otherwise injure plaintiff. The allegations regarding the preparation for the funeral were admitted, including the allegation that the hearse and carriage were furnished to plaintiff and afterwards taken away so that they were not used at the funeral. All allegations of the complaint not specifically admitted or denied, were denied generally.

The answer of Buening stated that there was a liverymen's association in the city of Milwaukee at the time of the occurrence in question, of which he was secretary, and Schubert a member; that one of the by-laws of such association prohibited, under penalty, any member thereof from furnishing vehicles of any kind to any liveryman who hired them out at less than the association prices, and that it was said defendant's duty, as secretary of the association, to do whatever he did on the occasion complained of, in order to prevent violations of the association by-laws: that after the hearse and carriage left Schubert's barn to go to plaintiff's residence, the witness was notified that Schubert was violating the laws of the association by furnishing vehicles to Nieman, a liveryman and undertaker who had charge of the funeral in question and who was not a member of the liverymen's association: that Nieman, on such occasion, as he was in the habit of doing, furnished carriages and vehicles at lower prices, and paid his employees less, than the association permitted: that on being informed of the facts he (Buening) communicated with Schubert's place of business by telephone and was requested therefrom to have the driver of the hearse communicate with his employer's place of business by telephone; that he complied with such request and the result was that the hearse and carriage were taken away from plaintiff's residence and he was deprived of their use; that defendant merely performed his duties to the association, without any specific agreement with Schubert to injure plaintiff, and without malice towards him.

The evidence showed the existence of the liverymen's union as alleged in Buening's answer; that he was secretary and Schubert a member thereof; that Nieman was a liveryman and undertaker doing business outside of the association; that according to the by-laws of the association no member thereof was allowed to do business with any person who did not patronize its members exclusively, or let a hearse to a private party for a funeral where the undertaker in charge of such funeral was reputed to patronize nonunion members; or to any person whose

family, for the occasion, patronized a non-union livery; that on the occasion in question plaintiff employed Nieman to obtain the carriage and hearse for him, and the engagement of the hearse and carriage of the defendant Schubert was made through Nieman in the name of the plaintiff and without Schubert knowing that Nieman was in any way concerned in the transaction; that the business was done with one of Schubert's employees; that, fearing the transaction might lead to a violation of the rules of the association, Schubert directed the driver of the hearse not to remain at the funeral if a nonunion man was in charge; that after the hearse and carriage left Schubert's barn to attend the funeral, Buening was informed of the facts, particularly that Nieman was the liveryman and undertaker employed by plaintiff, whereupon, pursuant to his duty as secretary of the union, he communicated with Schubert's place of business, giving notice of the violation by the latter of the rules of such union; that Buening was thereupon requested, by or on behalf of Schubert, to cause the driver of the hearse to communicate with the latter's office by telephone, and pursuant thereto Buening went to plaintiff's residence and stated to such driver that his employer wanted to talk with him by telephone. There was considerable evidence that when the driver received word, as aforesaid, he got into the buggy with Buening and drove a short distance, away from plaintiff's residence, but did not use the telephone; that he told Buening there was no need of it because he had orders to return and not allow the hearse and carriage to be used if Nieman officiated at the funeral, whereupon Buening drove back with the hearse driver, and such driver then drove away with the hearse and the carriage driver, followed. There was further evidence to the effect that Buening visited plaintiff's residence for the purpose of preventing the hearse and carriage from being used by the plaintiff; that he ordered the driver of the hearse to return to his employer's barn: that he said to Nieman, "I am secretary of the union and authorized to have the hearse go home. I am not going to leave before the hearse goes away. I am going to break up this funeral. I am not going to have this thing go on and this hearse has got to go home." There was further evidence to the effect that, in Buening's talk with the hearse driver and with Nieman, his conduct was such as to attract the attention of persons in the house and in the vicinity: that when he returned, after taking the driver away to talk with his employer's place of business by telephone, and the driver mounted the hearse and drove away, Buening, by word and manner, evidenced exultation over the success of his efforts to deprive plaintiff of the use of the hearse, saying to Nieman upon driving away, "You see what I can do. Good bye." There was further evidence to the effect that defendant Schubert ratified whatever was said and done in his behalf in respect to depriving plaintiff of the use of the hearse and carriage, and that all the acts in that regard

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were in strict harmony with the former's agreement with the liverymen's union. There was further evidence to the effect that as soon as plaintiff and the undertaker recovered from the confusion caused by the sudden and rude taking away of the hearse and carriage, and the consequent disarrangement of the funeral plans, they proceeded with the funeral by placing the coffin in one of the carriages and thus conveying it to the grave. The evidence further tended to show that it was one of the purposes of the liverymen's union to compel every liveryman to belong to it or go out of business and to prevent competition between liverymen and hold up the prices to such a level as the union might see fit to fix.

During the inpaneling of the jury defendants' counsel asked questions of the jurors respecting their belief as to the right of persons to form a union for such objects as those of the one in question. Such questions were objected to and the objections sustained, to which rulings due exceptions were taken. When the panel of jurors was complete no objection was made to the jury as a whole. Before the trial commenced, defendants' counsel moved the court to compel plaintiff to elect whether he would proceed in the action for damages for breach of contract or for damages for a tort. The motion was denied and the ruling was excepted to. A further motion was made by defendants' attorneys to strike out all of the allegations of the complaint appropriate to an action on contract, which motion was denied and the ruling excepted to.

Defendants' counsel moved the court to instruct the jury, in substance, as follows:

(1) There being no physical injury in this case, plaintiff is not entitled to recover compensation for mental suffering.

(2) If plaintiff knew that Nieman was unable to procure the vehicles from any member of the liverymen's association, and, with such knowledge caused Nieman to obtain them in his (plaintiff's) name, withholding from Schubert all knowledge of Nieman's connection with the transaction, there was no agreement between plaintiff and Schubert imposing any obligation upon the latter.

(3) It appearing that Schubert belonged to an association of liverymen and undertakers, obligating him under a penalty not to let vehicles to a person not a member of the association, and that Nieman was not a member, if Nieman falsely represented to Schubert that the vehicles were wanted by plaintiff, a friend of Schubert not engaged in the livery or undertaking business, with intent to deceive Schubert and to keep him from knowledge that Nieman was concerned in the transaction, the contract for hire was void and plaintiff cannot recover.

(4) Every person has a right to refuse to do business with any other person regardless of his reasons therefor, so far as the public or any individual member thereof is concerned.

(5) Any number of persons may lawfully associate themselves together and agree not to work for or deal with certain men or

classes of men, and Schubert had a lawful right to refuse to furnish vehicles to plaintiff or Nieman, regardless of his reasons therefor.

(6) Plaintiff did not sustain any actual damage by the occurrences complained of, and if the agreement between plaintiff and Schubert was valid, plaintiff is entitled to nominal damages only.

(7) If Schubert was actuated by no other motive than to keep his obligations with the liverymen's association, he cannot be convicted of having acted from malicious motives.

(8) If Schubert did nothing more than what he supposed he was bound to do by reason of his relations to the liverymen's association, no damages can be assessed against him by way of punishment.

(9) If Schubert, in depriving plaintiff of the use of the hearse and carriage, had no other motive than to protect himself from incurring a penalty for violating the rules of the liverymen's association, he cannot be made to pay damages to plaintiff by way of punishment even if his conduct towards plaintiff were illegal.

(10) If Buening acted solely in performance of his duty as secretary of the liverymen's association, he is not liable to plaintiff.

(11) If plaintiff was not damaged other than by being deprived of the use of the hearse, he cannot recover.

Such instructions were refused and due exceptions were taken. Before the arguments to the jury commenced, defendants' attorneys requested the court to direct the jury to find a special verdict, whereupon the court suggested to counsel to prepare questions. At the close of the arguments, questions were submitted by defendant's counsel and the request for a special verdict renewed. The court then said that the request came too late, and the special verdict was denied. The court then instructed the jury that defendants were liable in the case as a matter of law for the actual damages which plaintiff sustained, to the amount of the \$8 which was paid to Schubert. The court further instructed the jury that plaintiff was entitled to a verdict for at least \$8, and that, if the taking away of the hearse and carriage was a wilful act, they might award plaintiff compensatory damages for injury to his feelings; and that, if the jury believed that defendants were actuated by malice towards plaintiff, that they had an actual intent to injure him, or that their acts were done under such circumstances as to show an utter disregard of plaintiff's rights, then they might assess punitive damages in his favor. The instructions were excepted to as regards the liability of defendants for damages to plaintiff's feelings and as regards liability for punitive damages. The jury rendered a verdict in plaintiff's favor for \$1,000. There was a motion to set the verdict aside and for a new trial, upon all the grounds discussed in the opinion. The motion was denied. Judgment was 49 L. R. A.

rendered upon the verdict in plaintiff's favor, and defendants appealed.

Mr. W. B. Rabin, for appellants:

The plaintiff's complaint does not state a cause of action for injury to property, or to character, but alleges injury to feeling. Notice of personal injury should have been served upon the defendants, and alleged in the complaint.

Wis. Stat. 1897, § 4222, subs. 5; *Relyea v. Tomahawk Pulp & Paper Co.* 102 Wis. 301, 78 N. W. 412; *Lawton v. Waite*, 103 Wis. 244, 45 L. R. A. 616, 79 N. W. 321.

Notice of injury is a condition precedent, and must be alleged in the complaint or the complaint is defective.

Koch v. Ashland, 83 Wis. 361, 53 N. W. 674; *Hiner v. Fond du Lac*, 71 Wis. 78, 36 N. W. 632; *Steltz v. Wausau*, 88 Wis. 618, 60 N. W. 1054; *McKibben v. Amory*, 89 Wis. 607, 62 N. W. 416.

The complaint alleges mental suffering, disconnected with any physical injury. Mental suffering alone is no ground for recovery.

Summerfield v. Western U. Teleg. Co. 87 Wis. 1, 57 N. W. 973; *Craker v. Chicago & N. W. R. Co.* 36 Wis. 657, 17 Am. Rep. 504; *Draper v. Baker*, 61 Wis. 450, 50 Am. Rep. 143, 21 N. W. 527; *Gibney v. Lewis*, 68 Conn. 392, 36 Atl. 799; *Gulf, C. & S. F. R. Co. v. Trott*, 86 Tex. 412, 25 S. W. 419.

There can be no recovery for mental suffering flowing out of injury to property, because it is not the natural and probable consequence of the tort to the property.

Anderson v. Taylor, 56 Cal. 131, 38 Am. Rep. 52; *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303; *White v. Dresser*, 135 Mass. 150, 46 Am. Rep. 454.

Before a person can recover damages three things must be proved: (1) A wrongful act; (2) loss resulting; (3) adequate proof of both.

8 Am. & Eng. Enc. Law, 2d ed. p. 548.

Plaintiff, by permitting Nieman to act as funeral director while said plaintiff was the bailee of Schubert's hearse, committed a conversion of the bailment, and put it to a non-authorized use, because the said plaintiff knew that Schubert would not permit Nieman to have charge of the hearse.

Aschermann v. Philip Best Brewing Co. 45 Wis. 262; *Lane v. Cameron*, 38 Wis. 603.

The conversion of the bailment terminates the bailment, and the bailor has a right to retake the bailment.

Emerson v. Fisk, 6 Me. 200, 19 Am. Dec. 208; *Crump v. Mitchell*, 34 Miss. 449; *Partidge v. Philbrick*, 60 N. H. 556.

The defendant Schubert had a right to refuse to hire his hearse and carriage to persons that were not members of the association.

Breuster v. C. Miller's Sons Co. 101 Ky. 368, 38 L. R. A. 505, 41 S. W. 301.

When Schubert discovered the fraud practiced on him he had a right to rescind.

Friend Bros. Clothing Co. v. Hulbert, 98 Wis. 183, 73 N. W. 784; *McKinnon v. Vollmar*, 75 Wis. 83, 6 L. R. A. 121, 43 N. W.

800; *Cannon v. Henry*, 78 Wis. 167, 47 N. W. 186.

If a trespass was committed by the defendant Schubert as bailor in removing his bailment, it was only a technical trespass to personal property, and the plaintiff is not entitled even to nominal damages.

Paul v. Slason, 22 Vt. 231, 54 Am. Dec. 75; *Eten v. Lyster*, 60 N. Y. 252.

If defendants committed a wrong, their intent was certainly directed towards Nieman and without any wilful intent to injure the plaintiff, and the plaintiff cannot recover therefor.

Connecticut Mut. L. Ins. Co. v. New York & N. H. R. Co. 25 Conn. 265, 65 Am. Dec. 591; *Wulstein v. Mohlman*, 25 Jones & S. 50; *Dale v. Grant*, 34 N. J. L. 142.

The plaintiff can only recover punitive damages where malice is shown.

Where there is no express malice, or where the defendants did not act in a wanton, reckless, or insulting manner, punitive damages cannot be allowed.

Templeton v. Graves, 59 Wis. 95, 17 N. W. 672; *Putry v. Chicago, St. P. M. & O. R. Co.* 77 Wis. 219, 46 N. W. 56; *Grace v. Dempsey*, 75 Wis. 314, 43 N. W. 1127; *Collins v. Shannon*, 67 Wis. 441, 30 N. W. 730; *Anderson v. Sloane*, 72 Wis. 566, 40 N. W. 214; *Robinson v. Superior Rapid Transit R. Co.* 94 Wis. 345, 34 L. R. A. 205, 68 N. W. 961; *Porter v. Hannibal & St. J. R. Co.* 78 Mo. 66, 36 Am. Rep. 454; *Reed v. Keith*, 99 Wis. 672, 75 N. W. 392; *Schmitt v. Milwaukee Street R. Co.* 89 Wis. 195, 61 N. W. 834.

Where two persons do not act in concert each one is only liable to the injuries inflicted by his own acts.

Durgin v. Neal, 82 Cal. 595, 23 Pac. 133.

When the jury assessed the damages at \$1,000, they were actuated by passion and prejudice.

Meckelke v. Bramer, 59 Wis. 57, 17 N. W. 682; *Masteron v. Chicago & N. W. R. Co.* 102 Wis. 571, 78 N. W. 757; *Gillen v. Minneapolis, St. P. & S. S. M. R. Co.* 91 Wis. 633, 65 N. W. 373.

This association was certainly for a legal purpose as far as it went in refusing to deal with nonmembers of the association. And if this association was for a legal purpose an officer of the association authorized to look after those legal acts cannot be held responsible for the same.

Brewster v. C. Miller's Sons Co. 101 Ky. 368, 38 L. R. A. 505, 41 S. W. 301; *Guinard v. Knapp, Stout, & Co. Co.* 95 Wis. 482, 70 N. W. 671.

The mere taking away of the hearse was only a technical trespass, and the plaintiff is not entitled to damages for the mere taking away of the hearse.

Paul v. Slason, 22 Vt. 231, 54 Am. Dec. 75; *Eten v. Lyster*, 60 N. Y. 252; *Connecticut Mut. L. Ins. Co. v. New York & N. H. R. Co.* 25 Conn. 265, 65 Am. Dec. 591.

The taking away of the hearse was not such an injury as to cause mental suffering to follow therefrom.

Anderson v. Taylor, 56 Cal. 131, 38 Am. Rep. 52.
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Mere mental suffering does not entitle the plaintiff to any damages.

Summerfield v. Western U. Teleg. Co. 87 Wis. 1, 57 N. W. 973; *Gulf, C. & S. F. R. Co. v. Trott*, 86 Tex. 412, 25 S. W. 419.

Messrs. O'Connor, Hammel, & Schmitts also for appellants.

Messrs. Austin, Hamilton, & Bading and *R. N. Austin* for respondent.

Marshall, J., delivered the opinion of the court:

Questions put to jurymen during the impaneling of the jury as to their being biased against unions were improperly excluded. That was a legitimate subject of inquiry leading up to questions going to competency and as a basis for a challenge for cause, and, independent of that, as a basis for a peremptory challenge. However, no objection to the collected jury was made, and that circumstance operated to waive the previous objections. *Flynn v. State*, 97 Wis. 44, 72 N. W. 373; *Emery v. State*, 101 Wis. 627, 78 N. W. 145.

There was an objection to the introduction of any evidence because the action is for a personal injury, and notice of the claim to defendant, in compliance with § 4222, subd. 5, Rev. Stat., was not pleaded. The idea of the appellants' counsel is that the statute creates a condition precedent to the right of action and that plaintiff must show compliance with such conditions to make such right of action complete. The wording of the statute is as follows: "No action to recover damages for an injury to the person shall be maintained unless, within one year after the happening of the event causing such damages, notice in writing, signed by the party damaged, his agent or attorney, shall be served upon the person or corporation by whom it is claimed such damage was caused, stating the time and place where such damage occurred, a brief description of the injuries, the manner in which they were received, and the grounds upon which claims are made and that satisfaction thereof is claimed of such person or corporation." That refers to bodily injuries. This is not such an action. It is not within the statute. Moreover, the statute is a limitation upon the remedy to enforce a right, not a condition of the right itself. It is a limitation statute (*Relyea v. Tomahawk Paper & Pulp Co.* 102 Wis. 301, 78 N. W. 412), unlike § 1339, which prescribes the condition of a right as distinguished from a limitation upon a remedy to enforce a right. It being a statute of limitations, if it were applicable to this case, and we say it was not, the failure to take advantage of it, other than by an objection to evidence on the trial, waived the limitation upon the remedy. The law in that regard is fully discussed in *Meisenheimer v. Kellogg* (decided herewith, opinion by Mr. Justice Winslow) (Wis.) 81 N. W. 1033.

It is urged that the cause of action stated in the complaint is for breach of contract, hence that instructions to the jury, permitting an assessment of damages as in a tort action, were erroneous. The trial court

rightly decided that the purpose of the action, as stated in the complaint, was to recover compensation for damages suffered through tortious conduct of the defendants. The complaint sets forth a conspiracy to commit a wrong and acts pursuant thereto, to the special injury of the plaintiff. There is no room for serious controversy on that point.

Several errors are assigned on the theory that the combination of liverymen, known as the "Liverymen's Association of Milwaukee," to limit their services to persons patronizing them exclusively, and to monopolize the livery business in Milwaukee, including such service for the burial of the dead, and to carry prices to and maintain them at such a level as the combination might see fit to adopt, and acts done in pursuit of the purposes of such combination to the prejudice of, and regardless of their effect upon, plaintiff, were not unlawful. The trial court decided to the contrary.

It is not necessary in this case to decide to what length a combination of persons in restraint of trade, and interfering with personal liberty, may go to promote the interests of its members, without violating common-law rights and rendering such persons liable to respond in damages to the persons specially injured. Judicial expressions, in recent years at least, have not been in perfect harmony on the subject. The only safe course for the public, and legitimate course for the court, is for it to adhere strictly to the rules of the common law, both as regards what constitutes an unlawful conspiracy in restraint of trade, and the consequences to the guilty parties. So long as that is the law by which rights in regard to such matters must be tested, it is not the province of the court to change, but to administer, it.

The law applicable to this case, as regards the illegality of the combination in question, was plainly stated by this court in *Milwaukee Masons & Builders' Assn. v. Niezerowski*, 95 Wis. 129, 37 L. R. A. 127, 70 N. W. 166. It was there decided that all combinations in restraint of trade are contrary to public policy and illegal, unless they are for the reasonable protection, by reasonable and lawful means, of persons dealing legally with some subject-matter of contract. A combination that will resort to such means as the ruthless breaking in upon the solemnities of a funeral ceremony, or that aims to entirely monopolize such an essential to the burial of the dead according to the customs of the country as is usually furnished in cities by liverymen, and to so stifle competition and hamper individual, independent industry in regard to such business as to paralyze individual effort and compel every person, in order to obtain proper facilities for a funeral, to submit to the dictates of the combine will not stand the test above indicated. Such was the liverymen's union under consideration, by the uncontroverted evidence. Such a combination is clearly unlawful as against public policy, and the means resorted to to effect its purposes in this case were likewise unlawful. It would be hard to conceive of a

combination more odiously detrimental to the public interests, and more heartlessly oppressive to individuals, than one that seeks to control the customary means used in the burial of the dead, by the resort to such wanton acts as were perpetrated by the defendants in aid of the purposes of their combination.

This is an age of trusts and combinations of all sorts. There is clamor against them on the one hand, and for the privilege of combining upon the other, as if the law could be changed to fit the opinions and selfish ends of particular classes. There is clamor for laws to prevent combination, while law exists that condemns most of them, which is as old as the common law itself, and sufficiently severe to remedy much of the mischiefs complained of that are actual; yet violations of such law are so common, and the remedy it furnishes so seldom applied, that its very existence seems, in many quarters, to be little understood. In *Reg. v. Druitt*, 10 Cox, C. C. 593, it was held that any combination of persons to stifle and prevent the free use of labor and capital within legitimate bounds is unlawful, and that the law furnishes a remedy therefor. The liberty of a man's mind and will to say how he shall bestow himself and his means, his talents and his industry, is as much the subject of the law's protection as is his body.

A combination to do an act tending necessarily to prejudice the public or oppress individuals by unjustly subjecting them to the power of the confederates and give effect to the purposes of the latter, whether of extortion or mischief, is unlawful. *Bishop*, Crim. L. § 177; *Desty*, Crim. L. § 2; *Morris Run Coal Co. v. Barolay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159.

Every agreement between two or more persons to accomplish a criminal or unlawful object, or a lawful object by criminal or unlawful means, is an unlawful conspiracy, and any person whose rights are injured by acts done in furtherance of such conspiracy has his action at law for redress in damages.

If an unlawful combination exist, it is none the less unlawful because existing under a self-imposed constitution and governed by by-laws, and because it conducts its operations in a public or semipublic way, asserting the right, in pursuit of its purposes, to interfere with individual liberty and with the public interests. In a proceeding for damages for wrongdoing by such a combination to the special injury of an individual, the constitution and by-laws of the association, and protests of its members of innocence of bad intent, and of adherence to the obligations of their association, however innocent may be its name, to prevent incurring its penalties, will constitute no protection whatever, as regards compensatory damages, to a person specially injured by overt acts of its members in pursuit of the purposes of the conspiracy.

The union under consideration is within the condemnation of the common-law rule that a combination of persons, natural or

artificial, to restrict legitimate trade or commerce in any field, by hampering or destroying individual liberty, stifling competition or preventing the exercise of individual freedom to dispose of one's labor or capital according to his own free will, so long as the legal rights of other persons are not infringed upon, is unlawful. The limitations upon the rule are in the nature of exceptions to it to be shown by way of defense where the combination is shown to exist. If it is not so far-reaching, as regards effects upon the public, or time or place, or the benefits of the members are not so large, as to render the combination an unreasonable interference with trade or individual freedom, that will remove from it the stamp of illegality; yet overt unlawful acts, by two or more members of the combination acting by agreement to carry out its purposes, will render the combination, as to them, unlawful. The plainest principles of public policy, as before indicated, condemn such a monopoly as was attempted in this case, and the conduct of the defendants to carry out the purposes of the combination was as clearly unlawful.

At the close of the evidence there was a request on the part of counsel for defendant Schubert for a special verdict, whereupon the court stated that the only material controverted question of fact as to such defendant was whether he participated in the withdrawal of the hearse, as stated in the complaint, and that counsel might frame a question covering that subject. At the close of the argument the request for a special verdict was renewed, and questions submitted for approval of the court. Such request was then denied as made too late, and the court proceeded to submit the case to the jury, by a general charge, for decision on the question of whether defendants, or either of them, participated in depriving plaintiff of the hearse after it arrived at his house on the day of the funeral, and on the question of whether the taking away of the hearse inflicted injury to the plaintiff's feelings, and whether the act was perpetrated with wilful intent to insult and injure plaintiff; also for an assessment of damages under rules given by the court.

The refusal to grant the request for a special verdict upon the ground assigned therefor was error. Under § 2858, Rev. Stat. the right to such a verdict was absolute, the request therefor having been made in conformity with the statute before any argument to the jury. The record indicates that the learned circuit court did not consider the request complete till questions were prepared and submitted, because, when it was first made, preparation of questions by counsel was directed, and when they were presented and the request renewed it was denied as coming too late.

The statute, in mandatory language, clearly imposes on the trial court the duty of preparing the form for the special verdict where one is seasonably requested. *Schumaker v. Heinemann*, 99 Wis. 251, 74 N. W. 785. It will hardly do to shift that duty

onto counsel for the moving party, and then deny his motion because the duty is not performed before arguments to the jury commence. The plain letter of the statute was violated. The only legitimate purpose of suggestions from counsel, as to what particular questions shall be submitted for a special verdict, is to direct the attention of the court to the issuable facts upon which the controversy depends. If the verdict does not cover all the issues essential to a determination of the case, no judgment can be rendered upon it; but if it does not cover such issues no error can be successfully assigned because the form for the questions suggested by counsel was not adopted, or because questions were not framed and requested by such counsel.

The question of whether the refusal of the request for a special verdict constituted reversible error turns on whether it was prejudicial; for by the settled practice and the mandate of the statute (Rev. Stat. § 2829), the court must, at every stage of the action, disregard any error or defect in the proceedings which shall not affect the substantial rights of the adverse party. The truth of the saying by Chief Justice Dixon, in the early history of the court, that the statute is a beneficent provision which covers a multitude of errors grows in significance as the instances multiply where the way to justice is by it rendered direct and certain and speedily traversed, notwithstanding numerous errors happening through inadvertence, negligence, or inefficiency at some point, that otherwise would delay and render the enforcement of remedies so burdensome as to, in effect, constitute a denial of justice in whole or in part.

The statute applies here. The court rightly decided, as before indicated, though the decision was not thereafter strictly followed in the charge, that the conduct of the defendants was wrongful, intentional, and specially injurious to plaintiff, entitling him to his remedy in damages therefor. It was discretionary with the court whether to direct the jury, in case of awarding exemplary damages, to separate the amount assessed therefor from the amount allowed for compensatory damages. Though the charge would indicate to the contrary, the record shows that all the facts warranting punitive damages were admitted, or were established by the evidence without reasonable controversy. Such being the case, there was nothing to submit to the jury except the mere question of the amount of the verdict. The trial court was not bound, on request for a special verdict, to submit questions covering uncontroverted facts. *Ault v. Wheeler & Wilson Mfg. Co.* 54 Wis. 300, 11 N. W. 545; *Kerkhof v. Atlas Paper Co.* 68 Wis. 674, 32 N. W. 766; *Ward v. Chicago, M. & St. P. R. Co.* 102 Wis. 215, 78 N. W. 442.

It follows that the denial of the motion for a special verdict was wrong solely on the ground of the reason assigned for it. It was useless to require the jury, as did the court, to say whether defendants, or either of them, participated in depriving plaintiff of the use

of the hearse, because Schubert said he instructed his driver to return to the barn if a nonunion man was in charge of the funeral, and that he gave such instructions in conformity to his obligations to the union; and the evidence was all one way that Buening was the moving spirit in causing the driver of the hearse to obey the instructions of his master, and that his acts were in accord with his duties as secretary of the union, and in conformity to a request made of him, either by Schubert himself or by someone in his behalf, whose acts Schubert fully ratified with knowledge of all the facts. Such ratification rendered Schubert liable for actual and exemplary damages the same in all respects as if he had originally authorized Buening to act in his behalf. *Robinson v. Superior Rapid Transit R. Co.* 94 Wis. 345, 34 L. R. A. 205, 68 N. W. 961. There was perfect concert of action between all the parties concerned in the transaction to deprive plaintiff of the use of the hearse, and the acts of each and all were in accord with the agreement between the members of the union.

The court needlessly required the jury to say whether facts existed warranting an assessment of exemplary damages. It was sufficient that they were instructed that the assessment of such damages was discretionary with them.

It was correctly said by the court, in substance, before the formal charge was given, that the acts of the defendants were wilful and with intent to deprive plaintiff of the use of the hearse at a time when they knew it would be impossible to supply another. As men of common sense, defendants must have known that their conduct would greatly shock the sensibilities of the plaintiff, would humiliate and cause him great mental confusion, pain, and suffering. No reasonable conclusion could be arrived at from the evidence, other than that defendants intentionally carried out their unlawful design under such circumstances as to demonstrate the power of the combination to punish liverymen for doing business in an independent way, and persons for dealing with such non-union liverymen; that with such ends in view they proceeded with reckless disregard of consequences and with full knowledge of the inevitable result to plaintiff. All the elements of fact warranting exemplary damages appear clearly from the evidence as matter of law. There was the wilful violation of plaintiff's rights, inflicted under circumstances of aggravation, insult, or cruelty, with vindictiveness and malice. *McWilliams v. Bragg*, 3 Wis. 424; *Nichols v. Brabazon*, 94 Wis. 549, 69 N. W. 342.

The circuit judge, in his charge to the jury, divided recoverable damages into three kinds,—actual, compensatory, and exemplary. He said, "If you find for the plaintiff, the damages which he may recover are actual and compensatory damages." He then, in effect, told the jury that \$8 was the actual damage by the undisputed evidence, and that they should find a verdict at least for that sum; and then said, "If you find that the act

of taking away the hearse was one of insult and humiliation to the plaintiff, then you may also allow damages to plaintiff's feelings for the insult, humiliation, and anxiety of mind suffered by him in consequence of such act." Further instructions were given on the subject of punitive damages. Exception was taken to that portion of the charge in regard to allowing damages for injured feelings, and also to a refusal to charge the contrary doctrine.

The views of the law so given to the jury were erroneous and prejudicial in several particulars, notably in the one specifically excepted to. Damages in a tort action are not divided into actual, compensatory, and exemplary. The term "compensatory damages" covers all loss recoverable as matter of right. It includes all damages for which the law gives compensation, and that gives rise to the term "compensatory damages." "Compensatory damages" and "actual damages" are synonymous terms. Pecuniary loss is an actual damage; so is bodily pain and suffering. *Wilson v. Young*, 31 Wis. 574. The jury should have been told that plaintiff was entitled to recover full compensatory damages, and then instructed as to their elements in a case like this. If it were a case where recoverable damages included injury to the feelings, the jury should have been made to understand that compensation therefor was a matter of right, not a matter in their discretion. When guilt is established in a tort action, whether exemplary damages should be allowed or not is submitted to the judgment of the jury; but not so compensatory damages.

In this case there was no physical injury to plaintiff, and no personal injury to him of any kind save to his feelings. The case does not fall within the few exceptions to the rule,—which prevails in this state and in most jurisdictions,—that mental distress alone is too remote and difficult of measurement to be the subject of an assessment of damages. The true idea is that, under the general principle applicable to tort actions, recoverable damages are limited to such as are the natural and proximate result of the act complained of, some physical injury is necessary to a definite causal connection between the wrongful act and the mental condition, to render the former, in a legal sense, the cause of the latter, and such condition, with its immediate cause, sufficiently significant to be comprehended and measured in a money standard by average human wisdom with a reasonable degree of certainty.

We will not go further in the discussion of the rule of damages. The law in regard to it, for this state, was, upon full consideration, declared, in *Summerfield v. Western U. Teleg. Co.* 87 Wis. 1, 57 N. W. 973, opinion by Mr. Justice Winslow. The general rule there stated is clearly applicable to this case. There are exceptions, which will be found pointed out in the *Summerfield Case*, but they have no reference to a case of this kind.

The numerous exceptions saved by appel-

lants might be discussed in much greater detail, but they are in the main covered by the foregoing. There were some propositions contained in the requests refused which were correct in the abstract, but unnecessary to the case because the facts were not disputed, and immaterial because inapplicable to the facts. For the error in regard to the rule of damages, the judgment must be reversed. No other reversible error has been discovered in the record.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

H. W. GILKEY, *Respt.*,

v.

Town of HOWE *et al.*, *Appts.*

(105 Wis. 41.)

1. To render enforceable orders issued by a town organized under statutory authority the requirements of the statute need not be shown to have been substantially complied with, it being sufficient to show a valid law authorizing the incorporation, and a bona fide attempt to comply with it.
2. The duty to pay orders issued by a *de facto* town which is subsequently dissolved in a direct proceeding for that purpose devolves upon the towns from which the territory was taken, and to which it returns after the dissolution.

(December 15, 1890.)

APPEAL by defendants from an order of the Circuit Court for Door County overruling a demurrer to the complaint in an action brought to hold defendants liable for warrants issued by a *de facto* town which was attempted to be formed out of a portion of their territory. *Affirmed.*

The facts are stated in the opinion.

Messrs. Wigman & Martin, for appellants:

Statutory provisions relating to the organization and division of towns are mandatory and jurisdictional.

Smith v. Sherry, 54 Wis. 114, 11 N. W. 465; *State v. Pierce*, 35 Wis. 93.

Smith v. Sherry, 54 Wis. 114, 11 N. W. 465, held that such organization was subject to collateral attack, which doctrine was subsequently modified by statute.

Scriber v. Langlade, 66 Wis. 616, 29 N. W. 547, 554; Wis. Laws 1883, chap. 54, now Wis. Rev. Stat. § 671.

Prior to the commencement of this action, and within the time limited, a court of competent jurisdiction had dissolved the alleged organization of the town of Waupee, and had held the ordinance whereby it was supposed to have been organized null and void.

This holding must be construed as adjudging that this ordinance was null and void *ab initio*. It is as if it never existed.

NOTE.—As to validity of bonds of *de facto* municipal corporation, see also *W. N. Coler & Co. v. Dwight School Twp.* (N. D.) 28 L. R. A. 649.

49 L. R. A.

Legislative sanction is absolutely essential to lawful corporate existence.

Dill. Mun. Corp. § 17.

The statute, § 671, contemplates two, and only two, ways whereby a town may come into being.

There can be neither a *de facto* town nor a *de facto* office.

Hildreth v. M'Intire, 1 J. J. Marsh. 206, 19 Am. Dec. 61; *Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121; *Hawver v. Seldenridge*, 2 W. Va. 274, 94 Am. Dec. 532.

Since there was no *de jure* town, there could be no *de jure* office.

Norton v. Shelby County, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121; *Gorman v. Pople*, 17 Colo. 596, 31 Pac. 335; *Hildreth v. M'Intire*, 1 J. J. Marsh. 206, 19 Am. Dec. 61; *Re Boyle*, 9 Wis. 264; *Re Burke*, 76 Wis. 362, 45 N. W. 24; *Yorty v. Paine*, 62 Wis. 154, 22 N. W. 137; *Cole v. Black River Falls*, 57 Wis. 110, 14 N. W. 906; *Mecham*, Pub. Off. § 324; *Walcott v. Wells*, 21 Nev. 47, 9 L. R. A. 59, 24 Pac. 367.

Even as to a municipality duly created, a person dealing with the same does so at his peril, and if, in the transaction, any of the mandatory requirements of law have been neglected by such municipality, the person so dealing is without remedy.

Beyer v. Crandon, 98 Wis. 306, 73 N. W. 771; *Fisk v. Kenosha*, 26 Wis. 23; *Veeder v. Lima*, 19 Wis. 281; *Hall v. Chippewa Falls*, 47 Wis. 267, 2 N. W. 279; *Cooley*, Const. Lim. § 196; Dill. Mun. Corp. § 381; 15 Am. & Eng. Enc. Law, p. 1087.

A town order is not negotiable, and plaintiff took it subject to all its infirmities.

Davis v. Steuben School Twp. 19 Ind. App. 694, 50 N. E. 1.

A town having no lawful existence, though assuming and exercising the functions of a town, has no power to issue orders or contract binding obligations.

Norton v. Shelby County, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121; *Ruohs v. Athens*, 91 Tenn. 20, 18 S. W. 400; *Yorty v. Paine*, 62 Wis. 154, 22 N. W. 137.

Even where the town has lawful existence, but the contract is in excess of the power conferred, it is void, and creates no liability, legal or equitable, against the town.

Beyer v. Crandon, 98 Wis. 306, 73 N. W. 771.

Messrs. Webster & Classon, for respondent:

The organization of the town was simply voidable, and not void.

Wis. Rev. Stat. § 671; *Smith v. Sherry*, 54 Wis. 125, 11 N. W. 465; *Shapleigh v. San Angelo*, 167 U. S. 646, 42 L. ed. 310, 17 Sup. Ct. Rep. 957.

The liability devolves upon the defendant towns in the proportion claimed from them in the complaint.

Mount Pleasant v. Beckwith, 100 U. S. 520, 25 L. ed. 699.

Cassoday, Ch. J., delivered the opinion of the court:

This is an appeal from an order overrul-

ing a demurrer to the complaint, alleging, in effect, that the defendants, the towns of Howe and Armstrong, had for more than two years been duly organized and existing as towns in Oconto county; that November 28, 1894, the county board of supervisors of that county adopted an ordinance whereby certain sections of lands described were detached and set off from the town of Armstrong, and a government township of land, described, was detached and set off from the town of Howe, and all of such territory so detached from such towns, respectively, was by such ordinance erected and created into a new town, called the town of Waupee; that, after the passage and publication of that ordinance, the people of such town of Waupee proceeded to elect the town board and other town officers, and to levy taxes to supply the different funds of that town, as provided by law, and the town board so elected by the people duly issued town orders to carry on the business of that town; that the plaintiff was and is the owner and holder of town orders issued by such town of Waupee during its existence to the amount of \$308.88, which orders have never been paid, nor any part thereof; that January 17, 1896, the circuit court, in a proceeding brought for that purpose, set aside the organization of the town of Waupee, and held the ordinance creating such town to be null and void, and dissolved the organization of such town; that thereafter the town of Howe resumed ownership, possession, and control of the territory so detached from it, and that the valuation of such territory was \$52,080, by the assessment of 1895, and the town of Armstrong resumed possession, ownership, and control of the territory so detached from it, and that the valuation of such territory was, by the assessment of 1895, \$36,265; that the valuation of all the territory contained in the town of Waupee during its existence was, by the assessment roll of 1895, \$88,445; that, by reason of the facts alleged, the town of Armstrong became indebted to the plaintiff on such orders in the sum of \$181.89, as its proportionate share thereof, and that the town of Howe became indebted to the plaintiff on such orders in the sum of \$126.99, as its proportionate share thereof; that March 14, 1898, the plaintiff duly filed with the town clerks of the towns of Armstrong and Howe, to be brought before the town board of audit of each of such towns at its meeting in the spring of that year, his claim or demand for the amount due from each of such towns, and for the amount due from both of such towns jointly as above set forth, which claim was verified by the affidavit of the plaintiff, but that such claim or demand was not acted upon by the town board of audit of such towns, or either of them, or by the electors at the annual meeting of such towns for 1898, or, if acted upon, was not allowed by the board of audit, or by the electors of such town meeting, and that such sum has not been paid by such town or towns, or any part thereof: that more than ten days had elapsed between the annual town meeting of 40 L. R. A.

the towns in 1898 and the commencement of this action; and judgment was demanded against the defendants for \$308.88, together with interest thereon and his costs and disbursements herein, and that the court might specify by its judgment the amount each of such towns should pay.

The only question presented by the demurrer is whether the complaint states facts sufficient to constitute a cause of action. The statutes authorized the county board of supervisors of Oconto county to divide, set off, organize, vacate, and change the boundaries of towns in that county in the manner therein prescribed, §§ 670, 671, Rev. Stat. Counsel for the defendants contend, in effect, that such statutes are mandatory; and that, since the complaint fails to allege that every requirement of such statutes was substantially complied with, the county board got no jurisdiction, and hence that the adoption, passage, and publication of the ordinance, the organization of the new town, the election of a town board and other town officers, the levy of taxes, and the issuing of the town orders in question, as alleged, were each and all null and void, the same as though no attempt had ever been made to create such new town. In reaching such conclusion, counsel seem to rely upon *Smith v. Sherry*, 50 Wis. 210, 6 N. W. 561, 54 Wis. 114, 11 N. W. 465. That was an action of trespass to lands, and the removal of pine timber therefrom, brought by a tax-title claimant under a tax deed based upon a sale for the nonpayment of taxes assessed upon the land, in 1872, by the town of Seneca. Upon the first trial of that action the defense tendered was that, prior to such assessment, the lands described in the tax deed had been detached from the town of Seneca, and attached to the village of Shawano, by chapter 92, Private & Local Laws, 1872; and that the taxes for that year had been assessed and levied thereon by that village, and paid to that village, and hence that the plaintiff's tax deed was void; and the trial court so found; but under a stipulation of the parties, and at the request of that court, the defendant refrained from going into his whole defense until this court should determine the constitutionality of chapter 92, mentioned. Thereupon this court reversed the judgment, and held that act to be unconstitutional, as special legislation, and hence that the lands were never attached to the village of Shawano. 50 Wis. 210, 6 N. W. 561. The cause, having been remanded, was retried, in accordance with the stipulation, and the defense relied upon was to the effect that the land described in the tax deed never became a part of the town of Seneca, but was at the time such taxes were assessed a part of the town of Herman; that the only attempt to attach the same to the town of Seneca was by an unpublished order of the county board, passed March 29, 1872, on motion of a member of the board, that the town embracing the lands described in the tax deed "be attached to the town of Seneca for town purposes;" and, as a further defense, that the defendant was in the actual posses-

sion of each of the 40's covered by the tax deed, so as to stop the running of the statutes of limitations in favor of the plaintiff, and bar his claim of title. The trial court held in favor of the defendant on both defenses, and this court affirmed the judgment. 54 Wis. 114, 11 N. W. 465. It was there held, in effect, that such mere order of the county board, passed on motion, but never published, did not give the town of Seneca authority, nor color of authority, to put the taxing power of the town in motion. It will be observed that in that case the attempt was to detach territory from one *de jure* town, and attach the same to another *de jure* town, on simple motion, entered in the minutes of the board in the form of an order, and never published; and it was, in effect, held that the question whether such territory was so attached to the town of Seneca was properly determinable in that action between private parties, although that question was not specifically argued nor determined. But the question here presented was not otherwise involved in that case. The question here is whether the facts alleged were sufficient to constitute the town of Waupee a *de facto* corporation at the time of issuing the town orders in question, and, if so, whether the defendants can properly question its right to do so in this private action. Wherever there is a valid law under which a corporation with the powers assumed might have been lawfully incorporated, and there is an attempt, apparently in good faith, to comply with the requirements of such law, and the corporation thus attempted to be created is organized and enters upon the transaction of business, its existence as a *de facto* corporation is established, even though it has failed to comply with the law in some particular which prevents it from being a corporation *de jure*. *Stout v. Zulick*, 48 N. J. L. 601, 7 Atl. 362; *Methodist Episcopal Union Church v. Pickett*, 19 N. Y. 482; *Bank of Toledo v. International Bank*, 21 N. Y. 542; *Lancaster v. Amsterdam Improv. Co.* 140 N. Y. 584, 24 L. R. A. 322, 35 N. E. 964; *Larned v. Beal*, 65 N. H. 184, 23 Atl. 149; *Society Perun v. Cleveland*, 43 Ohio St. 481, 3 N. E. 357; *Spring Valley Waterworks v. San Francisco*, 22 Cal. 434; *Haas v. Bank of Commerce*, 41 Neb. 754, 60 N. W. 85; *American Salt Co. v. Heidenheimer*, 80 Tex. 344, 15 S. W. 1038; *McTighe v. Macon Constr. Co.* 94 Ga. 306, 32 L. R. A. 208, 21 S. E. 701, and cases there cited. But where there is no law authorizing a particular corporation *de jure* there can be no such corporation *de facto*. *Evenson v. Ellingson*, 67 Wis. 634, 31 N. W. 342; *Schriber v. Langlade*, 66 Wis. 616, 29 N. W. 547, 554; *McTighe v. Macon Constr. Co.* 94 Ga. 306, 32 L. R. A. 208, 21 S. E. 701. So there are cases holding, in effect, that where there is, apparently, no attempt in good faith to comply with certain substantial requirements of the law authorizing such corporation,—nothing sufficient to give color to the incorporation,—the body attempted to be incorporated will not be regarded as a corporation *de facto*. *First Nat. Bank v. Davies*, 49 L. R. A.

43 Iowa, 424; *Doyle v. Mizner*, 42 Mich. 332, 3 N. W. 968; *Garnett v. Richardson*, 35 Ark. 144; *Indianapolis Furnace & Min. Co. v. Herkimer*, 40 Ind. 142; *Abbott v. Omaha Smelting & Ref. Co.* 4 Neb. 416; *Childs v. Hurd*, 32 W. Va. 66, 9 S. E. 362; *Jones v. Aspen Hardware Co.* 21 Colo. 263, 29 L. R. A. 143, 40 Pac. 475. See also *Bergeron v. Hobbs*, 96 Wis. 641, 71 N. W. 1056. So, it is well settled that the corporate existence of a corporation *de facto* cannot be inquired into collaterally, but may be inquired into by direct proceeding on the part of the state. *Stout v. Zulick*, 48 N. J. L. 599, 7 Atl. 362; *Cochran v. Arnold*, 58 Pa. 399; *Hamilton v. Clarion, M. & P. R. Co.* 144 Pa. 35, 13 L. R. A. 779, 23 Atl. 53; *Catholic Church v. Tobbein*, 82 Mo. 418; *Fredericktown v. Fox*, 84 Mo. 59; *State v. Fuller*, 96 Mo. 165, 9 S. W. 583; *Finch v. Ullman*, 105 Mo. 255, 16 S. W. 863; *Saunders v. Farmer*, 62 N. H. 572; *Society Perun v. Cleveland*, 43 Ohio St. 481, 3 N. E. 357; *People v. La Rue*, 67 Cal. 526, 8 Pac. 84; *Atchison, T. & S. F. R. Co. v. Sumner County Comrs.* 51 Kan. 617, 33 Pac. 312; *Haas v. Bank of Commerce*, 41 Neb. 754, 60 N. W. 85; *Crowder v. Sullivan*, 128 Ind. 486, 13 L. R. A. 647, 28 N. E. 94; *McTighe v. Macon Constr. Co.* 94 Ga. 306, 32 L. R. A. 208, 21 S. E. 701. So it has been held by this court that "the validity of an ordinance of a county board purporting to organize or set off a new town, or to change the boundaries of existing towns, may be determined by the circuit court on certiorari." *State ex rel. Graef v. Forest County*, 74 Wis. 610-619, 43 N. W. 551. That decision was made in pursuance of a statute enacted the year after *Smith v. Sherry*, 54 Wis. 114, 11 N. W. 465, was decided, and a short time after *Sherry v. Gilmore*, 58 Wis. 324, 17 N. W. 252, was determined in the trial court. That statute expressly authorizes the validity of such order or ordinance to be tested "by certiorari or any other proper proceeding brought directly" for that purpose in the manner prescribed, "within two years after the date of such order, ordinance, or proceeding." *Sanborn & Berryman*, Wis. Anno. Stat. § 674. Under that statute it has been held by this court that the order or ordinance of the county board changing the boundaries of a town could not be questioned in a collateral proceeding, except when made without authority of law. *Schriber v. Langlade*, 66 Wis. 616, 29 N. W. 547, 554. But, as indicated by the authorities cited, the statute forbidding such collateral attack, and authorizing such direct attack, is simply confirmatory of the common law, except in so far as it limited the time within which such direct attack could be made. Thus, in the recent case of *Shapleigh v. San Angelo*, 167 U. S. 646, 42 L. ed. 310, 17 Sup. Ct. Rep. 957, the city of San Angelo was not at first incorporated according to law, and while it existed only as a *de facto* corporation it issued street improvement bonds. Subsequently, and in a direct proceeding brought in behalf of the state, the corporation was adjudged to be dissolved and null and void. Afterwards the city was

incorporated, embracing the same territory as the old corporation. In an action upon the bonds so issued by the *de facto* corporation against the new corporation, it was held that the latter was liable and that the disincorporation by such legal proceeding did not avoid legally subsisting contracts made by the *de facto* corporation. That decision seems to be directly in point, quite similar in its facts, and unanswerable in its logic. It is true that the statute cited also declares that "no such order, ordinance, or proceeding shall in any wise be called in question in any action or proceeding except one brought directly for that purpose within the time above limited, except in a case wherein such order, ordinance, or proceeding shall have been vacated by court of competent jurisdiction." Sanborn & Berryman, Wis. Anno. Stat. at § 674. True, the complaint alleges that, after the issuing of the town orders here sought to be collected, the circuit court, in a direct proceeding for that purpose, dissolved the town of Waupee, and held that the ordinance creating the same was null and void; yet since it appears from the facts alleged, that, at the time of issuing such orders, the town of Waupee was a *de facto* corporation, it follows, from the case cited, that the obligation to pay such orders devolves upon the defendants, since the territory embraced in the *de facto* town of Waupee was taken in part from the town of Armstrong and the balance from the town of Howe.

The order of the Circuit Court is affirmed.

A. C. FINNEY, Receiver, etc., of American Savings & Loan Association, *et al.*, *Respts.*,

Mary A. GUY, *Appt.*

(.....Wis.....)

1. No action will lie in courts out of the state to enforce liability of stockholders for corporate debts, where the statutes imposing such liability provide a single method of enforcing it by one suit in the state courts in favor of all creditors and against the corporation, if it has assets, and all stockholders.
2. A judgment in a statutory proceeding to enforce the liability of stockholders for corporate debts, to which all stockholders within the jurisdiction are required to be parties, and in which all equities between stockholders are required to be settled, is a bar to any other action to enforce such liability, even against stockholders who were out of the jurisdiction and therefore not parties to the action.
3. In all cases where a court is called upon to give effect to a right dependent upon a foreign statute, it involves the enforcement of foreign law, and its action in that regard depends upon the rule of comity.

NOTE.—As to enforceability of stockholder's liability outside of jurisdiction in which corporation was created, see note to *Cushing v. Perot* (Pa.) 34 L. R. A. 737; *Howarth v. Angie* (N. Y.) 47 L. R. A. 725, and footnote there-to; and *Howarth v. Lombard* (Mass.) *ante*, 301.

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4. Where a statutory right is created, coupled with a specific remedy to enforce it, such remedy is exclusive, and cannot be pursued in foreign jurisdictions.

5. The construction of a statute creating stockholders' liability for corporate debts by the state courts will not be followed in other states, if to do so would be unjust to their citizens and violate the policy of their laws.

(Dodge, J., *dissents.*)

(March 20, 1900.)

APPEAL by defendant from a judgment of the Circuit Court for Pierce County in favor of plaintiffs in an action brought to enforce the statutory liability of defendant as stockholder in an insolvent bank. *Reversed.*

Statement by Marshall, J.:

Action to enforce the statutory liability of a stockholder of a bank to creditors under the laws of Minnesota.

The complaint stated, in effect, as follows: The Farmers' & Merchants' State Bank, a banking corporation organized under the laws of and located in the state of Minnesota and there engaged in business from June 6, 1888, till June 20, 1893, on the last-named date, pursuant to the laws of such state, made an assignment for the benefit of its creditors, which assignment was fully perfected and such proceedings were thereafter had in administering it that the assets of the bank were converted into money and the net proceeds thereof distributed to the creditors, without paying them in full, of about \$80,000. The capital stock of the bank was \$75,000. Each individual stockholder was named in the complaint with the amount of stock owned by him. Defendant, Mary A. Guy, being one of such stockholders and said to be the owner of nineteen shares of the par value of \$100 each. She resides in Pierce county, Wisconsin. It was further alleged in the complaint, in effect, that by the laws of the state of Minnesota every person, on becoming a stockholder of a bank organized under its laws, in proportion to his interest, succeeds to the rights and becomes subject to the liabilities of his predecessor, and that the individual liabilities of stockholders to its creditors extend to double the amount of the stock, and continues, as to any stockholder who may sell or transfer his stock, till the expiration of one year after such sale or transfer; that a creditor of a bank, desiring to enforce the individual liability of its stockholders for the payment of his claim, may file his complaint, in an action instituted for that purpose, in any court in Minnesota having jurisdiction of the subject, and that thereupon such court is required to proceed "as in other cases, and when necessary to cause an account to be taken of the property and debts due to and from the corporation, and appoint one or more receivers;" that there is a provision of statute, however, that in certain circumstances therein named the court may proceed to en-

force the stockholders' liability without appointing a receiver, and by its judgment as in other cases. The complaint further stated, in effect, that the statutes of Minnesota provide that in a creditors' action to enforce the statutory liabilities of bank stockholders the court may require all the creditors of the bank to become parties to the action and exhibit their claims within a reasonable time fixed by the court, not less than six months from the date of the first publication of the order to that effect, or be barred from all the benefits of such liabilities. The complaint further stated, in effect, that according to the judicial system established in Minnesota by its highest judicial tribunal (citing the various cases that have been decided by such tribunal), the liability of stockholders of a bank organized under the laws of that state, to its creditors, must be enforced by first instituting an action, at the domicile of the corporation, against the corporation and all of its stockholders within the jurisdiction of the court, on behalf of all creditors of such corporation who shall participate in the action; that the proper method of proceeding in the action is to cause a judgment to be rendered in favor of each creditor for the amount owing him from the bank, and a judgment against each stockholder over whom the court shall have been able to obtain jurisdiction for the maximum amount of his liability, and to enforce the judgment as to such liabilities *pro rata*, as far as practicable, in order to realize a sufficient amount of money to pay all indebtedness of the bank established in the action to the extent of the full amount of such liabilities, and to cause a receiver to be appointed in the action to collect the judgments and distribute the proceeds and to enforce the liabilities of other stockholders residing in jurisdictions outside of that in which the judgment is rendered. Further, it was stated to be the law of Minnesota, as held by its highest judicial tribunal, and as indicated in the adjudications mentioned, that the statutory liability of stockholders is several, and that a judgment against a part of them does not release others against whom no judgment is or can be rendered in the action; that if any of the stockholders are omitted from the first action because the court cannot acquire jurisdiction of them for any cause, an action ancillary to such first action, in any jurisdiction in which such stockholders may be found, may be brought: that an action to enforce such a liability is upon contract; that the judgment in the original action is binding on all stockholders, whether parties thereto or not, as to the amount due to creditors of the bank, and on all creditors entitled to the benefits of the stockholders' liability to creditors, and as to the respective rights of the particular creditors; that a stockholder of a bank organized under the laws of Minnesota, wherever he may reside, is bound by its laws, and his liability in accordance therewith may be enforced wherever he may be found and without any judgment there obtained against the corporation, if it be a place where no such judgment is

possible. The complaint further alleged, in effect, that in January, 1894, an action was commenced, in a district court for the state of Minnesota having jurisdiction of the subject against the banking corporation named and its stockholders, by a creditor of such bank, suing in his own behalf and that of all others who might come in and participate in the action, to enforce the liability of such stockholders to such creditors, and that such proceedings were thereafter had in such action that the amount of the indebtedness of the bank was adjudicated according to the laws and judicial system of Minnesota, and that the total amount collectible from all the stockholders of the bank, aside from the defendant, has been judicially determined to be, and in fact is, less than sufficient to pay such indebtedness by over \$80,000; that defendant, being a nonresident stockholder, residing in Pierce county, Wisconsin, could not be reached in such action, and that she is liable to the creditors entitled to participate in the benefits of the stockholders' liability to the extent of \$3,800, with interest thereon from April 28, 1897. There were further allegations in the complaint showing that the receiver appointed in the creditors' action at the domicile of the corporation, and all the creditors whose claims were established in such action and entitled to participate in the benefits of the stockholders' liability, are joined as plaintiffs in this action, that they came to this state after having exhausted all remedies at the domicile of the corporation for the satisfaction of their claims, that they instituted this action against the defendant stockholder in this state because she could not be reached in the original action, and that this action is ancillary to the action brought at the home of the corporation. The prayer for judgment is: (1) That defendant be required to pay \$3,800 as her liability to plaintiffs, with interest from April 28, 1897, at the rate of 7 per cent per annum, with costs and disbursements, and that plaintiffs have execution therefor. (2) That plaintiff A. C. Finney be appointed receiver to collect the judgment and distribute the proceeds among the plaintiffs according to their respective rights in the fund. (3) That the court award such further judgment or order as may be necessary to enforce such liability of the defendant, and grant such further relief as the court can grant in the premises.

To that complaint the defendant interposed a demurrer, upon the ground, among others, that it fails to state facts sufficient to constitute a cause of action. The demurrer was overruled, and from the order accordingly entered this appeal is taken.

Mr. John W. Bashford, for appellant: The supreme court of Minnesota, in *Allen v. Walsh*, 25 Minn. 558, holds that it is reasonable to suppose that the legislature intended to provide an efficient and sole remedy for enforcing payment of the debts of an insolvent corporation out of the individual liability of its stockholders; for the rule is well settled that when a statute which

creates a right also prescribes an adequate remedy, the latter is to be taken as an exclusive one.

Faribault v. Misener, 20 Minn. 396, Gil. 347; *Sedgw. Stat. & Const. L.* 2d ed. 344; *May v. Black*, 77 Wis. 101, 45 N. W. 949; *Nimick v. Mingo Iron Works Co.* 25 W. Va. 184; *Lourey v. Inman*, 46 N. Y. 119; *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648; *National Bank v. Dillingham*, 147 N. Y. 603, 42 N. E. 338; *Marshall v. Sherman*, 148 N. Y. 26, 34 L. R. A. 757, 42 N. E. 419; *Erickson v. Nesmith*, 4 Allen, 233; *New Haven Horse Nail Co. v. Linden Spring Co.* 142 Mass. 349, 7 N. E. 773; *Post v. Toledo, C. & St. L. R. Co.* 144 Mass. 341, 59 Am. Rep. 86, 11 N. E. 540; *Bank of North America v. Rindge*, 154 Mass. 203, 13 L. R. A. 56, 27 N. E. 1015; *Fowler v. Lamson*, 146 Ill. 472, 34 N. E. 932; *Young v. Farwell*, 139 Ill. 326, 28 N. E. 846; *Patterson v. Lynde*, 112 Ill. 196, 106 U. S. 519, 27 L. ed. 265, 1 Sup. Ct. Rep. 432; *Hancock Nat. Bank v. Farnum*, 20 R. I. 466, 46 L. R. A. 471, 40 Atl. 341.

When a statutory liability is not in its nature penal, and does not depend upon remedies whose enforcement is peculiar to the courts of the state which has created the law; where, in short, the statutory liability is a simple personal liability growing out of the contract of the shareholder,—that liability may be enforced wherever jurisdiction over the particular shareholder may be obtained.

Russell v. Pacific R. Co. 113 Cal. 258, 34 L. R. A. 747, 45 Pac. 323; *Western Nat. Bank v. Lawrence*, 117 Mich. 669, 76 N. W. 105.

The Minnesota statute contemplates a single action of an equitable nature in which all the creditors and all the stockholders are parties, and the rights, equities, and liabilities of all parties in interest are finally determined.

Hale v. Haddon, 95 Fed. Rep. 777, 37 C. C. A. 240; *May v. Black*, 77 Wis. 105, 45 N. W. 949; *Young v. Farwell*, 139 Ill. 326, 28 N. E. 846; *Marshall v. Sherman*, 148 N. Y. 18, 34 L. R. A. 757, 42 N. E. 419; *Tuttle v. National Bank of the Republic*, 161 Ill. 497, 34 L. R. A. 750, 44 N. E. 985; 12 Enc. Pl. & Pr. 141; *Foster v. Posson*, 105 Wis. 99, 81 N. W. 123; *Crippen v. Loughton* (N. H.) 46 L. R. A. 467, 44 Atl. 538; *Stoddard v. Lum*, 159 N. Y. 265, 45 L. R. A. 551, 53 N. E. 1108.

The complaint makes an unjust discrimination against this defendant.

Great Western Teleg. Co. v. Burnham, 79 Wis. 47, 47 N. W. 373; *Germania Iron Min. Co. v. King*, 94 Wis. 439, 36 L. R. A. 51, 69 N. W. 181; *Davis v. Parcher & J. & A. Stewart Co.* 82 Wis. 499, 52 N. W. 771; *MacKinnon v. Mutual F. Ins. Co.* 83 Wis. 16, 53 N. W. 19.

It is beyond the power of a court of equity to invest a receiver with discretionary right to release or compromise with a stockholder with regard to the payment of his subscription, without notice to all the other stockholders.

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Gluck & B. Receivers, p. 189; *Chandler v. Brown*, 77 Ill. 333; *Chicago Bldg. & Mfg. Co. v. Summerour*, 101 Ga. 820, 29 S. E. 291.

Mr. R. M. Bashford, also for appellant:

This suit must be brought in equity by one creditor suing in behalf of himself and all others against the corporation and the stockholders in order to wind up the affairs of the corporation, to enforce the liabilities of the stockholders, and, if need be, to compel contribution.

Foster v. Posson, 105 Wis. 99, 81 N. W. 123; *Gianella v. Bigelow*, 96 Wis. 185, 71 N. W. 111; *Booth v. Dear*, 96 Wis. 516, 71 N. W. 816.

The liability created by the statute of another state will be enforced against a resident stockholder of this state, when the remedy provided for that purpose may be properly enforced by the courts of this state without prejudice to her own citizens.

May v. Black, 77 Wis. 102, 45 N. W. 949; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 30 L. ed. 825, 7 Sup. Ct. Rep. 757; *Pierce v. Milwaukee Constr. Co.* 38 Wis. 253; *Gager v. Bank of Edgerton*, 101 Wis. 593, 77 N. W. 920; *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 42 L. R. A. 396, 51 N. E. 207; *Bell v. Farwell*, 176 Ill. 489, 42 L. R. A. 804, 52 N. E. 346.

Messrs. F. M. White and Fred W. Reed, for respondents:

The laws of Minnesota provide the ordinary liability of stockholders, and provide a remedy for its enforcement which is essentially equitable in its nature, and it is exclusive only to the extent that it must be governed by equitable rules and considerations.

National New Haven Bank v. Northwestern Guaranty Loan Co. 61 Minn. 375, 63 N. W. 1079; *McKusick v. Seymour, S. & Co.* 48 Minn. 158, 50 N. W. 1114; *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069; *Elkhart Nat. Bank v. Converse*, 58 U. S. App. 83, 87 Fed. Rep. 252, 30 C. C. A. 632; *Hale v. Haddon*, 95 Fed. Rep. 747, 37 C. C. A. 240.

Whatever the language in *Allen v. Walsh*, 25 Minn. 543, the statutes of Minnesota as interpreted by the court of last resort in that state do not provide a peculiar and exclusive remedy which cannot be enforced in another state.

Hanson v. Davison, 73 Minn. 454, 76 N. W. 254.

The construction placed upon the statute by its court of last resort is binding on the Federal courts in these stockholder suits.

Bank of North America v. Rindge, 57 Fed. Rep. 279; *Rhodes v. United States Nat. Bank*, 24 U. S. App. 607, 34 L. R. A. 742, 66 Fed. Rep. 512, 13 C. C. A. 612; *McVickar v. Jones*, 70 Fed. Rep. 754; *National Bank v. Whitman*, 76 Fed. Rep. 697, 51 U. S. App. 536, 83 Fed. Rep. 288, 28 C. C. A. 404.

The liability of the stockholders must be determined according to the laws of the state of whose corporation defendant was a member.

Hancock Nat. Bank v. Ellis, 166 Mass.

414, 44 N. E. 349; *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48, 38 Am. Rep. 491.

Marshall v. Sherman, 148 N. Y. 9, 34 L. R. A. 757, 42 N. E. 419, is a suit to enforce the liability of a stockholder in a Kansas corporation under the statutes of Kansas, and in refusing to entertain the suit it overrules the Federal courts of the whole country and the courts of last resort in almost every state that has passed upon the question.

Kissberth v. Prescott, 91 Fed. Rep. 611; *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 44 N. E. 349, 172 Mass. 39, 42 L. R. A. 396, 51 N. E. 207; *Guernsey v. Moore*, 131 Mo. 650, 32 S. W. 1132; *Bagley v. Tyler*, 43 Mo. App. 195; *Ferguson v. Sherman*, 116 Cal. 169, 37 L. R. A. 622, 47 Pac. 1023; *Cushing v. Perot*, 175 Pa. 66, 34 L. R. A. 737, 34 Atl. 447; *Western Nat. Bank v. Lawrence*, 117 Mich. 669, 76 N. W. 105; *Bank of North America v. Rindge*, 57 Fed. Rep. 279; *Rhodes v. United States Nat. Bank*, 24 U. S. App. 607, 34 L. R. A. 742, 66 Fed. Rep. 512, 13 C. C. A. 612; *McVickar v. Jones*, 70 Fed. Rep. 754; *National Bank v. Whitman*, 76 Fed. Rep. 697; *American Freehold Land Mortg. Co. v. Woodworth*, 79 Fed. Rep. 951, 82 Fed. Rep. 269; *Mechanics' Sav. Bank v. Fidelity Ins., Trust & S. Co.* 87 Fed. Rep. 113; *Whitman v. National Bank*, 51 U. S. App. 536, 83 Fed. Rep. 288, 28 C. C. A. 404; *Dexter v. Edmonds*, 89 Fed. Rep. 467.

The liability of stockholders is primary and direct, and not secondary, and is founded on contract and substantially that of a partnership.

Coleman v. White, 14 Wis. 701, 80 Am. Dec. 797; *Gianella v. Bigelow*, 96 Wis. 185, 71 N. W. 111; *Williams v. Meloy*, 97 Wis. 561, 73 N. W. 40; *Merchants' Bank v. Chandler*, 19 Wis. 435.

A corporation is not a necessary party defendant.

Sleeper v. Goodwin, 67 Wis. 577, 31 S. W. 335; *Williams v. Meloy*, 97 Wis. 561, 73 N. W. 40; *Flour City Nat. Bank v. Wechselberg*, 45 Fed. Rep. 547; *Booth v. Dear*, 96 Wis. 516, 71 N. W. 816.

A cause of action arising on contract is a substantive right enforceable everywhere.

Walker v. Whitehead, 16 Wall. 314, 21 L. ed. 357; *Roberts v. Cocke*, 28 Gratt. 207; *Bagley v. Tyler*, 43 Mo. App. 195; *Dennis v. Los Angeles County Super. Ct.* 91 Cal. 548, 27 Pac. 1031; *Hodgson v. Cheever*, 8 Mo. App. 318; *Guernsey v. Moore*, 131 Mo. 650, 32 S. W. 1132; *Tinker v. Van Dyke*, 1 Flipp. 521, Fed. Cas. No. 14,058; *Hobart v. Johnson*, 19 Blatchf. 359, 8 Fed. Rep. 493; *Flash v. Conn.* 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263; *Western Nat. Bank v. Lawrence*, 117 Mich. 669, 76 N. W. 105; *Bell v. Farwell*, 176 Ill. 489, 42 L. R. A. 804, 52 N. E. 246; *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 42 L. R. A. 396, 51 N. E. 207; *First Nat. Bank v. Gustin Minerva Consol. Min. Co.* 42 Minn. 327, 6 L. R. A. 676, 44 N. W. 198; *Hencke v. Twomey*, 58 Minn. 550, 60 N. W. 667; *Coleman v. White*, 14 Wis. 701, 80 Am. Dec. 797; *Merchants' Bank v. Chandler*, 19 Wis. 437; *Gianella v. Big-*

low, 86 Wis. 185, 71 N. W. 111; *Williams v. Meloy*, 97 Wis. 561, 73 N. W. 40; 3 Thomp. Corp. § 3059.

A right of action arising on a statute is just as enforceable in any other state as a right of action under the common law.

Dennick v. Central R. Co. 103 U. S. 11, 26 L. ed. 439; *Bigelow v. Nickerson*, 34 U. S. App. 261, 30 L. R. A. 336, 70 Fed. Rep. 114, 17 C. C. A. 1; *Greaves v. Neal*, 57 Fed. Rep. 816; *Bell v. Farwell*, 176 Ill. 489, 42 L. R. A. 804, 52 N. E. 346; *Western Nat. Bank v. Reckless*, 96 Fed. Rep. 70; *Lowry v. Inman*, 46 N. Y. 119.

A suit to enforce a stockholder's liability is not entertained in another jurisdiction on the ground of comity,—that is, by the courtesy of courts enforcing an obligation which has no existence outside of the territorial jurisdiction of the law,—but it is an action to enforce a substantive contract which happens to be made in another state.

But the doctrine of comity applies with equal force to a cause of action arising on the statute of another state.

Northern P. R. Co. v. Mase, 27 U. S. App. 238, 63 Fed. Rep. 114, 11 C. C. A. 63; *Herrick v. Minneapolis & St. L. R. Co.* 31 Minn. 11, 47 Am. Rep. 771; *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978; *Cuykendall v. Miles*, 10 Fed. Rep. 342; *Bagley v. Tyler*, 43 Mo. App. 195; *Auer v. Lombard*, 33 U. S. App. 438, 72 Fed. Rep. 209, 10 C. C. A. 72.

The statutes and decisions of the state of Wisconsin are practically identical with those of the state of Minnesota.

The statute of a foreign state will be enforced where there is a similar statute in the state where the suit is brought, founded upon the same general policy, where it might not be if otherwise.

Delahaye v. Heitkemper, 16 Neb. 475, 20 N. W. 385; *Boyce v. Wabash R. Co.* 63 Iowa, 70, 18 N. W. 673; *St. Louis & S. F. R. Co. v. Brown*, 62 Ark. 254, 35 S. W. 225; *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48, 38 Am. Rep. 491; *Marshall v. Sherman*, 148 N. Y. 9, 34 L. R. A. 757, 42 N. E. 419; *Morris v. Chicago, R. I. & P. R. Co.* 65 Iowa, 727, 23 N. W. 143; *Knight v. West Jersey R. Co.* 108 Pa. 250, 56 Am. Rep. 200; *Stoeckman v. Terre Haute & I. R. Co.* 15 Mo. App. 503; *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439.

The practice of the two states also is identical.

Sleeper v. Goodwin, 67 Wis. 577, 31 S. W. 335; *Cleveland v. Burnham*, 55 Wis. 598, 13 N. W. 677, 680; *Gianella v. Bigelow*, 96 Wis. 185, 71 N. W. 111; *Booth v. Dear*, 96 Wis. 516, 71 N. W. 816; *Williams v. Meloy*, 97 Wis. 561, 73 N. W. 40; *Allen v. Walsh*, 25 Minn. 543; *Harper v. Carroll*, 62 Minn. 152, 64 N. W. 145, 66 Minn. 487, 69 N. W. 610, 1069; *Hanson v. Davison*, 73 Minn. 454, 76 N. W. 254; *Olsen v. Cook*, 57 Minn. 552, 59 N. W. 635; *Dent v. Matteson*, 70 Minn. 519, 73 N. W. 416.

The courts agree on the principles underlying the liability. The liability of the stockholder arises on contract.

Hencke v. Twomey, 58 Minn. 550, 60 N. W. 667; *Hanson v. Davison*, 73 Minn. 454, 76 N. W. 254; *First Nat. Bank v. Gustin Minerva Consol. Min. Co.* 42 Minn. 327, 6 L. R. A. 676, 44 N. W. 198.

The liability is direct to the creditors.

Minneapolis Baseball Co. v. City Bank, 66 Minn. 441, 38 L. R. A. 415, 69 N. W. 331; *Re People's Live Stock Ins. Co.* 56 Minn. 180, 57 N. W. 468.

And they can be sued on such liability before the corporate assets are exhausted.

Olson v. Cook, 57 Minn. 552, 59 N. W. 635; *Booth v. Dear*, 96 Wis. 516, 71 N. W. 816.

The obligation of the stockholder is primary and direct, and is not collateral to that of the bank or in the nature of surety. It is in the nature of a partnership liability.

Merchants' Bank v. Chandler, 19 Wis. 437; *Coleman v. White*, 14 Wis. 701, 80 Am. Dec. 797; *Gianella v. Bigelow*, 96 Wis. 185, 71 N. W. 111; *Williams v. Meloy*, 97 Wis. 561, 73 N. W. 40; *Mohr v. Minnesota Elevator Co.* 40 Minn. 343, 41 N. W. 1074; *Allen v. Walsh*, 25 Minn. 543; *Gebhard v. Eastman*, 7 Minn. 56, Gil. 40.

The liability is incurred when the stock is subscribed for,—both liability to pay the stock assessments and debts of the bank.

Holland v. Duluth Iron Min. & Development Co. 65 Minn. 324, 68 N. W. 50.

The liability is several, and not joint.

Harper v. Carroll, 66 Minn. 487, 69 N. W. 610, 1069.

The courts of Minnesota recognize and enforce these suits against her citizens.

First Nat. Bank v. Gustin Minerva Consol. Min. Co. 42 Minn. 327, 6 L. R. A. 676, 44 N. W. 198; *Rule v. Omega Stove & Grate Co.* 64 Minn. 326, 67 N. W. 60; *Hanson v. Davison*, 73 Minn. 454, 76 N. W. 254.

This action is ancillary to the decree entered in the Minnesota court.

Patterson v. Lynde, 112 Ill. 196; *Nimick v. Mingo Iron Works Co.* 25 W. Va. 184; *State Nat. Bank v. Sayward*, 63 U. S. App. 20, 91 Fed. Rep. 443, 33 C. C. A. 564; *Elkhart Nat. Bank v. Converse*, 58 U. S. App. 83, 87 Fed. Rep. 255, 30 C. C. A. 632; *Tuttle v. National Bank of the Republic*, 161 Ill. 497, 34 L. R. A. 750, 44 N. E. 984; *Bell v. Farwell*, 176 Ill. 489, 42 L. R. A. 804, 52 N. E. 346.

The judgment in the Minnesota court is binding here.

Harmon v. Hunt, 116 N. C. 678, 21 S. E. 539; *Baltimore & O. R. Co. v. Smith*, 54 Ohio St. 562, 44 N. E. 240; *Guerney v. Moore*, 131 Mo. 650, 32 S. W. 1132; *Merchants' Bank v. Chandler*, 19 Wis. 437; *Powell v. Oregonian R. Co.* 3 L. R. A. 201, 38 Fed. Rep. 187; *Stephens v. Fox*, 83 N. Y. 313; *Alexander v. Donohoe*, 143 N. Y. 203, 38 N. E. 263; *Howard v. Glenn*, 85 Ga. 238, 11 S. E. 610; *Great Western Teleg. Co. v. Gray*, 122 Ill. 630, 14 N. E. 214; *Bates v. Great Western Teleg. Co.* 134 Ill. 536, 25 N. E. 521; *Barkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; *Glenn v. Liggett*, 135 U. S. 533, 34 L. ed. 262, 10 Sup. Ct. Rep. 867; *Nichols v. Stevens*, 123 Mo. 90, 49 L. R. A.

25 S. W. 578, 27 S. W. 613; *Holland v. Duluth Iron Min. & Development Co.* 65 Minn. 324, 68 N. W. 50.

The proceedings had in the home court are conclusive on this defendant.

Holland v. Duluth Iron Min. & Development Co. 65 Minn. 324, 68 N. W. 50; *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810.

Not to enforce this judgment is to refuse to give due faith and credit to the judgment of a sister state.

Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Pelzer Mfg. Co. v. Hamburg-Bremen F. Ins. Co.* 71 Fed. Rep. 826; *Central Trust Co. v. Oharlotte, C. & A. R. Co.* 65 Fed. Rep. 267.

Marshall, J., delivered the opinion of the court:

As we view this case, the disposition of the question of whether the complaint states facts sufficient to constitute a cause of action is decisive of the appeal. Some of the primary questions, upon which the ultimate question turns, are not free from difficulty.

The nature of the statutory liability of stockholders of a bank to its creditors under the laws of Minnesota is precisely the same as under the laws of this state, according to the adjudications of the highest judicial tribunal in each. Section 2501 of the Minnesota statutes says that each stockholder in a bank shall be individually liable, in an amount equal to double the amount of stock held by him, for all the debts of such bank. Section 47 of the banking act of this state provides that stockholders in a bank organized under the laws of this state, shall be individually responsible, to the amount of their respective shares of stock, for all its debts and liabilities of every kind. In *Ooleman v. White*, 14 Wis. 700, 80 Am. Dec. 797, it was said, in substance, that such liability is primary and absolute, attaching at the instant the liability of the bank accrues, but enforceable on a basis, akin to that of a partnership liability with the limitation fixed by statute, of the par value of the stock held by each stockholder. To the same effect are *Gianella v. Bigelow*, 96 Wis. 186, 71 N. W. 111; *Booth v. Dear*, 96 Wis. 516, 71 N. W. 816; *Gager v. Marsden*, 101 Wis. 598, 77 N. W. 922; *Foster v. Posson*, 105 Wis. 99, 81 N. W. 124,—in which cases adjudications of the Minnesota court are cited as authority. The supreme court of Minnesota has decided that the liability is several of each stockholder to all the creditors, but joint in the sense that there must be one action in which all the liabilities of all the stockholders to all the creditors, and the equities of the stockholders between themselves, can be worked out. That is, in effect, as stated by this court, that the liability of the stockholders is akin to that of partners, with a limitation as to extent thereof fixed by the statute. *Allen v. Walsh*, 25 Minn. 543; *Arthur v. Willis*, 44 Minn. 409, 46 N. W. 851; *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069; *Hanson v. Davison*, 73 Minn. 454, 76 N. W. 254.

While the Minnesota court, in the two last

cases cited, said that the liability is several, not joint, it is evident that the expression was not intended in a strict legal sense, for it was there distinctly held that in respect to the manner the liability must necessarily be worked out, it is joint in that all the creditors participating must appear on one side of the controversy and all the stockholders charged, within the jurisdiction of the court, must appear on the other. The courts of the two states are in perfect harmony in that an action at law, as an original proceeding, at least, cannot be brought in any jurisdiction by a single or any number of creditors against a single or any number of stockholders, and that the liability, in view of the manner in which it must be worked out, is nearer to that of partners to creditors of a partnership than to any other with which it can be compared, as was said by Dixon, Ch. J., in *Coleman v. White*.

The Minnesota statutes (Gen. Stat. §§ 5905, 5906) provide a remedy for the enforcement of the statutory liability of stockholders to creditors similar in all respects to that indicated by the statutes of this state on the same subject. Rev. Stat. §§ 3223, 3224. The courts in both states have held that the plain legislative purpose was to furnish, by the statutes referred to, a method for the enforcement of the statutory liability of stockholders, and that it requires one action in equity, in favor of all creditors to be charged, and against the corporation if there are corporate assets to be reached. *Coleman v. White*, 14 Wis. 700, 80 Am. Dec. 797; *Gianella v. Bigelow*, 96 Wis. 186, 71 N. W. 111; *Booth v. Dear*, 96 Wis. 516, 71 N. W. 816 (Wisconsin); *Allen v. Walsh*, 25 Minn. 543; *Arthur v. Willius*, 44 Minn. 409, 46 N. W. 851 (Minnesota). Both courts have said that the remedy, plainly indicated by the legislature, for the enforcement of the liability, is inseparably connected with it and is exclusive. *Allen v. Walsh*, 25 Minn. 543; *Foster v. Posson*, 105 Wis. 99, 81 N. W. 124. In regard to this last branch of the subject, it is claimed by the respondent that the doctrine of *Allen v. Walsh* has been to some extent changed, and that will be considered later.

If we could rest the case at this point there would be no question but that the complaint is fatally defective. Unless the suggested modification of the doctrine of *Allen v. Walsh* in Minnesota requires a different result, such must be the decision, for two reasons: (1) The statutory right, coupled with the statutory remedy for its enforcement, clearly intended to be pursued at the home of the corporation, is not transitory. (2) The action in a Minnesota court is a bar to any other action to enforce the liability of stockholders.

It is elementary that while a statutory remedy, not in terms exclusive, for the enforcement of a common-law right, is cumulative, and that a statutory right, in the absence of a remedy to enforce it, may be made available by some one of the ordinary remedies for the redress of wrongs, a statutory remedy, not by its terms cumulative, to en-

force a statutory right, is exclusive. 1 Am. & Eng. Enc. Law, p. 184c. The ultimate question under consideration at this point, as appellant's counsel suggests, was definitely passed upon in *May v. Black*, 77 Wis. 101, 45 N. W. 949, where it was said that a statutory right, if coupled with a remedy to make it effective, that remedy is exclusive and the right is enforceable only within the jurisdiction of its creation. Numerous cases are cited to support that doctrine, among them: *Pollard v. Bailey*, 20 Wall. 520, 22 L. ed. 376; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 30 L. ed. 825, 7 Sup. Ct. Rep. 757; *Rocky Mountain Nat. Bank v. Bliss*, 89 N. Y. 338; *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648; *Nimick v. Mingo Iron Works Co.* 25 W. Va. 184; *Patterson v. Lynde*, 112 Ill. 196. For further cases on the subject, see *Huntington v. Attrill*, 146 U. S. 647, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *New Haven Horse Nail Co. v. Linden Spring Co.* 142 Mass. 349, 7 N. E. 773; *Bank of North America v. Rindge*, 154 Mass. 203, 13 L. R. A. 56, 27 N. E. 1015. The subject was fully discussed in *Pollard v. Bailey*, 20 Wall. 520, 22 L. ed. 376, and the decision there reached has been followed without exception in the Federal Supreme Court. Waite, Ch. J., speaking for the court, said: "The individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute. At common law it does not exist. The statute which creates it may also declare the purpose of its creation and provide for the manner of its enforcement. . . . Here the liability and the remedy were created by the same statute. This being so, the remedy provided is exclusive of all others. A general liability created by a statute, without a remedy, may be enforced by an appropriate common-law action. But where the provision for the liability is coupled with a provision for a special remedy, that remedy and that alone must be employed." So in *Erickson v. Nesmith*, 4 Allen, 233, it was said: "A creditor of a corporation established in New Hampshire, the stockholders of which are individually liable for its debts, under the statutes of that state . . . cannot maintain a bill in equity . . . to enforce his claims against the stockholders [in Massachusetts] although some of them live here." In *Marshall v. Sherman*, 148 N. Y. 9, 34 L. R. A. 757, 42 N. E. 419, after an exhaustive review of decisions on the subject, it was said, in substance, that while it is not easy to state with exactness the principle upon which the courts of one state will not take jurisdiction of an action to enforce against one of its citizens a stockholder's liability under the laws of another state, the great weight of authority is against the maintenance of such an action. The case of *May v. Black*, 77 Wis. 102, 45 N. W. 949, is there cited as one of the significant instances where the law has been so declared. It is useless to pursue this subject further. There was little use of saying more in regard to it than to state the law as indicated and refer to the decisions of our own state establishing it as the prevailing

rule here. Our attention is called to some recent adjudications which are said to conflict with the rule that a statutory liability of stockholders to creditors will not be enforced outside the jurisdiction of the state creating it, which, though in point as to the abstract question, are not as applied to the facts of this case.

One of the most significant cases referred to is *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 42 L. R. A. 396, 51 N. E. 207. It differs from *Marshall v. Sherman*, 148 N. Y. 9, 34 L. R. A. 757, 42 N. E. 419, in that it holds that the statutory liability of stockholders under the Kansas statute can be enforced in a foreign jurisdiction, solely upon the ground, however, that the law of Kansas does not furnish an exclusive remedy to enforce the right, according as such law is construed in the home jurisdiction; that every stockholder is thus liable in an action at law, to the first creditor who pursues him, in any court where service can be made upon him, till he has paid the full amount of his statutory liability, such liability being treated as in every sense several and on contract, so that the remedy of a creditor to enforce it can as well be pursued in one jurisdiction as another; and that under such circumstances a foreign jurisdiction should lend its aid to creditors against stockholders within its reach if thereby no serious inconvenience or injustice will be inflicted upon its own citizens. Turning to those statutes coupling a right with a remedy against stockholders, the court said: "This court has many times decided that the statutes of other states, creating the liability of stockholders to creditors of a corporation, which provide for a suit of a special kind to which the corporation and all the stockholders are to be made parties, will not in general be enforced by the courts of this state. . . . The special remedy provided by the statute must be pursued, and as the statutes of a state have no force *ex proprio vigore* beyond the territorial limits of the state, the remedy usually must be pursued in the state where the corporation has been established and the statutes passed;" citing numerous cases in that and other courts, including *May v. Black*, 77 Wis. 102, 45 N. W. 949. The court, having come to the conclusion that the cause of action under the Kansas statute was transitory, tested the question of whether courts of Massachusetts should take jurisdiction to enforce it by the general principles governing the conduct of courts in enforcing rights dependent upon foreign laws, which principles, other than such as relate to penal statutes, were stated, in substance, as follows: The foreign law must not contravene the policy of the state whose jurisdiction is invoked, or be contrary to public morals or abstract justice, or be calculated to injure the state or its citizens; the jurisdiction invoked must be able to reach all the parties affected by the litigation, so as to do complete justice between them, and it must be able to attain that end consistent with its own forms of procedure. Testing the situation before the court by such principles, it was concluded 49 L. R. A.

that the enforcement, in the courts of Massachusetts, of the statutory liability of a stockholder, resident in that state, of a Kansas banking corporation, does no injustice to such stockholder, because, if he be compelled to pay, he has the same right to pursue his associate stockholders for contribution as if he were a citizen of, and compelled to respond to creditors in, Kansas; that the difficulties are no greater in the one case than in the other; that whatever difficulties exist, they were created by the Kansas statute, which permits individual actions at law against stockholders wherever they may be found, which law entered into the stockholder's contract with the corporation and its creditors when he became a member of such corporation.

So it will be seen that the Massachusetts case, confidently relied upon by the respondent, does not militate at all against the doctrine that a statutory right, dependent in the home jurisdiction upon a statutory remedy, must be enforced in such jurisdiction or not at all, nor against the doctrine that a statutory right cannot be enforced in a foreign jurisdiction unless all the necessary parties to an action of that kind are before the court, nor if its enforcement will violate the policy or will subject the citizens of the foreign jurisdiction to serious inconvenience or injustice. It was principally on the latter ground that the New York court, in *Marshall v. Sherman*, declined to take jurisdiction.

Another case confidently referred to is *Western Nat. Bank v. Lawrence*, 117 Mich. 669, 78 N. W. 105. The action was to enforce a statutory liability created by the Kansas statute, and jurisdiction was taken for the same reason as that stated by the Massachusetts court in the case before referred to, that is, upon the sole ground that the liability under the Kansas statute, as construed by its court, is enforceable by an action against any stockholder as an ordinary liability on contract, till such stockholder shall have paid to creditors the full amount for which he is responsible; that the action is transitory and should be enforced in all jurisdictions the same as other actions on contract, that can be as well enforced in one jurisdiction as in another, and where there is no good reason why the foreign court should not lend its aid to the enforcement of the right. True, the Michigan court made the extraordinary statement that the right to maintain a suit to enforce a statutory right under the Kansas statute in Michigan does not depend upon the law of comity. That was unnecessary to the decision. It is directly contrary to *Hancock Nat. Bank v. Ellis* and, as it seems, to elementary principles. In all cases where a court is called upon to give effect to a right dependent upon a foreign statute, it involves the enforcement of a foreign law and its action in that regard depends upon the rule of comity. That, as it seems, is too clear for reasonable controversy.

Neither *Hancock Nat. Bank v. Ellis*, *Western Nat. Bank v. Lawrence*, *Bell v. Farwell*, 176 Ill. 189, 42 L. R. A. 804, 52 N. E. 346,

nor any other of the numerous cases that might be referred to regarding the enforcement of the statutory liability of stockholders to creditors, created by the Kansas statute, and statutes of other states creating a several liability of stockholders to creditors, in the sense that each stockholder is made liable directly to each creditor, and may be made to respond accordingly in an action at law against him alone wherever he may be found, have any significance in determining the right of creditors in a foreign jurisdiction under statutes like that of Minnesota and this state, which plainly require the equities of all stockholders as between themselves to be worked out in a single action in equity at the home of the corporation, and the contributions of all stockholders accumulated in the action to be treated as one fund, to be administered for the benefit of all creditors in proportion to the respective claims against the corporation as established in such action to which such corporation is a necessary party if there are corporate assets to be reached, and a proper party in respect to the issue regarding the indebtedness for which stockholders may be held liable. By a moment's consideration of the distinction between the two statutory systems, represented by the Kansas statute and the statute of Minnesota, it will be seen that the remedial processes that will affect the purposes of one are entirely unadapted to the other. A failure to keep such distinction in mind has led text writers and courts into the error of supposing that the decisions in regard to one of such systems are in conflict with those in regard to the other.

It is contended that, admitting the rule above discussed—that where a statutory right is created, coupled with a specific remedy to enforce it, such remedy is exclusive and cannot be pursued outside the home jurisdiction, as indicated in *May v. Black*—it does not apply here, because we are dealing with a Minnesota law and the supreme court of that state, in *Hanson v. Davison*, 73 Minn. 454, 76 N. W. 254, has decided that the statutory remedy given there to enforce the liability under consideration, is only exclusive so far as it goes, that it requires an original action, by a creditor or creditors, in behalf of all persons so circumstanced who shall come into the action, against all the stockholders of the bank within the jurisdiction of the court, and that the liabilities of all such stockholders must be there enforced, and the indebtedness of the corporation forming the basis therefor and for any action that may thereafter be brought in aid of the statutory action determined; that the statutory remedy does not preclude the institution and prosecution of ancillary actions to reach stockholders, either in the home or another jurisdiction, that cannot be reached in the first instance, and that such stockholders by such actions may be pursued in any jurisdiction in Minnesota where they can be found, and in any foreign jurisdiction where the court will permit it.

Such is the state of the law as it now exists in Minnesota. It is a wide departure 49 L. R. A.

from the doctrine announced in *Allen v. Walsh*, 25 Minn. 543, where the statutes governing the subject were carefully and plainly construed, which construction, for a period of some twenty years, covering that within which the liability in question accrued, was the settled law of the state. In the early case it was held that the statute prescribes a single action in equity, in which the liability of all stockholders to all creditors and the equities between the stockholders must be worked out or not at all. There is no room to mistake what the court intended in that case. The following language was used: "It is reasonable to suppose that the legislature intended by these sections [referring to the sections set forth in the complaint here] to provide an efficient and sole remedy for enforcing payment of the debts of an insolvent corporation out of the individual liability of its stockholders, for the rule is well settled that when a statute which creates a right also prescribes an adequate remedy, the latter is to be taken as the exclusive one; . . . that the chapter which gives this remedy forms a part of the General Statutes, which were adopted in 1866 and which contain the enactment that creates the statutory liability, and therefore the rule referred to is fairly applicable. It is obvious, from an examination of these sections, that the remedy they provide contemplates a single action, in which all persons having or claiming any interest in the subject of the action shall be joined or properly represented and their respective rights, equities, and liabilities finally settled and determined."

We might easily, but it would draw this opinion out to an unnecessary length, refer to the decisions that followed *Allen v. Walsh* down to *Hanson v. Davison*, and show that the plain language of the early case was taken and applied in every instance in its literal sense.

In view of the foregoing, we read with some surprise the statement of the court in the *Hanson Case* that the doctrine of *Allen v. Walsh* does not go so far as to preclude the institution and prosecution of an action ancillary to the principal action against those who cannot be brought in in the first instance. The reason of the later decision does not appeal very strongly to our judicial judgment. It starts out by overturning twenty years of established law at home and runs counter to the decisions of this and all other states where similar laws exist. While admitting that the Minnesota statute gives a specific remedy for the enforcement of the right under consideration, and that in pursuing such remedy the corporation may be a necessary party, and that such remedy must be pursued at the home of the corporation, the court not only ignores, as it seems, the law of the state long and firmly established, but that elsewhere, as indicated, but ignores the principle, of universal application, that a remedy coupled with a new right and evidently given for the purposes of its enforcement is exclusive.

To justify the position taken, without ex-

pressly overruling its long line of decisions to the contrary, the Minnesota court arbitrarily ingrafted onto the existing system an element that the language of the statute and of the court construing it, as well as elementary principles, plainly exclude. To sustain the new doctrine that there must be a statutory action in the first instance, commenced and prosecuted to a termination, and that other actions may be brought in the home and other jurisdictions, it became necessary to hold that the result in the first action, as to all questions necessarily there litigated, is binding, not only on all persons made parties to such action, but also so circumstanced that they might have been made parties could they have been found within the jurisdiction of the court, and on all parties that might have been admitted as participants in the action upon their own application; that in an ancillary action all questions litigated in the principal action must be deemed at rest, so that while defendants in the first action have their day in court as to the vital questions standing at the threshold of their liability, those in actions subsequently brought are bound without having that privilege; that while some stockholders can have their equities as between themselves and associate stockholders settled in the action where their liability is enforced, others may be made to respond and to cancel their liability, and then be compelled to resort to some other action, in some other jurisdiction, to settle their equities with their associates. It is recognized that it would be unjust to bind a stockholder by an adjudication in an action to which he is not a party; but it is said that such is not the result of the new doctrine, because in the first action the corporation stands for all of its stockholders who are not present. How that can be it is easy to assert, but exceedingly difficult to demonstrate upon principle. The cases cited by the court do not appear to touch the question, as clearly indicated in the able dissenting opinion of Mr. Justice Cauty. We shall not take time to review the authorities which the learned court refers to, to sustain its position on this branch of the case; suffice it to say, that they are all cases to enforce corporate rights. They do not appear to be in point in any respect to the theory they are used to support; not one is a case to enforce a superadded liability of stockholders to creditors or case involving any analogous question.

The corporation is not made a defendant in the principal action as a representative of the stockholders in any sense. It is joined of necessity only where there are corporate assets which ought to be applied to the payment of the debts. Otherwise, it is a proper party, but only for the purpose of establishing against it as a finality the amount of the indebtedness for which the stockholders are liable. The primary right to be adjudicated in such an action is the stockholders' liability. As an incident thereto, where there are corporate assets which should be applied to the payment of the indebtedness, the corporation must be brought in for the purpose

of sequestrating and reaching such assets. If there are no such assets the corporation need not be made a party at all. That has been repeatedly held by this and other courts. *Booth v. Dear*, 96 Wis. 516, 71 N. W. 816; *Sleeper v. Goodwin*, 67 Wis. 577, 31 N. W. 335; *Re People's Live Stock Ins. Co.* 56 Minn. 180, 57 N. W. 468; *Minneapolis Baseball Co. v. City Bank*, 66 Minn. 441, 38 L. R. A. 415, 69 N. W. 331.

We shall not further discuss the present state of the law governing the subject under consideration as it exists in the state of Minnesota. There are many features, not before referred to, that are entirely out of harmony with the law here and elsewhere under similar statutes. While the statutes of Minnesota, as construed by its court, are supreme in that state, their effect here depends upon the law of comity.

The doctrine of *Hanson v. Davison*, as we view the decisions cited in support of it by respondents' counsel, and all others bearing on the subject that have come under our notice, from a pretty thorough study thereof, is without substantial support except by *Hale v. Hardon*, 95 Fed. Rep. 747, 37 C. C. A. 240, where two Federal district judges rendered a decision following such doctrine and reversing the circuit judge who decided the case in the first instance, and the third member of the court, a circuit judge, dissented from his associates in a vigorous and quite exhaustive opinion, in which he stated, in substance, after reviewing the authorities, that the decision in *Hanson v. Davison* is so out of harmony with the previously established doctrine of the Minnesota court and with elementary principles, and so subversive of the rights of parties equally interested in a controversy to an equality of remedies, and to the right of every person to his day in court as to every material question involving his interest, that there is no rule of comity which requires or justifies its recognition in any other jurisdiction.

With due respect for the able court that pronounced the decision in *Hanson v. Davison*, we have reached the same conclusion as that expressed in the dissenting opinion referred to. To give effect to the Minnesota statutes as now construed by its highest tribunal would be unjust to the defendant, because it would, in effect, make a liability enforceable here that was not enforceable when it accrued, and that could not have been enforced under the law of Minnesota as it existed prior thereto during the time the defendant was a member of the corporation; it would subject defendant to substantially an independent action to enforce her liability, while, when it accrued, it was enforceable only in an action in equity at the domicile of the corporation, having sole jurisdiction of the entire subject of stockholders' liabilities to the creditors of the corporation, and of all questions necessarily incident thereto; it would conclude her, as to questions vital to her liability, by a judgment rendered in an action to which she was not a party; whereas when she became a member of the corporation she did so in contemplation of a liability

with certain incidents, she would be burdened with materially different incidents; whereas the plain purpose of the law is that all stockholders shall stand equally as regards rights and remedies, it would subject the defendant to a much more burdensome remedy, before her ultimate rights could be determined and enforced, than it does the resident stockholders; it would result in giving to resident stockholders their day in court and denying that valuable right to the defendant; it would give effect to a law which is contrary to the policy of the laws of this state. For these and many other reasons that might be named, the law of Minnesota, as at present understood, should not be made effective here. Clearly the court cannot, consistent with the rules of comity, give effect to a doctrine which, if recognized, would lead to the oppressive results mentioned.

This court recognizes fully the importance of interstate comity and uniformly freely gives effect to it as regards the laws of sister states when it will not seriously violate the policy of our own laws or the rights of our own citizens. Tested by that standard and the most liberal rules usually applied to the subject, courts of this state cannot lend their aid in the circumstances presented in the complaint before us. A liberal course in the enforcement of the laws of other states in proper cases should be the rule, but the paramount duty of our judicial system is to safeguard our own state policy and prevent injustice to our own people within reasonable limits. *Gilman v. Ketcham*, 84 Wis. 60, 23 L. R. A. 52, 54 N. W. 395; *Emery v. Burbank*, 163 Mass. 326, 28 L. R. A. 57, 39 N. E. 1026; *Seamans v. Temple Co.* 105 Mich. 400, 28 L. R. A. 430, 63 N. W. 408; *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 42 L. R. A. 396, 51 N. E. 207; *Dearing v. McKinnon Dash & Hardware Co.* 33 App. Div. 31, 53 N. Y. Supp. 513.

The doctrine of the *Hanson Case* is not sustained, in its main features, in the home court, upon any other theory than that the corporation in the original action stands for all the absent creditors, and that a judgment as to it, after it has ceased to exist for any practicable purpose, concludes such absent members on questions in which the corporation has no interest and which it is bound to protect for the benefit of such members. That doctrine, as stated in the dissenting opinion referred to, in the Federal court, was never promulgated in Minnesota prior to *Hanson v. Davison*, and no case has been found elsewhere, except *Hale v. Hardon*, where it has been even partially recognized, unless based on some special statute entering into the contract sought to be enforced.

The conclusion reached is, that the complaint fails to state a cause of action that can be entertained by the courts of this state, and that the decision of the lower court to the contrary must be reversed, and the cause remanded for further proceedings according to law.

So ordered.
49 L. R. A.

Dodge, J., dissenting:

The decision in this case seems to me to destroy a clear and absolute right by denying any remedy for its enforcement, and that, too, for no better reason than mere inconvenience to creditors in their procedure; an inconvenience, too, which seems to me rather imaginary than real. This is a result which is not to the credit of the courts, and should not be reached without a struggle to avert it. The Constitution of Minnesota provides, and, at the time the defendant acquired his shares of stock, did provide: "Each stockholder in any corporation . . . shall be liable to the amount of stock held or owned by him." Const. art. 10, § 3. Under that provision, the defendant, with her co-stockholders, were permitted to be a corporation. By availing herself of that privilege, she entered into an absolute contract with the creditors of the corporation to pay, if needed, after exhausting the assets of the corporation, a sum equal to the par value of her stock. That such is her position, and such the relation to creditors which she assumed, is the settled law of the state of Minnesota. *Willis v. Mabon*, 48 Minn. 140, *sub nom. Willis v. St. Paul Sanitation Co.* 16 L. R. A. 281, 50 N. W. 1110; *Hanson v. Davison*, 73 Minn. 454, 76 N. W. 254. Not only is it the law now, but so it was at all the times when defendant acquired or held her stock. I can hardly believe that the suggestion is deliberately made in the opinion of my brethren that the court has changed the law by its decision in *Hanson v. Davison* so that it is now other than it was before. Courts do not make or change law—they declare and administer it; and the supreme court of Minnesota has, by the case last mentioned, simply declared what the law of that state has been ever since the adoption of the Constitution. True, that court, or the author of the opinion, in an earlier case had indulged in certain remarks from which might be drawn inferences inconsistent with the decision in *Hanson v. Davison*, but those remarks were mere *obiter dicta*, which, as is usual with *obiter dicta*, did not serve to make or establish any law, but merely to subject to criticism the opinion containing them. This absolute liability existing on the one hand and its corresponding right upon the other, this court is confronted by the command of the Constitution of Wisconsin (art. 1, § 9): "Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property, or character; he ought to obtain justice freely and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws." That command is disobeyed, and the excuse does not seem to me sufficient. That excuse is that this court, like the court of Minnesota, long ago decided that serious inconvenience and confusion would result from enforcement of the individual liability of each stockholder at the behest of each creditor, and therefore that, for mere convenience of procedure, the action which the courts were bound to extend to a creditor having such a right should be an

equitable one, in which, as plaintiffs, should be joined all the creditors, either actually or by representation, and to which should be joined such of the stockholders as could be brought within the jurisdiction of the court, together with the corporation itself, to the end that in the one action the court might ascertain the extent to which the assets of the corporation were inadequate to satisfy its debts and the resulting extent of the liability of stockholders, and could adjust and apportion that liability among such of them as were solvent. That is the whole scope and extent of the decisions in this state from *Coleman v. White*, 14 Wis. 700, 80 Am. Dec. 797, to *Foster v. Posson*, 105 Wis. 99, 81 N. W. 124. That, too, is the full extent of the decisions of the supreme court of Minnesota. Now, for the first time it is held that the judgment in such a suit discharges the liability of all stockholders, whether parties to it or not, and that the stockholder who evades the jurisdiction, either as a fugitive or as a nonresident, until the judgment has been rendered, has successfully defied and annulled the Constitution of Minnesota and of this state as well. The cases referred to could not, with propriety, go further than decision of the questions presented in them. Courts are created to decide controversies, not to emit abstract treatises. It is, therefore, as always, to be presumed that any utterances general in their terms were not intended by the court to apply to controversies or situations distinguishable from those present for decision. The assertion in *Coleman v. White* that a general equitable suit, with all creditors as plaintiffs, and all stockholders within the jurisdiction, together with the corporation, as defendants, is the exclusive remedy, could mean no more than that such remedy is exclusive of a direct action at law by one creditor against one stockholder when the equitable procedure was neither obstructed nor exhausted. So the assertion in *Foster v. Posson* that the judgment in such general suit is final, as to all rights whether as between creditors and stockholders or as between different stockholders, must be understood as limited to stockholders over whom the court had jurisdiction, since that was the situation of those litigating as alleged by the complaint, though the fact is not made apparent in the opinion. The suggested inconveniences attending the enforcement of the creditors' rights against stockholders who successfully evade the jurisdiction in the original suit are quite fully demonstrated to be insignificant by the reasoning in *Hanson v. Davison* and in *Hale v. Haddon*, 95 Fed. Rep. 747, 37 C. C. A. 49 L. R. A.

240, which I shall forbear repeating. In the case presented by the complaint at bar there are absolutely none. The excess of debts over all assets in an amount exceeding the total stock, and the entire exhaustion of all stockholders over whom jurisdiction can be obtained, are set forth; and the absolute liability of defendant for a definite amount, with no possible right of contribution against any solvent co-stockholders, is made to fully appear. Is it not the part of justice to vindicate the clear rights of the plaintiffs in this case, where it is obvious that no undue or unequal injury will be done the defendant, rather than to perpetrate certain wrong on the plaintiffs from mere apprehension that under some other circumstances it might not be easy to fully protect a defendant? If either is to suffer, should it not rather be the stockholder, who, by the same diligence she finds easy when demanding her dividends could have informed herself of the general litigation, and, by appearing therein, have protected herself from any inequality? I the more deplore this decision because it diminishes the solvency of our own banks, and denies to their creditors the liability of any stockholders who, by reason of nonresidence or otherwise, may escape the process of the court in which the general equity suit must be prosecuted. It invites fraud and evasion by offering exemption to stockholders upon the easy expedient of placing their holdings in the names of nonresidents. These are evils which, with the probable drastic legislation to avert them, seem to me much more terrible than the inconvenience of courts or incongruity in mere forms of procedure.

Since the decision of this case, the opinion of the Supreme Court of the United States in *Whitman v. National Bank*, 176 U. S. 539, 44 L. ed. 587, 20 Sup. Ct. Rep. 479, has been published, and seems to me to be squarely in conflict with the opinion of this court. True, the liability under the Kansas Constitution was there under consideration, but the recovery was justified, not alone because the statute of Kansas would permit it, but because the provision of the Constitution was self-executing, and, without the aid of any statute, imposed a contract liability upon holders of stock enforceable in any court of general jurisdiction, considerations equally characterizing the Minnesota Constitution. In that case, also, is shown how untenable are the objections to the binding effect upon stockholders of the adjudication against the corporation in the general closing-up action, which objections are deemed so weighty by my brethren.

WEST VIRGINIA COURT OF APPEALS.

F. C. PIFER

v.

Margaret N. BROWN, *Appt.*

(43 W. Va. 412.)

- *1. A parol license from one lotowner in a town to another to pass a tile drain under the former's lot for the purpose of draining the lot of the latter is revocable at the pleasure of such licensor.
2. To entitle a party wishing to drain his lot under the surface of his neighbor's lot by a right not subject to revocation at the will of such neighbor, the privilege of so doing must be acquired by deed.
3. The right of drainage through the lands of another is an easement requiring for its enjoyment an interest in such lands, which cannot be conferred except by deed or conveyance in writing.

(April 21, 1897.)

*Headnotes by ENGLISH, P.

NOTE.—Revocability of license to maintain a burden on land, after the licensee has incurred expense in creating the burden.

- I. Introduction.
- II. How far permission to place burden is a mere license.
- III. Effect of consideration paid or expense incurred.
 - a. Consideration.
 - b. Expense incurred.
- IV. Writing is necessary.
- V. Duration of right.
- VI. Exception in case of abandonment or change of easement.
- VII. Equitable exceptions.
 - a. Specific performance.
 1. General principle.
 2. Illustrative cases.
 3. Mutual or joint action.
 4. What expenditure required.
 5. Erroneous applications of the doctrine.
 6. Cases involving public-service corporations.
 - b. Estoppel.
 1. The principle involved.
 2. Cases which have applied the doctrine against licensors.
 3. Correctness of application of principle.
 - c. Trustee *ex maleficio*.
- VIII. Doctrine of executed license.
- IX. How far relief may be afforded.
- X. Statutory changes.
- XI. Conclusion.

I. Introduction.

The question how far acceptance of a permit to place a burden on another's land and incurring expense in placing the burden there will give the licensee a right to maintain the burden is easily answered on principle, but the effort to relieve hard cases has made the decisions very diverse, and thrown much confusion into the case law upon the subject.

Chancellor Kent (3 Com. 452) defines a license as an authority to do a particular act or series of acts upon another's land without possessing any estate therein. This definition has been generally accepted as correct. Fol-

A PPEAL by defendant from a decree of the Circuit Court for Upshur County enjoining her from interfering with a drain which had been laid across her property. *Reversed.*

The facts are stated in the opinion.

Mr. Samuel V. Woods for appellant.

Mr. U. G. Young, for appellee:

Where there is a conflict in the testimony this court will not reverse a decree, although the appellate court might have rendered a different decree if it had acted on the case in the first instance.

Smith v. Yoke, 27 W. Va. 639; *Deonan v. Glynn*, 28 W. Va. 715; *Prichard v. Evans*, 31 W. Va. 137, 5 S. E. 461; *Burtlett v. Cleavenger*, 35 W. Va. 720, 14 S. E. 273.

Plaintiff constructed the ditch in question by virtue of a parol license, which, having been executed, cannot be revoked at the mere caprice of the defendant, and especially since he cannot be placed *in statu quo*, and a court

allowing it strictly, no right to place a burden on the land which is not revocable at will can be granted by a license, because the moment it ceases to be so revocable it creates an interest in the land, and rises to the dignity of an estate or an easement. An easement is defined by the same writer, on the same page, as a liberty, privilege, or advantage in land without profit, existing distinct from an ownership of the soil. It is an incorporeal hereditament, and as such lies only in grant, so that if the privilege conferred is an easement a deed is necessary to create it.

On the other hand, if an estate is created by the license it must be created by writing under the statute of frauds.

The failure to preserve the above distinctions is one cause of the uncertainty in the decisions. Another cause is the application of so-called equitable principles which are not found in the old chancery practice, or the application of well-recognized equitable principles to facts which were not within their legitimate scope. To protect the licensee the courts have applied the principles of specific performance of contracts and equitable estoppel, and have held the licensor to be a trustee *ex maleficio* for the benefit of the licensee.

An examination of the cases will show how far these principles may be legitimately applied.

II. How far permission to place burden is a mere license.

In an early case, decided before the passage of the statute of frauds, it was held that a parol license to stack hay on land of the licensor was valid. *Webb v. Pater-noster*, Palm. 71. This case is very meagerly reported, and the ground of the decision is not apparent. There was nothing at the time of its decision to prevent the creation of an estate for years by parol.

However, in *Wood v. Lake*, Sayer, 3, a license to stack coal on land for seven years was held valid as not being an interest in land within the statute of frauds.

Again, in *Taylor v. Waters*, 7 Taunt. 373, 2 Marsh. 551, an agreement to permit another to enter an opera house for a term of years was held not to be an interest in land, but a license to permit him to enjoy certain privileges there-

of equity will protect him in his rights and prevent interference by the defendant.

2 Minor, Inst. p. 28; *Vannest v. Fleming*, 70 Iowa, 638, 8 L. R. A. 277, 44 N. W. 906; *Wharton v. Stevens*, 84 Iowa, 107, 15 L. R. A. 630, 50 N. W. 562; *Boynton v. Longley*, 19 Nev. 69, 6 Pac. 437; *Metcalf v. Hart*, 3 Wyo. 513, 27 Pac. 900, 31 Pac. 407; *Tufts v. Copen*, 37 W. Va. 623, 16 S. E. 793.

When lands belonging to different owners are adjacent to each other, and one is lower than the other, and the surface water from the higher tract has been accustomed by a natural flow to pass over the lower tract, the owner of such upper tract of land has an easement to have the water flow over the land below, and the lower tract is charged with a corresponding servitude.

Ogburn v. Connor, 46 Cal. 347, 13 Am. Rep. 213; *Gray v. McWilliams*, 98 Cal. 157,

21 L. R. A. 593, 32 Pac. 976; *Boynton v. Longley*, 19 Nev. 69, 6 Pac. 437; *Vannest v. Fleming*, 79 Iowa, 638, 8 L. R. A. 277, 44 N. W. 906.

A mere license in the nature of an easement may be acquired in any way by which permission can be understood to have been given, and whether there is any writing in existence to prove the grant, or not.

Goddard, Easements, p. 90; *Tufts v. Copen*, 37 W. Va. 623, 16 S. E. 793; *Angell, Watercourses*, § 303.

Defendant by her acts is estopped from interfering with this ditch.

Stone v. Tyree, 30 W. Va. 702, 5 S. E. 878; *Hanly v. Watterson*, 39 W. Va. 224, 19 S. E. 536; *Herman, Estoppel*, § 776; 2 Pom. Eq. Jur. § 814.

There appears to be no doubt that in equity licenses executed are taken out of the

on, and was held not required to be in writing by the statute of frauds.

These three cases are not sound in principle, and have been thoroughly discredited, but they have left their impression by being followed in some of the later decisions.

Thus, in *Clement v. Durgin*, 5 Me. 9, which was an action for damages for flowing land by a mill dam, the court held that the right to flow was given by statute subject to the duty of paying the damages, and that the right to damages could be waived by parol. But it is said that such a license is in its nature revocable unless the party to whom it is given has been thereby led to incur expense, in which case it is not revocable,—at least, without tendering indemnity. The mill owner acting on the parol license claims no interest in the land. He justifies a certain act done in relation to it which without license of the owner would have been unwarranted. The license given might have been countermanded before it had been acted upon, as, if a party promises to give money, no action will lie upon it, but having given it, he cannot recover it back. He cannot reclaim what he has given away. So in this case, having given the license, and it having been acted upon, he cannot enforce an action or complaint for damages.

So, a license to flow land confers no interest therein so as to require an agreement conferring it to be in writing within the statute of frauds. *Woodbury v. Parshley*, 7 N. H. 237, 26 Am. Dec. 739.

Again, a license to build a bridge on another's land does not convey an easement or interest in the land within the meaning of the statute of frauds. *Ameriscoggin Bridge v. Bragg*, 11 N. H. 109.

Again, where a license is given to overhang land with a building cornice the owner of the land cannot revoke the license after expenditure in erecting the building has been incurred. This was placed upon the ground that the privilege was a license, and not an easement. *Jarvis v. Satterwhite*, 2 Ky. L. Rep. 436, 3 Ky. L. Rep. 190.

So, the effect of those decisions is seen in a ruling that a parol authority to divert the water of a canal through a culvert onto lands of the licensor is a mere license in its nature revocable. *Foot v. New Haven & N. Co.* 23 Conn. 214.

In *McManus v. Cooke*, L. R. 35 Ch. Div. 688, 56 L. J. Ch. N. S. 662, 56 L. T. N. S. 900, 35 Week. Rep. 754, 51 J. P. 708, the court cites several cases as holding that an easement is not an interest in land under the 4th section of 49 L. R. A.

the statute of frauds, and then states that if such is a fact, although no such incorporeal hereditament can be granted except by deed, an agreement for such a grant need not be in writing, as a contract for an interest in land. *Hollis v. Edwards*, 1 Vern. 159, is also cited as holding that the clause of the 4th section, relating to agreements which could not be performed within one year, did not extend to an agreement concerning lands; and it is said that it had been assumed that an agreement for an easement sufficiently concerned lands to come within that decision, so that under these authorities an agreement for an easement would not be controlled by the statute, and might be by parol. But the judge who delivered the opinion in the *McManus* Case says he should have thought that such an agreement must have come within one clause or the other of this section; and he continues: "My own opinion would have been that such an agreement sufficiently concerns lands to come within that part" of the section requiring contracts concerning lands to be in writing.

In *Williams v. Morris*, 8 Mees. & W. 488, it is said that much doubt has been thrown upon *Webb v. Pater-noster*, Palm. 71, and *Taylor v. Waters*, 7 Taunt. 373, 2 Marsh. 551, and that it certainly strikes one as a strange proposition to say that such a license (that is to enter upon land) can be irrevocable unless it amount to an interest in land which must therefore be covered by a deed.

In *Wood v. Leadbitter*, 1 Mees. & W. 838, 14 L. J. Exch. N. S. 161, the whole subject is reviewed, and the doctrine of the cases holding that such a license conferred no interest in lands was repudiated. The court holds that a mere license is revocable, but that which is called a license is often more than a license; it often comprises, or is connected with, a grant, and then the party who has given it cannot, in general, revoke it so as to defeat his grant to which it was incident; also that a license by parol, coupled with a grant, is as irrevocable as a license by deed, provided, only, that the grant is of a nature capable of being made by parol. The court further holds that every license is, and must be in its nature, revocable so long as it is a mere license. Where it is connected with a grant there it may by ceasing to be a naked license become irrevocable, but then it is obvious that the grant must exist independently of the license unless it be a grant capable of being made by parol. And the doctrine of *Wood v. Lake*, *Sayer*, 3, was repudiated in *Phillips v. Thompson*, 1 Johns. Ch. 181.

statute of frauds, and that relief may be had in equitable tribunals by the licensee against an action at law.

Angell, Watercourses, § 318; *Houston v. Laffee*, 46 N. H. 507; *Tufts v. Copen*, 37 W. Va. 623, 16 S. E. 793; *Metcalf v. Hart*, 3 Wyo. 513, 27 Pac. 900, 31 Pac. 407; *Pom. Eq. Jur.* §§ 103, 1409.

The husband of the defendant was acting as his wife's agent, which he had the right to do, and she is bound by his acts.

Boguess v. Richards, 39 W. Va. 567, 26 L. R. A. 537, 20 S. E. 599; *Bishop, Contr.* § 1035; 9 Am. & Eng. Enc. Law, pp. 836, 837.

English, P., delivered the opinion of the court:

This was a suit in equity instituted in the circuit court of Upshur county by F. C. Pifer against Margaret N. Brown. The

plaintiff in his bill alleged that he was the owner of a lot of land in the town of Buckhannon, in said county (describing it, and exhibiting a copy of the deed from John D. Martin and wife to himself, dated the 3d of December, 1884), and further says that in the month of October, 1894, after a destructive fire in said town, the frame building owned by him, in which he carried on business as a druggist, was completely destroyed; that he at once set to work to erect an expensive brick building on said lot, and had made excavations for a ground room or cellar extending several feet below the surface of the earth, and constructed around it a stone wall, — feet thick, for a foundation to the main structure, and as a part of said underground room; that said wall and foundation is of solid stone masonry, and built at very great expense; that in or-

So, the better doctrine is that a license to perpetually overflow land creates an interest in the land, and is void under the statute of fraud unless in writing. *Wilmington Water Power Co. v. Evans*, 166 Ill. 556, 46 N. E. 1083.

So, a right to drain across the land of another is an easement, and not a mere license. *Wynn v. Garland* (1857) 19 Ark. 23, 68 Am. Dec. 190.

So, a license to enter a theater to witness a performance is revocable at any time. *McCrea v. Marsh*, 12 Gray, 213, 71 Am. Dec. 745; *Burton v. Scherpf*, 1 Allen, 134, 79 Am. Dec. 717.

If the permit is a mere license it may be revoked.

In *Lake Erie & W. R. Co. v. Kennedy*, 132 Ind. 274, 31 N. E. 943, in discussing the question of the revocability of a license, the court says there was a permission which gave a right of occupancy, and nothing more. There is no element of fraud, and no consideration was paid for the right to use the land. A mere permission to occupy land is a license, and may be revoked by the licensor or his grantee, unless some act is done which operates by way of estoppel to make the license irrevocable.

If it is an easement it required a grant at common law to create it.

Incorporeal hereditaments lie in grant, and pass only by deed. *Wood v. Leadbitter* (1845) 13 Mees. & W. 838, 14 L. J. Exch. N. S. 161.

If the permission creates an estate it must, to be valid, be evidenced by writing under the statute of frauds.

A consideration may have been given for a license or expenditures made strictly on the faith of it, yet the owner of land may revoke it at will without paying back the money or making compensation for the expenditure. Inoperative at common law for want of a seal, and void under the statute of frauds because not in writing, a license, if continuing, is subject at any moment to revocation. *Morgan v. United States*, 14 Ct. Cl. 319.

III. Effect of consideration paid or expense incurred.

a. Consideration.

The doctrine being settled that an easement, as well as an estate, is an interest in land, contracts creating which must be in writing under the statute of frauds, on principle the mere fact that a consideration has been paid or expense incurred on the faith of the contract will not make it valid.

The mere fact that a consideration is to be 49 L. R. A.

paid for a license does not render it irrevocable. *Huff v. McCauley*, 53 Pa. 206, 91 Am. Dec. 203; *Dodge v. McClintock*, 47 N. H. 383; *Duenneen v. Rich*, 22 Wis. 550; *Baldwin v. Taylor*, 166 Pa. 507, 31 Atl. 250.

Where upon consideration of £20 a rector gave by parol the exclusive right to construct a vault within the church and bury therein, it was held after the rector had opened the vault and buried another body therein that such a right could not be granted by parol. *Bayley, J.*, said if that were an interest in land the grant would not be binding under the statute of frauds unless there was a memorandum in writing signed by the party granting. If it be not an interest in land it is an easement, or the granting of an incorporeal hereditament which could only be effectually granted by deed. *Bryan v. Whistler*, 8 Barn. & C. 288, 2 Mann. & R. 318.

Where, in consideration of the raising of the chimneys and paving of the ground of the licensor, a parol license was granted to construct a drain over the premises of the licensor, which when completed was obstructed by the licensor, the court held that a man cannot claim a thing lying in grant but by deed, and that although a parol license might be an excuse for a trespass until such license was countermanded that a right and title to a passage for the water, for a freehold interest, required a deed to create it, and that since there was no deed, the action, which was founded on right and title, could not be supported. The ruling was put upon the ground that the right claimed is a freehold right, and that the thing claimed was an easement, and not an interest in land which might pass by livery, but which required a deed. *Hewlins v. Shippam*, 5 Barn. & C. 221, 7 Dowl. & R. 783, 4 L. J. K. B. 241, 31 R. R. 757.

b. Expense incurred.

A mere license, not subsidiary to a valid grant, may be revoked at pleasure, and does not create or transfer any interest in land, even though granted for a valuable consideration, and for a purpose which involves the expenditure of money upon the faith of it; and the mere fact that the licensor without objection permits the licensee to expend money upon the land upon the faith of the license will not operate as an estoppel. The licensee is conclusively presumed, as matter of law, to know that a license is revocable at the pleasure of the licensor, and if he expend money in connection with his entry upon the land of the latter he does so at his

der to make said lower ground room useful, and to maintain good sanitary conditions about said building, it was and is necessary to keep said room or cellar well drained, and to this end plaintiff constructed a ditch from said room or cellar, by the most natural and practical course of drainage, through the lands or lots of adjoining owners to the nearest running stream or brook leading to Fink's run, and thence to the river; that plaintiff first obtained permission from all of such owners before proceeding to construct said underground sewerage; that among the lots through which said underground sewerage was constructed was a lot owned by the defendant, which was conveyed to her by Tom G. Brady and wife by deed dated the 3d day of May, 1886, a copy of which deed is also exhibited. The plaintiff further alleges that, before doing any work on said

sewerage, he went to Dr. R. L. Brown, the husband of the defendant, who, acting for the defendant, agreed with plaintiff, and gave him permission to construct said sewerage through the lot of defendant upon condition that he (the said Brown) and the defendant should be allowed to tap said sewerage, if at any time said defendant desired to do so, to drain her own property, to which plaintiff assented; that while plaintiff was constructing said sewerage, but before any work had been done upon the property of the defendant, plaintiff went to the defendant, and said to her that he hoped she would not think he was taking too much liberty with her property; that he had had an understanding and agreement with her husband, Dr. R. L. Brown, about constructing an underground sewerage through her lot, and defendant replied to plaintiff that it

peril. Any other doctrine would render most licenses irrevocable, and make them operate as conveyances of interest in land. *Minneapolis Mill Co. v. Minneapolis & St. L. R. Co.* 51 Minn. 304, 53 N. W. 639.

A verbal license to enjoy a permanent privilege on the land of another is revocable at the will of the licensor, although money may have been expended thereunder by the licensee. *Hathaway v. Yakima Water, Light & P. Co.* 14 Wash. 460, 44 Pac. 896.

The expenditure of money on faith that a license will not be revoked will not operate to create an interest in land in favor of the licensee. *Lambe v. Manning*, 171 Ill. 612, 49 N. E. 509.

Where an auctioneer engaged in selling goods at auction on the owner's premises was expelled therefrom, and brought an action for the injury upon the ground, *inter alia*, that he was there under an agreement with the property owner which could only be put to an end by their mutual consent, the court said this ground of action arises upon an agreement which, being by parol, confers no interest in the land, and therefore could not prevent its revocation, although the licensee had incurred expense on the faith of it. *Cresswell, J.* says, such a license to be operative at all must be by deed. *Taplin v. Florence*, 10 C. B. 744.

A parol license to build a bridge on land of the licensor may be ended by notice to quit. *Couch v. Burke*, 2 Hill, L. 534.

A license by a canal company to the abutting owner to erect a bridge over the canal is subject to revocation at any time. *Bass v. Roanoke Nav. & Water Power Co.* 111 N. C. 439, 19 L. R. A. 247, 16 S. E. 402.

An easement cannot be created by parol. The fact that the agreement has been performed in part will be of no avail in a court of law. *Banghart v. Plummerfelt*, 43 N. J. L. 28.

A license to construct a ditch across the property of the licensor may be revoked, although work has been commenced upon the land. *Hitchens v. Shaller*, 32 Mich. 496.

The owner of land may at any time revoke his parol license to lay an aqueduct through it, and after doing so he will not be restrained in equity from cutting off the aqueduct. *Owen v. Field*, 12 Allen. 457.

A licensee to lay a water main over land may be revoked at any time, even after it has been executed and money expended on the faith of it. *Great Falls Waterworks Co. v. Great Northern R. Co.* 21 Mont. 487, 54 Pac. 943.

A parol license to run a pipe over the land of the licensor may be revoked at any time not-

withstanding expense has been incurred by the licensee on the faith of it. *Houston v. Laflee*, 46 N. H. 505.

A contract for a consideration, to allow the turning of water over the land of the grantor, although executed by the construction of a ditch, to rise above a mere revocable license and take the dignity of an easement, must show such an intention and be by deed. *Simpson v. Wright*, 21 Ill. App. 67.

A drain maintained across land by mere parol license may be closed at the pleasure of the licensor without giving notice to the licensee. *Wilson v. St. Paul, M. & M. R. Co.* 41 Minn. 56, 4 L. R. A. 378, 42 N. W. 600.

A parol license to construct and maintain a ditch over the land of the licensor is revocable at will notwithstanding the expenditure of money in reliance thereon. *Fryer v. Warne*, 29 Wis. 511.

A parol agreement giving the right to enter upon land to construct and maintain a ditch for the drainage of water from the land of the grantee is a mere license revocable at pleasure. *Dunham v. Joyce*, 129 Mo. 5, 31 S. W. 337.

A verbal license is not sufficient to confer an easement of having a drain in the land of another to convey water, and such license may be revoked though it has been acted upon. *Cocker v. Cowper* (1834) 1 Crompt. M. & R. 418, 421, 5 Tyrw. 103.

Where, under parol authority to drain over the lands of a licensor, expenditures had been made in erecting embankments and drains, the court said the inquiry involves the difficult problem to what extent and under what circumstances equity will disregard the well-established rules of common law, as well as the plain provisions of the statute of frauds, in establishing a servitude of this kind. And in disposing of the question, the court says, *inter alia*, a statute that renders legal the revocation of certain classes of contracts is founded on the theory that while by its force great losses will many times fall upon promisees, nevertheless such losses must be endured by such sufferers in order that the mass of the community shall be protected against worse disaster. When the legislature has declared that in general with respect to certain subjects there is great danger of fraud and perjury if parol evidence is received, how is it competent for a court to declare that there is no such danger in particular instances of such subjects? The conclusion is that servitudes cannot be imposed upon land by parol transactions, except to the extent evidenced by ancient doctrines in the English chancery. *Lawrence v. Springer*, 49 N. J. Eq

was all right, to go ahead with his work, which plaintiff did; that plaintiff dug a ditch through the garden part of defendant's lot, as well as through the lots of the other property owners, leading from the lower room or cellar of his said lot, for the purpose of draining it, about 4 feet deep, and placed therein well-jointed earthen tiling, 6 inches in diameter, the whole distance of said ditch, and, after so planting said tiling, plaintiff filled in the dirt on said tiling, completely covering the same and completely filling said ditch; that said drain or sewerage was constructed at great expense to plaintiff; that it extends through the property of the defendant to the distance of about 50 feet; that defendant lives on said lot, and was living on the same when plaintiff was having said ditch dug and said tiling put down, and saw said work being done, and permitted and

agreed to the same; that plaintiff, as part of the consideration, put in a 6-inch tiling to drain the property of defendant, if at any time she desired to tap the same, at an additional cost to him, when a 2-inch tiling would have fully answered his purpose; that it is absolutely necessary to the use of plaintiff's property that said underground sewerage and drainage be constructed, and that it is very essential to the health of the town that it be drained; that said ditch does not in any way interfere with the use of defendant's property, and in fact benefits it, by serving as drainage of the surface water which collects on said lot of defendant, which is low, and needs draining, especially at the point through which plaintiff constructed said ditch or drain. Plaintiff further says that said drainage or ditch was constructed, tiling laid, and completed, in the first part of

289, 24 Atl. 933, Reversing 47 N. J. Eq. 461, 21 Atl. 41.

A parol license to erect buildings on land of the licensor is merely a tenancy at will. *Dame v. Dame*, 38 N. H. 429, 75 Am. Dec. 105.

A license to erect a house on the land of the licensor is revocable at his pleasure. *Harris v. Gillingham*, 6 N. H. 9, 23 Am. Dec. 701.

Where two persons join in erecting a building on the land of one, under a parol agreement that it shall be occupied jointly, the owner of the land may turn the other out whenever he chooses to do so. *Benedict v. Benedict*, 5 Day, 468.

A verbal license to erect upon the land of another an addition of a substantial character to a building is a grant of an interest in land within the statute of frauds. The expenditure, in such erection, of money which will be lost by the determination of the license, does not render the license irrevocable. *Collins Co. v. Marcy*, 25 Conn. 239.

A license to flow lands for a mill pond is revocable, although a mill is erected in reliance upon it. *Beaver v. Reed*, 9 U. C. Q. B. 152.

A parol license to build a dam on the land of the licensor, and raise a reservoir of water for use of a mill, will confer no right upon the licensee to maintain the dam after it is built. *Pitman v. Poor*, 38 Me. 237. And that case was followed in *Moulton v. Faught*, 41 Me. 298.

A license to construct a mill pond on the land of the licensor is revocable, even after the licensee has made large expenditures upon the mill. The court says the doctrine of the earlier cases which converted an executed license into an easement is now generally discarded as being in the teeth of the statute of frauds. *Johnson v. Skillman*, 29 Minn. 95, 43 Am. Rep. 102, 12 N. W. 149; *Olson v. St. Paul, M. & M. R. Co.* 38 Minn. 479, 38 N. W. 490.

The building of a dam and erection of mills to be used in connection therewith, in reliance upon a license for the use of the water, will not make the license irrevocable. *Babcock v. Uter*, 1 Keyes, 397.

A parol agreement to permit the erection of a mill upon the land of the licensor, and to reduce the contract to writing, will not, after the license has been acted upon, give a right of action at law for refusal to comply with it. *Trammell v. Trammell*, 11 Rich. L. 471.

When the right to do acts upon the land of another is of such a nature as to require to be created by a grant, in order to be properly indefeasible, a mere license to do such acts does not become irrevocable because it has been executed by the licensee; although such execution 40 L. R. A.

has been attended by an expenditure of money or labor, and although also the termination of said license may cause the loss of such expenditure. *Foot v. New Haven & N. Co.* 23 Conn. 214.

A parol agreement for the right to use a railroad track for the transportation of coal from have been incurred in reliance thereon, although a consideration has been paid therefor and large expenditures in the development of the mine have been incurred in reliance thereon, although equity may afford some relief to the licensee upon its revocation. *Dillon v. Crook*, 11 Bush, 321.

A gratuitous license to a lumber company to construct a logging road across the licensor's land does not become irrevocable by the company's expending money in reliance upon the expectation of the continuance of the license. *Nowlin Lumber Co. v. Wilson*, 119 Mich. 406, 78 N. W. 338.

A parol license to build upon and occupy the land of another indefinitely is absolutely void, and confers no title whatever. *Houghtaling v. Houghtaling*, 5 Barb. 379.

A parol license to enter upon another's premises to erect and maintain a house is revocable, and confers no right whatever upon the licensee to occupy the premises after its revocation. *People v. Fields*, 1 Lans. 222.

A license to work mines is revocable at pleasure, notwithstanding money has been expended. *Desloge v. Pearce*, 38 Mo. 588.

A parol license to place stone upon land, founded upon no consideration, is revocable at pleasure, although the licensee may have expended money on the faith of it. *Wheelock v. Noonan*, 108 N. Y. 179, 15 N. E. 67.

A parol license to place a retaining wall on the land of the licensor is revocable at his pleasure, both at law and in equity, notwithstanding expense has been incurred in the construction of the wall. *Crosdale v. Lanigan*, 129 N. Y. 604, 29 N. E. 824.

An agreement by a landowner to throw some of his land into the highway if another will move the wall and prepare the ground for travel is a mere license, and may be revoked at any time notwithstanding labor has been expended in moving the wall. *Ruggles v. Lesure*, 24 Pick. 187.

A parol license to divide a pew may be revoked at any time notwithstanding expense has been incurred under it. *Adams v. Andrews*, 15 Q. B. 284, 20 L. J. Q. B. N. S. 33, 15 Jur. 149.

A parol license by a property owner to an intending tenant to enter the premises and put

last January; that the same was in use from that time until the 1st of March of this year, when the defendant dug down into said ditch where it was constructed through her property, or caused it to be done, as plaintiff is informed, and took out, or caused to be taken, two whole joints of the tiling which had been planted therein for the purpose aforesaid by the plaintiff, destroying the connection, and obstructing the drainage of plaintiff's property, and rendering useless to plaintiff said underground sewerage, which plaintiff had constructed at great expense. Plaintiff further says that he suffers an irreparable injury and damage to his property by reason of said obstruction; that said ditch or drain was constructed with assent of the defendant; that said assent was given in consideration of the advantages said ditch or drain would be to defendant's prop-

erty in draining it, and for the further consideration of the privilege extended to defendant of tapping said ditch or drain when she desired to drain the water from her residence or otherwise, and for other considerations; and that said right was accepted upon the assent of the defendant, and the said drainage or ditch constructed and used, and said expenditures made, upon that assent. The plaintiff therefore prayed that an injunction be granted him, restraining and enjoining the defendant from further obstructing and disturbing said ditch or drainage, and requiring said defendant to restore and repair said ditch or drainage so obstructed and disturbed by her, and from in any way interfering with plaintiff's rights in said ditch or drain. On the 11th day of March, 1895, an injunction was awarded as prayed for to take effect when the plaintiff, or someone for

up fixtures pending the execution of the written lease is revocable at the will of the licensor without refunding the expenditure. *Potter v. Mercer*, 53 Cal. 687.

A statement by a landowner that if another will dig out a spring on his land, stone it up, and lay pipes to convey the water to the house of the licensee he may have the spring, creates merely a license which may be revoked after the offer has been complied with. *Taylor v. Gerrish*, 59 N. H. 569.

The expenditure of money, where it is for the benefit of the person setting up the agreement and of no advantage to the other person, and the agreement being in point of law of no validity, can scarcely of itself be the basis of a jurisdiction in equity to make that valid which the statute declares shall be void. *Wolfe v. Frost*, 4 Sandf. Ch. 72.

A license to maintain windows in a party wall is revocable at pleasure. *Sweeney v. St. John*, 28 Hun, 634.

If a sewer is placed upon another's land with his consent the license may be revoked at any time notwithstanding any expenditures of the licensee. *Pitzman v. Boyce*, 111 Mo. 387, 19 S. W. 1104. In that case the court approves the doctrine that an easement cannot be granted by parol, although expenditures have been made on the faith of it, and explains *Baker v. Chicago, R. I. & P. R. Co.* 57 Mo. 265, in which contrary sentiments were expressed, upon the ground that in that there had been a deed executed and delivered in escrow granting a right of way.

A parol license to enlarge a canal across the land of the licensor gives no permanent right to maintain the enlarged work. *Selden v. Delaware & H. Canal Co.* 29 N. Y. 639.

A parol license to use water from a pond for the use of a mill is revocable, although the mill and pond are completed in reliance upon it. *Edinburgh Life Assur. Co. v. Barnhart*, 17 U. C. C. P. 63.

A parol license to one engaged in erecting a building, that the water from the eaves may be permitted to drop upon the property of the licensor, is revocable at the pleasure of the licensor notwithstanding the completion of the building. The court says there is not a single element that would take the case out of the operation of the statute of frauds. No consideration was paid for the pretended right, no possession taken on the land other than turning water from the roof of the building upon it. *Tanner v. Volentine*, 75 Ill. 624.

A parol license to overflow the land of the licensor is revocable, although it has been acted 49 L. R. A.

on by the licensee, and although valuable improvements have been erected in pursuance thereof. *Woodward v. Seely*, 11 Ill. 157, 50 Am. Dec. 445. In that case the court says, if one man can acquire by parol the right so to use another's land as to render it useless to the owner, it will be taking but a short and easy step, and going very little further, to hold that he may acquire the title itself by parol; for of what avail is it to a man to have the naked title to a piece of land which he cannot use, but which in spite of him another has the right to keep forever covered with water? It makes no difference that the licensee may have acted upon the license and erected valuable buildings which would be worthless in case the license is revoked; before acting so imprudently he should have acquired permission by deed to overflow the land of the licensor.

The court said of that case it is not the case of a parol purchase of land where the purchaser contracts to pay the value of the land, enters into possession, and makes valuable improvements, when a court of equity will compel the vendor who has received the purchase money to make a title to the land.

In *Kamphouse v. Gaffner*, 73 Ill. 453, where expenditure under a parol license to work a mine was relied on to make the license irrevocable, the court refused to recognize that doctrine. It said *Russell v. Hubbard*, 59 Ill. 335, where contrary sentiments had been expressed, must either be limited to cases of party walls, or be considered as overruled. On mature consideration we are unwilling to announce the doctrine that, notwithstanding the prohibition of the statute of frauds to the contrary, an interest in lands which cannot be terminated by revocation may be acquired by parol license which a court of law will recognize and protect. We still preserve the distinction between law and equity, however, and to what extent a court of equity might enforce specific performance or grant relief on account of hardship resulting from revocation by the licensor is another question, and one that we cannot now properly consider.

In *Glynn v. George*, 20 N. H. 114, a structure, erected by a person who had entered land under a parol license, was destroyed by the owner of the land, and he was held justified in so doing, although there was no discussion of the revocability of the license.

IV. Writing is necessary.

The right to have water flow in a tunnel over the land of another cannot pass by parol

him, should execute bonds therein required, in the penalty of \$300, which order was complied with. The defendant demurred to the plaintiff's bill, claiming that it was not sufficient in law: First, because the bill does not show upon its face that there was some note or memorandum in writing, signed by the party to be charged thereby, or his agent, giving the plaintiff the easement or right claimed in his bill; second, because the bill does not clearly and specifically set forth the grounds for the alleged irreparable injury to the plaintiff, so that the court may pass upon the facts thus alleged as a matter of law. The defendant Margaret N. Brown filed her separate answer, putting in issue the material allegations of the plaintiff's bill. Several depositions were taken by the plaintiff and defendant, and on February 25, 1896, the cause was finally heard, and it was

decreed that said demurrer of defendant be overruled; and the court being of opinion that the cause was for the plaintiff, and that he was entitled to the relief prayed for in the bill, perpetuated said injunction, and perpetually restrained and enjoined the defendant, Margaret N. Brown, from disturbing or obstructing the drain in this cause mentioned, and from this decree the said Margaret N. Brown obtained this appeal.

The first error assigned and relied upon was claimed to be in perpetuating the injunction awarded to the plaintiff; the second error was claimed to be in overruling the demurrer of the defendant to the bill; and the third, in denying the defendant affirmative relief prayed for in her answer. The first two assignments of error are so intimately connected, both being dependent upon questions of law and fact suggested by

license without deed. *Fentiman v. Smith* (1803) 4 East, 107.

In *Wood v. Leadbitter* (1845) 13 Mees. & W. 838, 14 L. J. Exch. N. S. 161, which was an action of trespass for ejecting plaintiff from a stand, for entrance to which he had paid for the purpose of witnessing a race, the court held that a right to come and remain for a certain time on the land of another can be granted only by deed, and a parol license to do so, though money is paid for it, is revocable at any time, overruling *Taylor v. Waters*, 7 Taunt. 374, 2 Marsh. 551, where it was held that a license represented by a ticket to enter a theater was irrevocable.

To admit a verbal agreement under the guise and name of a contract to permit a permanent easement in, or servitude upon, real property would be to evade and defeat the statute of frauds. *Dorris v. Sullivan*, 90 Cal. 279, 27 Pac. 216.

Permission to overflow the lands of another must be esteemed a power concerning and necessarily relating thereto, which, to be effectual or permanent, must be expressed by deed or conveyance in writing. *French v. Owen*, 2 Wis. 250; *Lockhart v. Geir*, 54 Wis. 133, 11 N. W. 245.

In *Den ex dem. Richman v. Baldwin*, 21 N. J. L. 395, it is said, it seems now well settled upon principle that in order to confer any permanent right or interest in land an instrument under seal is essential, and that a parol license to go and remain for a certain time on the land, though for a valuable consideration, is revocable at the will of the licensor. Lord Mansfield is reported to have said, if a man lets another build on his land it should be pronounced a gift, but the doctrine cannot be supported, and has never been sanctioned.

In *Carleton v. Redington*, 21 N. H. 291, the court says, if a license to erect a dam implies also a license to repair the same at pleasure, it would seem, from many authorities, that the license cannot be sustained. It is said that such a license would give a permanent interest in the land on which the license is to be exercised, and that such an interest cannot be created by parol.

A license to erect a cottage on another's land, and live in it, does not grant any interest in the land within the law governing the acquisition of pauper settlements. *King v. Horndon-on-the-Hill*, 4 Maule & S. 565.

It requires words of grant to create an easement or a permanent interest in realty. *Nunnally v. Southern Iron Co.* 94 Tenn. 397, 28 L. R. A. 421, 29 S. W. 361.

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The right to insert beams in another's wall is an easement which can only be created in writing or by prescription which presumes a grant. *Walker v. Shackelford*, 49 Ark. 506, 5 S. W. 887.

A right to erect dams and overflow land is an incorporeal hereditament which can only pass by grant. *Thompson v. Gregory*, 4 Johns. 81, 4 Am. Dec. 255.

A parol license to erect a market house on the land of the licensor is not binding. *Brown v. Galley, Hill & D. Supp.* 310.

A parol license to place sheds on the property of the licensor is revocable at any time. *Druse v. Wheeler*, 22 Mich. 430.

A claim of right to enter upon the land of another to repair a dam necessary to the workings of a mill, which was originally erected with the consent of the owner of the soil, cannot be maintained but by showing a grant or prescriptive right. The court says a permanent right to hold another's land for a particular purpose, and to enter upon it at all times without his consent, is an important interest which ought not to pass without writing. *Cook v. Stearns*, 11 Mass. 533.

A license to erect a dam which will overflow the land of the licensor can only be given so as to create a permanent right by deed. *Brown v. Woodworth*, 5 Barb. 550.

A parol license that another may abut and erect a dam upon the land of the licensor for a permanent purpose is void within the statute of frauds. *Mumford v. Whitney*, 15 Wend. 380, 30 Am. Dec. 60.

Where there is a license by parol coupled with a parol grant or pretended grant of something which is incapable of being granted otherwise than by deed, there the license is a mere license, it is not an incident to a valid grant, and it is therefore revocable. *Wood v. Leadbitter* (1845) 13 Mees. & W. 838, 14 L. J. Exch. N. S. 161.

V. Duration of right.

A mere parol license being, as shown by the authorities above cited, of no effect to confer an interest in land, it must of necessity, whenever it attempts to confer such interest, be subject to revocation at the will of the licensor. There seems to be no question about this when it is made so expressly.

Where the agreement is that the building shall remain on the soil only at the pleasure of the landowner there will exist a mere parol license revocable at any time. *Laughery Turnp. Co. v. McCreary*, 147 Ind. 526, 46 N. E. 906.

Where one about to construct a mill applies

the pleadings in the cause, that we may consider them together, and in the first case we may consider what is shown by the weight of testimony to have been the true state of facts in regard to the consent or permission given to the appellee by the appellant, Margaret N. Brown, or her husband, Robert L. Brown, to construct the sewer mentioned in the plaintiff's bill across the lot owned by said Margaret N. Brown. Upon this question, Dr. R. L. Brown, in answer to the fifth question asked him, which reads as follows: "State, please, whether you ever made any agreement with the plaintiff, or gave him any consent to dig, construct, or lay that ditch through the lot of the defendant,"—replied: "I never gave him any consent, or any permission of any kind, direct, or indirect, written or verbal, to dig a ditch or use a ditch through the lot of my wife, in Buckhannon,

where I am informed he has dug a ditch 88 feet 9 inches long, and 4 feet deep, for the drainage of his building on the corner, or for any other purpose." On the other hand, Loyd J. Wells, a witness for the plaintiff, in answer to question 2, when asked, "What conversation, if any, did you hear between F. C. Pifer and Dr. R. L. Brown concerning the construction of said ditch through defendant's lot?" answered: "I heard Mr. Brown tell Mr. Pifer he could go through there. I never heard anything said about damages, any way. I heard Mr. Brown say that he might want to tap the ditch some time, and he also said, when he dug the ditch,—when he put the tiling in,—to put the clay dirt on the bottom and the rich dirt on the top. Mr. Brown allowed that it would be an advantage to his lot; that it wouldn't be no disadvantage." And in answer to another ques-

tion to an upper proprietor upon the stream for a grant of a right to flow his land with the mill pond for a specified time, and is expressly refused, but receives permission by parol to flow it at the pleasure of the licensor, equity will not interfere to prevent a revocation of the license, although large expenditures have been made on the faith of it. *Wood v. Edes*, 2 Allen, 578.

If the license is by its terms revocable at will, the execution of it will not prevent its revocation. *Hall v. Chaffee*, 18 Vt. 150.

A mere license to erect and maintain a dam during the pleasure of the licensor will not estop the licensor from revoking it when expenditures have been made upon the faith of it, since the licensee will make the improvements with full knowledge of the rights of the licensor, and the improvements are for his own benefit, and not to improve the estate. *Risien v. Brown*, 73 Tex. 135, 10 S. W. 681.

Whatever disagreement there may be about the right to enforce the agreement against the licensor, there is practical unanimity that it is not binding on his assignee without notice.

Specific performance will not be decreed of a parol agreement to sell the right to back water on a mill site as against grantees of its owner who purchased without notice, although large expenditures have been made in erecting a dam on the faith of the agreement. *Hamilton Woolen Co. v. Moore*, 25 Fed. Rep. 4.

A parol license to use a wall in the erection of a building will not be binding upon a subsequent grantee of the licensor, but he may in equity compel the owner of the building to disconnect it from the wall. The court says the fact that the plaintiff will suffer no substantial injury if the wall remains as it is, while the defendants will suffer heavy loss if the wall is removed, and they are thus compelled to take out their timbers and erect a new wall on their own land to support their building, cannot give them a right to use the plaintiff's property if they have no legal interest therein. *Hodgkins v. Farrington*, 150 Mass. 19, 5 L. R. A. 209, 22 N. E. 73.

An oral license to erect and continue a mill dam on one's land is of no validity as against his subsequent grantee. *Stevens v. Stevens*, 11 Met. 251, 45 Am. Dec. 203.

A written license not under seal, to enter upon land and lay pipes for the conveyance of water, although executed, does not constitute an encumbrance upon the property, since a permanent right to enter upon and hold another's land for a particular purpose without his consent is an important interest which should pass 49 L. R. A.

only in the mode and by the instrumentalities provided by law, in the absence of which they will not be available as against innocent purchasers for value. *Wilkins v. Irvine*, 33 Ohio St. 138.

A parol license to maintain a cornice over the land of the licensor, and convey water from it through pipes upon the licensor's building, is revocable at pleasure, and will be revoked by the conveyance of the property by the licensor. *Winne v. Ulster County Sav. Inst.* 37 Hun. 349.

The right to overflow land without paying damages cannot be established by proof of a parol license from the owner's grantor. *Seidensparger v. Spear*, 17 Me. 123, 35 Am. Dec. 234.

In *Clark v. Close*, 43 Iowa, 92, it is said, where a person is engaged in erecting a dam which will cause the overflow of certain land, and another person, without knowing of the dam, purchases the land and pays for it, we do not think that the person erecting the dam has a right to proceed and overflow the land because he obtained a license from the vendor before the sale, and has expended money on the strength of it.

A license to place a building on land is not enforceable at law against the grantee of the licensor without notice. *Prince v. Case*, 10 Conn. 375, 27 Am. Dec. 675. In that case the court says: "The policy of our law is that titles to real estate shall appear upon record so that all may in this way be informed where the legal estate is. But were this new mode of conveyance to prevail, encumbrances might frequently be found to exist against which no vigilance could guard, no diligence protect. Our records would be fallacious guides; and when we had gained all the information they could give we should remain in doubt as to the title. It is much better to leave those who had ventured to rely upon the word or honor of another to resort to that word or honor for their redress, than to suffer a person who had resorted to the official register to be defeated by secret claims of this kind. The law cannot prefer the claims of those who take no care of themselves, to those who have faithfully used all legal diligence."

So, a parol license to erect a building on land cannot run with the land and bind the inheritance. *Perry v. Fitzhowe*, 8 Q. B. 757, 15 L. J. Q. B. N. S. 239, 10 Jur. 799.

One whose land is overflowed by a mill pond may recover damages therefor, although his ancestor consented by parol to the erection of the dam and the consequent overflow of the

tion this witness stated that this conversation occurred some time in December. Spencer Boylen, another witness for the plaintiff, in his deposition says, "Mr. Pifer said he would see Mr. Brown, and see if he could get permission," in response to a question asking, "What conversation, if any, did you hear between F. C. Pifer and Dr. R. L. Brown concerning the construction of a ditch through the lot of the defendant, as laid down on the plat by a green line?" The witness proceeds as follows: "A few days after, Mr. Pifer was there on the work. He said he would go and see Mr. Brown about getting permission. He was gone some little time, and he and Mr. Brown came up on the wall where we were at work. The first thing that I remember of hearing Mr. Brown say was, 'Be sure and put it low enough, so it will not interfere with my garden.' Mr.

Pifer told him he would do that; that it would have to go into the ground pretty deep, so it would drain from the bottom of his cellar. They talked on there for some little time about the putting up of a wall and the building, and the last thing I remember of hearing Mr. Brown say was to be sure, when they put back the dirt, to put the good dirt on top." A. B. Clark, another witness for the plaintiff, was asked this question: "State what you may know of an agreement between F. C. Pifer and Dr. R. L. Brown to drain the cellar of F. C. Pifer by digging a ditch through Mrs. Brown's lot to intercept the drain or ditch through N. C. Louden's lot." Replied: "Well, I heard a conversation between Dr. Brown and Mr. Pifer in regard to it. A part of the conversation I did not get, but the end or finishing up of the talk I heard. About the last thing I heard

land. *Bridges v. Purcell*, 18 N. C. (1 Dev. & B. L.) 492; *McCracken v. McCracken*, 88 N. C. 272; *Harris v. Miller*, Meigs (Tenn.) 158, 33 Am. Dec. 138.

Ordinarily a parol license is regarded as a personal privilege, which is destroyed by an attempt to assign it.

A parol license to be exercised upon the land of another is a mere personal trust and confidence, and is not assignable, and, although it may be binding on the parties, it will not pass to a purchaser. It is not an easement carrying an interest in land. *Cowles v. Kidder*, 24 N. H. 364, 57 Am. Dec. 287.

Sale of a dam erected under a parol license to overflow adjoining land will operate as a revocation of the license. *Carleton v. Redington*, 21 N. H. 291.

A parol license to construct a railroad over the land of the licensor is revoked by an assignment of the road. *Blaisdell v. Portsmouth*, G. F. & C. R. Co. 51 N. H. 483.

But in one case it was held that where a valuable consideration is paid for the license, and a structure is erected in accordance therewith at large expense, the right to maintain the structure may be assigned. This is put upon the ground that the license was an executed one. *Tytus Gardner Paper Co. v. Middletown Hydraulic Co.* 15 Ohio C. C. 118.

Some of the courts which have undertaken to enforce the contract against the licensor have attempted to limit the duration of the license by the supposed necessity of the structure to be erected.

A license to place a dam and fish traps in a river will not permit their renewal after they have been swept away by the water. *Wingard v. Tift*, 24 Ga. 179.

A license to lay an aqueduct across land of the licensor may be revoked upon the decay of the aqueduct. *Allen v. Flske*, 42 Vt. 402.

A parol license to erect a dam to flow lands terminates with the decay of the dam. *Cowles v. Kidder*, 24 N. H. 364.

A license to erect a dam for a temporary purpose will terminate with the fulfillment of the purpose. *Hepburn v. McDowell*, 17 Serg. & R. 383, 17 Am. Dec. 677.

The destruction of the works which were licensed will amount to a termination of the license. *Veghte v. Raritan Water Power Co.* 19 N. J. Eq. 153.

After the license has been enjoyed a sufficient time to compensate the licensee for his outlay it may be revoked. *Augusta v. Burum*, 93 Ga. 68, 26 L. R. A. 340, 10 S. E. 820.

Where, in accordance with a verbal license, 49 L. R. A.

a dam is erected in such a way as to flow the land of the licensor, the licensee will have a right to maintain the dam until he has had a reasonable time to dispose of the water, and until such reasonable time has elapsed the license is irrevocable without tendering to him the expenses which he has incurred. *Woodbury v. Parshley*, 7 N. H. 237, 26 Am. Dec. 739.

VI. Exception in case of abandonment or change of easement.

There are a few cases which have held that an easement may be changed or abandoned by parol. Since this is not the creation of any interest in land, it would seem that these decisions were correct on principle, and they have been generally so considered.

Where a landowner permits the improvement of adjoining property in favor of which ancient lights exist, approves the plans, and takes no steps to assert his claim that the alteration of the property will destroy the easement, he will not, after the improvements have been completed at large expense, be permitted to shut off the lights. *Cotching v. Bassett*, 32 Beav. 101, 32 L. J. Ch. N. S. 286, 9 Jur. N. S. 590, 11 Week. Rep. 107.

A parol license to place a covering over an area on the builder's property, through which the licensor receives light and air for a window, cannot be revoked after it has been executed without compensating the builder for the expense which he has incurred. The chief justice said he thought it very unreasonable that after a person had been led to incur an expense in consequence of having obtained a license from another to do an act, and that license had been acted upon, that other should be permitted to recall the license and treat the first as a trespasser for having done that very act. *Winter v. Brockwell* (1807) 8 East, 308.

An owner of a right to flow the land of another with a mill pond may by parol give him the right to erect an embankment on his own property which will reclaim a part of the overflowed land, and this license cannot be revoked after the embankment has been constructed. *Morse v. Copeland*, 2 Gray, 302.

If a parol license is to do that upon the licensee's own land which prevents the further enjoyment by the licensor of an easement on the land, such a license, when executed, is irrevocable, and the effect is to extinguish the easement. *Boston & P. R. Corp. v. Doherty*, 154 Mass. 314, 28 N. E. 277.

If the owner of an easement of light and air licenses the owner of the servient estate to

was: 'Go ahead and put in your ditch; put it down deep,'—about 4 feet it was, I think they said; 'to be careful and fill the earth back so it will not injure my garden.' That was about the amount of it." This witness also fixes the date of the conversation some time in December, 1894. The plaintiff, F. C. Pifer, also testified in the cause that he went to Dr. Brown, and asked license or permission to put down a tiled drain through his (the defendant's) premises. After some conversation in regard to it, Dr. Brown gave him permission to put a drain through his premises, on condition that he would not disturb his garden (which is to say, in a way that would not interfere with his vegetables, growing or planted), or, further, that he should be allowed to tap and use the drain

in case he himself should wish to drain his cellar, or in case of waterworks in Buckhannon, and he should use the water privilege,—have the benefit of the drain to conduct away the waste water. This conversation occurred some time in December, 1894. Witness also states that he began the work of constructing said sewer on the 18th or 19th of January, 1895, and the tiling was laid some three or four days afterwards, and as soon as it thawed sufficiently he replaced the dirt in a workmanlike manner; leaving on the surface the rich or dark soil, as agreed with Dr. Brown. In answer to another question, he says he received a letter from Dr. Brown, from Mt. Iron, St. Louis county, Minnesota, dated January 29, 1895, which was the only letter he had received from him

erect a wall which necessarily obstructs the enjoyment of the easement, and it is erected accordingly, it may amount to proof of an abandonment of the easement. It is not a release because it is by parol. *Dyer v. Sanford*, 9 Met. 395, 43 Am. Dec. 399.

A person having once given his consent to forego the use of an easement, and suffered a person to act upon the faith of that consent, and to incur expense in doing the very thing to which his consent was given, as by erecting a building across a right of way, it is too late for the licensor to retract the consent, or throw upon the licensee the burden of restoring things to their former state and condition. *Vogler v. Geiss*, 51 Md. 407.

An easement in a street may be abandoned by parol. *Hoch v. Metropolitan Elev. R. Co.* 59 Hun, 541, 13 N. Y. Supp. 633.

After the construction of a railroad along a street in front of abutting property in accordance with the parol consent of the owner, such consent cannot be withdrawn so as to compel the railroad company to make compensation for the right to maintain its tracks there. The court said the abutting owner did not own the street or any interest therein. All he was entitled to was damages, and he could by parol waive his right thereto. *Pratt v. Des Moines N. W. R. Co.* 72 Iowa, 249, 33 N. W. 666.

The easement which an abutting landowner has in the street of which he does not own the fee may be abandoned by parol, so that after money has been expended on the faith of the abandonment he cannot revoke his consent. *White v. Manhattan R. Co.* 139 N. Y. 10, 34 N. E. 887, Reversing 45 N. Y. S. R. 760, 18 N. Y. Supp. 396.

In case of a complaint of obstruction of light and air to ancient windows, and the interference with chimney draft and the removal of support for a wall by improvements on defendant's property, it was held a good equitable plea that plaintiff had consented to the improvements on account of which defendant had expended a large sum of money in making them. *Davies v. Marshall*, 10 C. B. N. S. 697, 31 L. J. C. P. N. S. 61, 7 Jur. N. S. 1247, 4 L. T. N. S. 581, 9 Week Rep. 866.

A license to interfere with ancient lights cannot be revoked after the structure has been completed and expense incurred. *Morgan v. Lalley*, 33 U. C. Q. B. 369.

Where a license has been given to divert, at a place upon the land of the licensee, water from a stream which fed the mill of the licensor, the court held that the effect of the license was not to transfer any right or interest whatever in the water, but simply to be an acknowledgment that the licensor wanted the water no

longer for the purpose of his mill, and after he had once signified such relinquishment, and suffered other persons to act upon the faith of it, and to incur expense in doing the very act to which his consent was given, it is too late to retract such consent. This ruling was, however, based upon the erroneous idea that flowing water is *publici juris*, rights in which could be acquired by appropriation, and which would again become public by relinquishment. *Liggins v. Inge* (1831) 7 Bing. 682, 5 Moore & P. 712.

Because the acts in the above cases have for the most part been done on the land of the licensee, a few cases have mistaken that fact as the foundation upon which the decisions rest, and have held that if the act was performed on the land of the licensee that of itself was sufficient to make the license irrevocable. But that fact is not of itself sufficient. If the act casts a burden on the adjoining land, it is immaterial whether it is performed on the land of licensor or licensee.

In *Blood v. Keller*, 11 Ir. C. L. R. 124, which was an action for raising a weir so as to flood plaintiff's land, the authority of cases is recognized which held that a parol license to do an act on the licensee's own land which would prima facie be a lawful act independently of the license, but which might from circumstances be attended with injurious consequences to the licensor, cannot be countermanded if the act be done and completed and expense incurred on the part of the licensee; or that, at least, the licensor cannot insist on the removal of what has been done without putting the licensee *in statu quo* as to the expenditure incurred.

A parol license is valid which permits the diversion of water before it reaches the land of the licensor, so that after expense has been incurred under it it cannot be revoked. *Curtis v. Noonan*, 10 Allen, 406.

The right to divert a stream of water from flowing over land may be granted by parol for a sufficient consideration, and when executed the license cannot be revoked. Such license conveys no estate, interest, or use in the land, and is not within the principle of the registry acts. *Addison v. Hack*, 2 Gill, 221, 41 Am. Dec. 421.

The right to divert the water of a stream is not a mere incorporeal hereditament which can only pass by grant. *Berick v. Kern*, 14 Serg. & R. 267, 16 Am. Dec. 497.

In *Mason v. Hill*, 5 Barn. & Ad. 1, 2 Nev. & M. 747, it is said that the only ground upon which a parol license to divert water from a stream by means of a dam can be irrevocable is that it has been acted upon and expense incurred. But since the facts in the case did not

since he left Buckhannon, a copy of which letter is filed with this deposition, and reads as follows:

Mt. Iron, St. Louis Co., Minnesota,
Jan. 29th, 1895.

F. C. Pifer, Esq.

Dear Sir:—My wife informs me that you have taken the liberty to put a ditch through my premises, and that you said I had given you permission so to do. Under no consideration, and for no money, will I permit a ditch through my place, unless it be terracotta pipe 4 feet under ground, and have outlet clear beyond the premises,—I to be the judge how far beyond; and then only in consideration of \$50 to be paid to my wife on the accept-

ance of the contract by me. If this don't suit you, and you leave the ditch there, I will sue you in 15 days from this date for damages.

Very respectfully,
Robert L. Brown.

Said witness also identified the handwriting of said Robert L. Brown, and stated that he believed this letter to have been written by said Brown, and, when asked in what direction would the surface water from his lot naturally flow, answered, "Towards and through the defendant's lot." Said witness also states that there was a cellar under his building at the time he bought it, and, from its appearance, it has been built for a long time; it was drained by means of a wooden ditch or sewer towards the defendant's prop-

erty. On all these conditions nothing was decided upon that question.

The true doctrine is stated by the New York court as follows: Although the licensee may expend money on his own land solely on the faith of the license, that circumstance does not prevent the parties granting it from revoking it at pleasure without making any compensation for the expenditure; as where a building is erected by one lot owner upon a promise that an adjoining owner will build no nearer the street than the former building is placed. *Wolfe v. Frost*, 4 Sandf. Ch. 72.

That case was followed in *Rice v. Roberts*, 24 Wis. 461, 1 Am. Rep. 195.

That the construction of a culvert by which water is to be diverted upon land of another is upon land not owned by him, will not prevent the revocation of a license to construct it so long as the necessary and unavoidable consequences of its construction will be an exercise on the part of the builder of a right over the land of the licensor and to restrict the domain of the owner of the land; a right which, if made indefeasible by a grant, would burden the land with a perpetual easement. *Foot v. New Haven & N. Co.* 23 Conn. 214.

Parol permission to divert and use water from a stream is a mere license revocable at the pleasure of the licensor. *Jensen v. Hunter* (Cal.) 41 Pac. 14.

VII. Equitable exceptions.

a. Specific performance.

1. General principle.

Whenever in these cases there is a contract for the right to maintain the burden, founded on a valuable consideration, and partly performed by entry into possession and the incurring of expense, the case is brought within the well-known equitable doctrine of specific performance of contracts. Many of the cases which contain statements that licenses are irrevocable after expense has been incurred fall within this principle, and are correctly decided, although placed upon incorrect grounds. There are, however, many cases which have been referred to this principle, which are not properly within it. It would seem needless to state that there can be no specific performance if there is no contract, yet there are numerous cases in which the courts have formulated the contract as well as decreed its performance. On principle such cases are not sustainable.

In order to justify specific performance of an agreement for an easement in land its terms must be definite and certain, the improvements must have been made wholly on the faith of it. 40 L. R. A.

and the remedy at law must be wholly inadequate. *Johnson v. Skillman*, 29 Minn. 95, 43 Am. Rep. 192, 12 N. W. 149.

To enforce an agreement relating to real estate in a court of equity it must be a complete and sufficient contract founded, not only upon a valuable consideration, but its terms defined by satisfactory proof, accompanied by acts of part performance unequivocally referable to the supposed agreement. *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Eckerson v. Crippen*, 110 N. Y. 585, 1 L. R. A. 487, 18 N. E. 443.

A court of equity will not undertake to uphold a license that is not established by clear and satisfactory proof, and the consideration of which has not been fulfilled. It will intervene only to prevent fraud or the infliction of loss resulting from the bad faith of the licensor. *Baltimore & H. R. Co. v. Algire*, 65 Md. 337, 4 Atl. 293.

In case of a license to construct a drain, the court says: Nor can a parol agreement be enforced in equity by way of specific performance. The terms of the contract respecting the ditch are unknown except that one was to have the privilege of draining over the other's lands. The case is bare of evidence showing whether such privilege was intended to be perpetual or limited in duration. It is well settled that a court of equity will not enforce a parol agreement to convey an interest in lands when any of the essential terms of the agreement are left in doubt. *Thoenke v. Fiedler*, 91 Wis. 386, 64 N. W. 1030.

Equity will not enforce the specific performance of a parol agreement in a doubtful case. And where a party sets up part performance to take a parol agreement out of the statute of frauds it is necessary that the contract should be established by competent proof to be clear, definite, and unequivocal in all its terms. *Hazelton v. Putnam*, 3 Pinney (Wis.) 107, 3 Chand. (Wis.) 117, 54 Am. Dec. 158.

Where a tenant obtained permission of his landlord to put ventilators into the leased building at his own expense, for which he gave no valuable consideration and received no deed, it was held that an incorporeal right affecting land could not be created without deed, and that, therefore, the landlord could obstruct the ventilators upon giving notice of his intention to do so. *Aldin v. Clark* [1894] 2 Ch. 437, 63 L. J. Ch. N. S. 801, 8 Reports, 352, 71 L. T. N. S. 110, 42 Week. Rep. 453.

Where a parol license was given to construct a railroad track over land of the licensor partly in anticipation of the railroad embankment making lots of the licensor more available, the court held that the expenditure of money in constructing the embankment and tracks would

erty, entering the defendant's property very near where the new ditch is located,—and further states that said new ditch had been in use about two weeks before it was disturbed. The witness Spencer Boylen, in his deposition, states that the ditch, where it is dug, is the practical and natural drainage of said Pifer lot. He also states that, in constructing said ditch through the defendant's lot, the workmen cut the old sewer which had been used to drain the cellar under the old building about 6 or 8 feet inside of Mrs. Brown's lot. The defendant Margaret N. Brown, in her deposition, says, when asked: "When, and under what circumstances, did you first learn that the plaintiff, Mr. Pifer, was about to construct a ditch through your lot?" "I first learned this on the 21st day of January, 1895, when I saw Mr. Pifer with the surveyor, Mr. Mullins, running a line

diagonally across my garden lot; and on the 22d day of January Mr. Pifer came to my door, and said to me: 'Mrs Brown, I don't want you to think I am taking too much liberty in digging this ditch through your garden, but I spoke to Dr. Brown about it before he left home, and he said it was all right for me to do it, provided I left everything just as I found it; and, for fear he forgot or neglected to tell you, I thought best to come and say to you I was ready to begin it.' I replied, after some hesitancy: 'If you have permission from Dr. Brown to dig this ditch, and to leave everything as you find it, I suppose it is right for you to do it.'"

Now, the question of fact in regard to the understanding and agreement between the plaintiff and R. L. Brown as the agent of his wife, and also the question of fact as to the natural course of the drainage or flow of wa-

not raise an equity which would prevent a revocation of the license. The court says the right to build a railroad track and operate it upon the land of another is an interest in land which can only pass by grant, and an agreement to convey such a right, if not in writing, is clearly within the statute of frauds. If, however, a party verbally contracting for such right enters upon the land and expends money in building the track upon the faith of the owner's verbal promise to convey, and he otherwise performs his part of the agreement, such performance or partial performance will take the case out of the statute, and a court of equity will decree specific performance of the agreement. Specific performance as an equitable remedy, by its very terms presupposes the existence of a contract between the parties to the controversy, for it is absurd to talk of the specific performance of an agreement that has no existence. In the case before the court there was no agreement to convey, but the party constructing the track was acting under a mere license. If any estoppel exists it is what is known as an estoppel *in pais*, and consists in the licensor's having said or done something whereby the licensee has been misled to his injury if the license shall be revoked. Outside of the fact of revoking the license there is no ground for the claim that the licensee has in any way been deceived or misled by the licensor. Permission was given to build the track. No deception was practised. If the licensee saw proper to enter upon the licensor's land, and expend money in constructing its track upon a mere parol license, which as matter of law it is conclusively presumed to have known was revocable at the pleasure of the licensor, it was his own folly. Suppose the licensee had concluded it was to its interest to take up the track altogether, it would unquestionably have had the right to do so, however much the licensor would have been injured in consequence of it. On principle there ought to be some mutuality in this respect. To say that the license is irrevocable because the thing permitted to be done only involved the expenditure of money would be going beyond the most extreme views on the subject, and make most licenses irrevocable. The practical effect of such a doctrine would be to make most licenses conveyances of an interest in land by mere estoppel *in pais*. St. Louis Nat. Stock Yards v. Wiggins Ferry Co. 112 Ill. 384, 54 Am. Rep. 243.

The doctrine of that case was followed in Stoddard v. Filgur, 21 Ill. App. 560, and Lake Shore & M. S. R. Co. v. Hoffert, 40 Ill. App. 631. The Wyoming court says: Suppose the own-

er of land, without going so far as to make a complete contract, specific in all its material terms so as to be capable of definite proof and of enforcement, shall stop short of that, but shall, by other inducements, influence other persons to invest money and labor on his lands with a positive assurance that their possession shall not be interfered with, and that they should eventually receive titles covering their improvements, and that he should stand by, permit, and continue to encourage these investments in execution of the promise he had given them, to erect improvements and make their homes upon his land. If he should then revoke their license, bring ejectment to expel them from their homes they had built, and interpose the statute of frauds in bar of all relief to them, would his conduct be less a fraud than in the case of refusal to perform a complete contract? It is then said when the law says that a parol contract for the sale of land conveys no estate under the statute of frauds equity does not deny it. But when, by virtue of such contract, the vendee has been put in possession of the land, induced to make valuable improvements thereon of which he would be defrauded and robbed by excluding him from the possession, and where a judgment would not afford adequate relief, equity steps in and says the vendor shall not accomplish this fraud by enforcing his legal title in ejectment, but that he shall make a deed of the land conveying an estate in accordance with the terms of the parol contract. When the law says that a parol license will not give the licensee a permanent interest equity will not deny it; but when, by virtue of such license, the licensee has been put in possession and induced to put valuable improvements on the land, of which he will be defrauded and robbed by a revocation of the license, equity will interpose and either forbid the licensor to revoke the license or impose such terms as will avoid the fraud and accomplish what justice and good conscience demand. It is further said that when through inducements held out by one person, even only by means of a promise, by which another is influenced to change his position so that he cannot be placed *in statu quo*, and will be seriously damaged unless the promise is fulfilled, then the refusal to perform is fraud. Further, that cases may arise, and have arisen, where a license to occupy land has been intended and understood as a mere personal favor to the licensee to give him a place to live or to occupy for some other beneficial purpose which is revocable at will. In other cases the granting of the license has been in terms an assurance of permanent possession.

ter from the plaintiff's lot, although there may be some conflict in the testimony with reference thereto, were passed upon by the court, which by its final decree found in favor of the plaintiff; and this court has held, in the case of *Smith v. Yoke*, 27 W. Va. 639 (first point of syllabus), that "where the decree sought to be reversed is based upon depositions which are so conflicting, and of such a doubtful and unsatisfactory character, that different minds and different judges might reasonably disagree as to the facts proved by them, or the proper conclusion to be deduced therefrom, the appellate court will decline to reverse the finding or decree of the chancellor, although the testimony may be such that the appellate court might have pronounced a different decree if it had acted upon the cause in the first instance." And the same thing is held in the case of *Doonan*

v. Glynn, 28 W. Va. 715; *Prichard v. Evans*, 31 W. Va. 137, 5 S. E. 461; *Bartlett v. Cleavenger*, 35 W. Va. 720, 14 S. F. 273. Now, the court below found the fact that Robert L. Brown, acting as the agent of his wife, consented to the construction of this sewer under the lot which belonged to his wife; the appellant, Margaret N. Brown, at the time the appellee was about proceeding to open the ditch through her lot for the purpose of laying down the tile, having, as she states in her testimony, told the appellee that if he had permission from Dr. Brown to dig this ditch, and to leave everything as he found it, she supposed it was right for him to do so. The evidence shows that he did have permission from Dr. Brown, and it also shows that the work was done in the manner that Dr. Brown said it must be done, in the letter written to the appellee from Minnesota,

It is evident that the same rule cannot apply to both classes of cases. The revocation of the license, even after expenditure is made in consequence of it, in the first case is a right, in the other a fraud. When we have traveled through the mass of decisions, cloudy and conflicting, and have arrived at the principle that equity will relieve when there is fraud, we have arrived at a principle in regard to which there is no conflict. *Metcalf v. Hart*, 3 Wyo. 513, 27 Pac. 900, 31 Pac. 407. But in that case the court held that there was no fraud, and that because of the circumstances of the case there could be no decree for specific performance, but the licensee was allowed the value of his improvements.

Where a person obtained land from another for the purpose of building a house, for which he paid an annual ground rent, and upon an attempt to revoke the tenancy brought an action to compel the granting of a lease for a term similar to those held by other tenants, the court held he was not entitled to the relief, saying that if a stranger builds on my land, knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure on it. The tenant knew the extent of his interest, and it was his folly to expend money upon a title which he knew would, or might soon, come to an end. But, it is further held, that if, when the improvements are made, the tenant acts under the belief that he has an absolute right to a certain kind of lease, and the landlord encourages him in that belief, equity might compel the landlord to grant it. Lord Kingsdown, dissenting, said if a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such permission or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a court of equity will compel the landlord, to give effect to such promise or expectation. He further says, if there appears to be such uncertainty as to the particular terms of the contract as might prevent a court of equity from giving relief if the contract had been in writing, but there had been no expenditure, a court of equity will nevertheless interfere in order to prevent fraud. There has been a difference of opinion among great judges as to the nature of the relief to be granted, but no doubt was entertained by any of them that, either in the form of a special in-

terest in the land or in the shape of compensation for expenditure, a court of equity would give relief. On the other hand, if a tenant, being in possession of land and knowing the nature and extent of his interest, lays out money on it in the hope or expectation of an extended term, or of allowance for expenditure, when any such hope or expectation has not been created or encouraged by the landlord, the tenant has no claim which any court of law or equity can enforce. *Ramsden v. Dyson* (1865) L. R. 1 H. L. 170, 12 Jur. N. S. 506, 14 Week. Rep. 926.

The uncertainty in the contracts is usually as to the duration of the interest. The different views may be illustrated by the two following cases:

In *Heyl v. Philadelphia, W. & B. R. Co.* 31 Pa. 469, the court, in distinguishing the cases in which it was held that the executed parol license was irrevocable, says, in such cases the expenditure of money in pursuance of the license can be accounted for on no other presumption than that of a mutual understanding that the privilege should remain unrevoked.

In *Benedict v. Benedict*, 5 Day, 468, Swift, J., says it has been contended that the nature of a parol license to place a building on another's land is an agreement that the building shall remain on the land so long as it shall last; and, being executed in part, a court of law can carry it into effect. But I apprehend that the real contract is that the house shall continue on the land during the pleasure of the owner of the land. At any rate, what is conclusive on this point is that if a parol license, even when carried into effect, will give the builder a right to continue the house so long as it shall last, and to maintain ejectment for it, then real estate may be transferred by parol, which is directly contrary to the statute.

Of course the intention of the parties is to govern, and there are usually sufficient circumstances to manifest such intention. If the intention can be found it will be given effect.

An old treatise on frauds, cited in *Parkhurst v. Van Cortland*, 14 Johns. 15, 7 Am. Dec. 427, lays down the doctrine of part performance as follows: Where an owner of land has encouraged another to go on with his improvements upon the estate under a false expectation of a conveyance or a lease, and this expectation raised in him by the assurance of such owner, it is agreeable to the general course of equitable relief to disappoint the contrivance by compelling the deceiver to realize the expectation he has created.

dated January 29, 1895. And the evidence clearly showing, if the witnesses who were examined are to be regarded as entitled to equal credibility, that the plaintiff, Pifer, had a verbal permission from the defendant Brown to construct this underground drain through and under the lot belonging to his wife in the manner he did, it is clear that the plaintiff made no misrepresentation and practised no fraud upon the defendant Margaret N. Brown in the absence of her husband. And the evidence further shows that said R. L. Brown acted as the agent of his wife in matters of this character, and it appears from her own testimony that she was willing to submit to his judgment, defer to his opinion, and abide by the agreement made by him in this matter. At any rate, she so expressed herself when approached by the plaintiff on the day he was about proceeding to open the

ditch. We must therefore say that the court committed no error in finding that a parol license was given to the plaintiff to construct said underground drain through and under the defendant's lot, and that in pursuance of said license, and in accordance with its terms, said underground drain was constructed. The question, then presented by the record, is whether such license, after it has been acted upon and executed, can be revoked at the will of the licensor. Upon this question the authorities are conflicting, and the question is, to some extent, dependent upon the circumstances surrounding each particular case. The defendant Margaret N. Brown was present and saw this work progressing when the plaintiff proceeded to dig the ditch, and the only restriction she placed upon her unqualified consent to the work being done as the plaintiff proposed

2. Illustrative cases.

If possession is taken under a license founded on a consideration there is sufficient to take the case out of the statute of frauds. *Robinson v. Thrailkill*, 110 Ind. 117, 10 N. E. 647.

If, in obedience to a request from the government, a private person builds a jetty into tide water for the accommodation of shipping, including business carried on by the government, the government will not be permitted afterwards to revoke the license, but it will be perpetual. *Plimmer v. Wellington*, L. R. 9 App. Cas. 699, 53 L. J. P. C. N. S. 104, 51 L. T. N. S. 475, 49 J. P. 116.

Where as part of the consideration of a purchase of real estate, it was agreed that the purchaser should have a right to use water from a spring on the land of the grantor, which agreement was by mistake not inserted in the deed, the court held that the agreement was more than a license. It was an agreement for a purchase. A valuable consideration was paid for it. It was part of the sale of the real estate. Upon the faith of it the dwelling house was purchased, and the purchaser expended money in laying pipes and fitting the house for use of the water. Of this agreement a court of equity will not hesitate to decree specific performance. *Legg v. Horn*, 45 Conn. 415.

A written contract for an easement in land, founded upon a consideration and executed by one of the parties, gives a greater right than a mere revocable license. *Willoughby v. Lawrence*, 116 Ill. 11, 56 Am. Rep. 758, 4 N. E. 350.

Where a bond for a deed was given on consideration that the grantee should make and keep open a ditch on the premises for the benefit of other property of the grantor, it was held that, although this agreement was not under seal, yet, there being a mutual agreement between the parties to do certain things which had been executed by one of them, justice required that it should be performed by the other, or an equivalent rendered in damages. *Van Ohlen v. Van Ohlen*, 56 Ill. 528.

Specific performance may be decreed of a parol contract to permit the maintenance of a bridge abutment upon the land of the grantor in consideration that his customers be allowed to pass over the bridge free of toll. *Hall v. Boyd*, 14 Ga. 1.

After a drain has been constructed over the land of a licensor under a parol license for which there was a consideration he will not be permitted to revoke the license so long as the 49 L. R. A.

necessity for the drain continues. The foundation for this doctrine is stated to be to prevent the one party from taking advantage of the want of a formal writing to work a fraud upon the other. *Morton Brewing Co. v. Morton*, 47 N. J. Eq. 158, 20 Atl. 286.

Where, under a parol agreement for compensation, a watercourse was constructed across land, and enjoyed for nine years, the court said, the work having been effected and used for nearly ten years, the landowner could not prevent the licensee from enjoying the right; and a reference was made to a master to ascertain the amount to be paid for the use of the land. That was a case where the watercourse was to supply the inhabitants of a town with water. *Devonshire v. Eglin* (1851) 14 Beav. 530, 20 L. J. Ch. N. S. 495.

If a consideration has been paid for the right to impose a servitude upon another's property, and possession has been taken, and improvements made, on the faith of it, equity will decree a specific performance of the contract. *Wetmore v. White*, 2 Cal. Cas. 87, 2 Am. Dec. 323.

A license for a consideration paid to erect fixtures on the land of the licensor gives the right of possession to control, repair, and protect the fixtures against the owner of the fee. This is placed upon the ground that part performance of a parol contract, especially when the nonexecution would operate as a fraud on the rights of the vendee, has been repeatedly enforced in equity. *Wilson v. Chalfant*, 15 Ohio, 248, 45 Am. Dec. 574.

When a valuable consideration is given for a right to construct a ditch over another's property, and the ditch is constructed and used for many years, equity will protect the rights of the licensee. *Baldock v. Atwood*, 21 Or. 73, 26 Pac. 1058.

In *Hervey v. Smith* (1856) 22 Beav. 299, where, for a consideration, the owner of a building allowed another to construct chimney flues in the wall, the master of the rolls, in deciding that the use could not be interfered with, said, where an easement is sold by the owner of land, and is enjoyed for years, this court would hold that the agreement had been performed in every part except the conveyance, and would not allow it to be recalled. The contract being complete, the money being paid, and the possession being given, this court will prevent the possession being interfered with by the vendor, although the purchaser does not ask for a specific performance of the contract.

Where, upon a valuable consideration, a landowner permits by parol the erection of a

was that it should have been authorized by her husband. That it was so authorized, we must say that the circuit court was fully warranted in finding from the testimony.

This brings us to the question as to the legal effect of a parol license of this character. Will a court of equity allow it to be revoked, at the pleasure of the licensor, after money has been expended and the work completed in pursuance of the license, before the licensee has had any opportunity to derive any benefit from his expenditure and labor? Under the head of "Rights by License," Chancellor Kent says, in vol. 3, p. 452: "The law is solicitous to prevent all kinds of imposition and injury from confidence reposed in the acts of others; and a parol license to do an act on one's own land affecting injuriously the air and light of a neighbor's house is held not to be revocable by such

neighbor after it has been once acted upon, and expense incurred. Such a license is a direct encouragement to expend money, and it would be against conscience to revoke it as soon as the expenditure begins to be beneficial. The contract would be specifically enforced in equity. Such a parol license to enjoy a beneficial privilege is not an interest in land, within the statute of frauds." Authorities not wanting in respectability may be found on both sides of this question. So, in the case of *Le Fevre v. Le Fevre*, 4 Serg. & R. 241, 8 Am. Dec. 696, cited in Washburn on Easements, p. 441, the facts were as follows: The owner of a parcel of land sold a part of it to the owner of a tanyard, together with a right to draw water by pipes laid in the earth along a designated line through the vendor's land from a stream on his land to the vendee's tan-

dam, canal, and water wheel upon his property, equity will not permit him to revoke it after the license has been acted upon. *Meetze v. Charlotte, C. & A. R. Co.* 23 S. C. 2.

The construction of a ditch across another's property in consideration that the latter have the right to use the water therein for irrigation purposes will create a property right which cannot be revoked. *Huston v. Bybee*, 17 Or. 147, 2 L. R. A. 568, 20 Pac. 51.

In *Olmstead v. Abbott*, 61 Vt. 281, 18 Atl. 315, there was a contract that in consideration that the licensee would purchase a mill site and erect a mill and dam thereon the licensor would give the right to flow his land for a mill pond. The court held that after the completion of the dam it was too late for the defendant to revoke the license he had given. The court says a refusal to carry out the agreement, though resting in parol, is considered a fraud of that kind which gives a court of equity jurisdiction and power to decree specific performance as the only way in which the licensee can have adequate redress. It is a fraud practised under pretense of an agreement, but there is such a part performance that the case is taken out of the statute.

An agreement to permit the penning back of water to raise a mill pond in consideration of the construction of a road across the property of the mill owner for the use of the licensor may be specifically enforced after the road has been opened and used by the licensor, and the pond has been constructed and used for some time, the court saying it is really not so much a case of part performance as of complete performance on both sides. The chancellor in that case, however, says: "I think it is to be regretted that this exception to the application of the statute of frauds is nowadays upheld. Now, men have no difficulty in reducing or procuring to be reduced into writing their bargains." *Nicol v. Tackaberry* (1863) 10 Grant, Ch. (U. C.) 109.

If there is an agreement for an easement, based upon a consideration, and executed, equity will enforce it. *Dempsey v. Klpp*, 61 N. Y. 462.

A parol license for value to flow lands by a mill dam is irrevocable after it has been executed. *Lacy v. Arnett*, 33 Pa. 169.

Where upon a valuable consideration a landowner gives a parol license to another to dig and forever maintain a ditch across his land, under which possession is taken and expense incurred, there is sufficient part performance so that equity will decree specific performance of the contract. *Adams v. Patrick*, 30 Vt. 518. 49 L. R. A.

In *Hendry v. English*, 18 Grant, Ch. (U. C.) 119, which was a case of verbal permission to flood land by a dam 9 feet high, and the dam was built only 7 feet, 6 inches high, after which an attempt was made to raise it to the height originally intended, the chief justice said, I do not in any respect question the law that if a landowner under a verbal agreement, or, what amounts to the same thing, under an expectation created or encouraged by another landowner that if he will do a certain thing involving the expenditure of money, he will grant him a certain privilege upon his own land, and, upon the faith of such permission or expectation lays out money in doing what it was contemplated he should do with the knowledge of the other landowner and without objection by him, a court of equity will compel the other landowner to give effect to such permission or expectation. This doctrine is only applicable on the ground of fraud; and the court will prevent a party using the statute of frauds to sustain or further fraud.

When a landowner gives by parol license to another the right to erect a part of a mill dam on the grantor's land, and to overflow a part of that land in the view of benefiting his own estate and at the expense of large sums of money, the licensee executes the contract, builds the dam and a mill useless without it, and thereby does benefit the grantor's estate, equity will not permit the grantor to revoke and annul the license at will and without remuneration, but the contract being executed, and money expended on its execution, equity will hold the grantor to the continuance of the license unless he pay the licensee for its revocation. *Southwestern R. Co. v. Mitchell*, 69 Ga. 114.

If one about to change the tall race of his mill agrees with the owner of the land over which the new race is to run as to the amount to be paid therefor, and the latter accepts that sum and consents to the improvements, he cannot, after the money is expended on the faith of the agreement, revoke the license unless the licensee can be placed *in statu quo*. *Test v. Larsh*, 76 Ind. 402.

Where under a parol agreement a landowner permitted another to construct an irrigation ditch across his property in consideration that he should have one half the water flowing through it, the court said the object to be attained by the agreement was that the maker of the ditch was to acquire by purchase a right of way over the land of licensor. He was seeking to acquire something more than a mere

yard. After these pipes had been laid and used for a considerable time, it was orally agreed between the parties that they should be taken up and laid in another place than the line indicated by the deed, which was accordingly done by the vendee at his expense. After lying in this situation for six or seven years in connection with the business of the tanyard, the owner of the latter sold the same, with the water right which he had purchased, to the present plaintiff. Soon after this the original vendor cut off the pipes within his own land, and stopped the flow of water therein to his tanyard, and for this the plaintiff brought his action. The court held: That, as the pipe was laid in the manner indicated by the owner of the land at the expense of the owner of the tanyard, a court of equity would treat the latter as owning the right to maintain it there—First,

license or authority to do a particular act or series of acts on another's land without possessing any estate therein. The transaction was in the character of a purchase by one party and sale by the other, of a right of way for a ditch. The licensee to enter and construct the ditch was vested by a contract of purchase for a valuable consideration. It would be highly inequitable after the work has been done and money expended to allow the landowner to recall his consent, fill the ditch, and cut the one doing the work off from the use of it. There has been part performance and possession under the agreement, and though the agreement rests in parol the party is entitled to specific performance. To refuse specific performance under the circumstances would be to sanction fraud and allow a statute passed for the prevention of fraud to become the means of accomplishing fraud. *Flickinger v. Shaw*, 87 Cal. 126, 11 L. R. A. 134, 25 Pac. 268.

In *Big Mountain Improv. Co.'s Appeal*, 54 Pa. 372, there was a contract for an exchange of lands.

The Illinois court seems to have had some needless trouble with one of its decisions.

In *Russell v. Hubbard*, 59 Ill. 335, the court held that where the owner of a brick building agreed with the owner of adjoining property, who was contemplating the erection of a frame house on his land, that if he would build of brick he might use the wall of the grantor's house as one of his walls, after the proposition was accepted and the house built, the license could not be withdrawn, although resting merely in parol. The court says, where money or labor has been expended on the faith of such license the law will interpose to protect the licensee. The revocation under such circumstances will be fraudulent, and compensation in damages would afford no adequate redress. In such case the execution of the parol permission would supply the place of a writing to take the case out of the statute of frauds. The grantor is estopped from revoking the license. All the elements which constitute an estoppel exist. The erection of the particular building was induced by agreement: it was relied upon, and pecuniary injury must follow if it is allowed to be controverted.

That case would seem to be well within the principles governing the specific performance of contracts, but the court, instead of standing by it on that ground, has attempted to distinguish and limit it as applying only to cases of party walls.

In *Forbes v. Balenselfer*, 74 Ill. 183, which was a license for a right of way, the court says 49 L. R. A.

by having incurred expense in laying it down under an agreement with the landowner that he should have such right; and, second, by his being in possession. That the court would require the landowner to execute this agreement on his part, and would have granted an injunction to prevent the landowner from prosecuting a suit at law for laying down the pipe, and that courts of law would not suffer him, under these circumstances, to take the law into his own hands, by cutting or destroying the aqueduct. To the suggestion that the laying down of the pipe was done by a parol license only, which was revocable, the court held that after being executed, and expense thereby incurred by the licensee, it could not be revoked, so as to make the licensee a wrongdoer. This case, it is believed, states the doctrine on this subject in Pennsylvania,

of *Russell v. Hubbard*, in that case the doctrine was limited to cases where a large sum of money had been expended under the license partly for the benefit of the licensor, and the position of the licensee had been so changed at the request of the licensor that he could not, on the revocation of the license, be restored to his original position or be compensated in damages, and, having been induced by the licensor so to act, it would have been a fraud to permit a revocation. It was there only intended to hold that cases might arise when to revoke would be a great wrong and oppression and amount to a fraud on the part of the licensor, such as a court would interpose to prevent by holding that he was estopped from revoking the license.

This doctrine has been carried to its full limit in cases of parol gifts which have been upheld. If there was to be no consideration, but an out and out gift was intended which had been executed to such an extent that to refuse to carry it out would be a fraud on the donee, the case would seem to be one calling for specific performance.

In *Dillwyn v. Llewelyn*, 4 DeG. F. & J. 517, 8 Jur. N. S. 1068, 10 Week. Rep. 742, 6 L. T. N. S. 878, it is said if A puts B in possession of a piece of land, and tells him, "I give it to you that you may build a house upon it," and B, on the strength of that promise, with the knowledge of A, expends a large sum of money in building a house accordingly, the donee acquires a right from the subsequent transaction to call on the donor to perform that contract and complete the imperfect donation which was made.

A parol promise to give land to another, accompanied by actual delivery of possession, will be enforced in equity by decree for specific performance, where the promisee, induced by the promise, has made substantial expenditures upon the premises with the knowledge of the promisor. The consideration for the promisees is found in the fact that anything that may be detrimental to the promisee in legal contemplation will constitute a good consideration for the promise. *Freeman v. Freeman*, 43 N. Y. 34, 3 Am. Rep. 657.

A parol agreement to make a deed of land for the erection of a schoolhouse will constitute an irrevocable license after the house has been erected, so long as it is used for school purposes. *Agnew v. Jones*, 74 Miss. 347, 23 So. 25.

Wherever a person has induced another upon the faith of his promise, though verbal, to expend his money or labor for which he can only

and several other cases might be cited in that state announcing the same doctrine. This ruling has been followed and announced in several of our states. So in the case of *Wharton v. Stevens*, 84 Iowa, 107, 15 L. R. A. 630, 50 N. W. 562, it was held that, if surface water flows by a well-defined channel, be it in a ditch, or swale in its primitive condition, and seeks discharge in a neighboring stream, its flow cannot be retarded or interfered with by a landowner to the injury of neighboring proprietors. Mandatory injunctions may issue to compel the removal of obstructions placed in a ditch so as to retard the flow of the water as it was before such obstructions were built. So also, in the case of *Metcalf v. Hart*, 3 Wyo. 513, 27 Pac. 900, and 31 Pac. 407, it is held that, when, by authority of a parol license, "the licensee has been put in possession, and in-

duced to place valuable improvements on the land, of which he would be defrauded and robbed by a revocation of the license, and ejectment by the holder of the legal title, equity will interpose, and either forbid the licensor to revoke the license, or impose such terms as will avoid the fraud and accomplish what justice and good conscience demand." Again, in the case of *Wickersham v. Orr*, 9 Iowa, 254, 74 Am. Dec. 348, it was held that, "when a portion of a partition wall has been erected upon a lot under and by virtue of a license from the owner thereof, such license cannot be revoked, either by the licensor or his grantee with notice." In the case of *Rhodes v. Otis*, 33 Ala. 578, 73 Am. Dec. 439, the court held that, "a parol license to float spars down a private stream, obtained for valuable consideration, cannot be revoked by the grantor when the grantee,

be remunerated by enjoyment of the thing so promised, equity will compel the promisor to give such deed or writing as shall be requisite to secure the promisee in the perfect enjoyment of what was promised. *M'Kellip v. M'Ilhenny*, 4 Watts, 317.

Possession taken under a license to occupy permanently gives in equity a title to the premises according to the terms of the license. *Pope v. Henry*, 24 Vt. 560.

8. Mutual or joint action.

There are many cases where adjoining property owners unite in some action with respect to their property for the mutual benefit of the two estates in which what is done on one property is a consideration for what is done on the other. After such contracts are executed they are held to come within the principle of specific performance.

Where, in accordance with a parol agreement, one of two adjoining landowners took down a party wall between the lots and rebuilt it in such a way as to give each the right to rest a leaning skylight on the top of it, after which the other attempted to erect a skylight in such a way as to obstruct the light of the builder, contrary to the agreement, the court says, the question is whether the agreement alleged is one to which the equitable doctrine of part performance so as to avoid the statute of frauds would apply. The nature of the agreement was such as to give each person an easement to have the light pass over the land of the other. The court continues, one person has pulled down and rebuilt a wall partly on his own and partly on the other party's land, and has put the latter in the possession of all the advantages of the new wall, namely, increased space on his side and an increased easement of light over the land of the builder by reason of the lower wall. Will a court of equity permit the other party to depart from his agreement, though by parol, when the builder, on the faith of it, has thus expended money, and given the other party advantages, including an easement, over his land? And it is decided that the doctrine of part performance applies whenever one person has obtained, and is in possession of, some substantial advantage under a parol agreement which in writing would be such as the court would direct to be specifically performed, and that the doctrine applies to a parol agreement for an easement, though no interest in the land is intended to be acquired, and that the case before the court was within these principles; the court saying: 49 L. R. A.

"The defendant having obtained all the advantages which this agreement was intended to give him, it would be a fraud on his part to refuse to carry out his part of the agreement, and to resist an attempt to compel him to do so by insisting on the statute of frauds." *McMannus v. Cooke* (1887) L. R. 35 Ch. Div. 681, 56 L. J. Ch. N. S. 662, 56 L. T. N. S. 900, 35 Week. Rep. 754, 51 J. P. 708.

Where a partition wall is built partly on the land of the adjoining owner under his parol license, the license cannot be subsequently revoked. The court says the right of the licensee rests upon the principle that when money or labor has been expended on the land of another upon the faith of a promise given by him, the owner shall not assert his legal right to the soil so as to interfere with that use and enjoyment of the building or structure erected as a result of such promise by the money and labor of the licensee. *Wickersham v. Orr*, 9 Iowa, 254, 74 Am. Dec. 348.

In *Miller v. Brown*, 33 Ohio St. 547, where a wall was built for a party wall under an agreement under seal, the court says it was built where it was by consent of the parties. It was not then certainly known where the lines would be. Even if the wall was commenced on the land of one of the parties, if he allowed the other to go on and in good faith build upon his premises in the way he did, it is now too late to retract. The builder spent his money for the benefit of both. The other saw him do it, saw him put the foundation joist where he did. He cannot now require it to be taken away.

Where a ditch for the drainage of surface water has been constructed by two adjoining landowners under a parol agreement as to its course, each party contributing labor or money in its construction, and they have recognized the ditch by farming in accordance with it, neither can set aside or disregard it without the consent of the other. The court says the assent to the construction of the ditch is in the nature of a license, which, having been accepted and the rights conferred assumed and exercised, cannot be set aside or disregarded. *Vannest v. Fleming*, 79 Iowa, 638, 8 L. R. A. 277, 44 N. E. 906.

In a case where two adjoining landowners united in constructing a drainage system for the joint benefit of the two estates, it was held that one could not obstruct the portion of the system on his land to the detriment of the other, upon the principle that equity would compel the specific performance of the contract. The court said that the expenditure of money under the circumstances would be re-

having acted under it, would be injured by the revocation. The doctrine of estoppels in pais applies to such a case." So, again, in the case of *Cook v. Pridgen*, 45 Ga. 331, 12 Am. Rep. 582, it was held that "a parol license to one to enjoy a permanent easement upon the land of another (as to back water upon it) is an interest in the land, and must be in writing, by the statute of frauds, and is void at law." But if the licensee in pursuance of the license goes forward, and for the enjoyment of the easement makes large investments, and the easement be one in its nature permanent, equity will decree a specific performance as in other cases of a part performance by one party of a parol contract for a sale of lands. To the same effect, see *Beatty v. Gregory*, 17 Iowa, 109, 85 Am. Dec. 546. On this same subject, Rice, in his valuable work on the Modern Law of Real Property

(p. 511), says: "Where a parol license has been executed and acted upon, and expenses incurred in perfecting an easement over the land of another in reliance upon the parol license previously granted, it cannot afterwards be revoked without placing the licensee in statu quo. [Citing *Woodbury v. Parshley*, 7 N. H. 237, 26 Am. Dec. 739.] In such cases, equity holds that, for remedial purposes, the license shall be deemed an executed contract. [Citing *Snowden v. Wilas*, 19 Ind. 14, 81 Am. Dec. 370; *Beatty v. Gregory*, 17 Iowa, 114, 85 Am. Dec. 546; *Dempey v. Kip*, 61 N. Y. 462; *Lacy v. Arnett*, 33 Pa. 169; *Meek v. Breckenridge*, 29 Ohio St. 642.] . . . It is now well settled in this country that, as between private persons, a parol license, though primarily revocable, is not so when the licensee has executed it, and in so doing has incurred expense. This doc-

garded in equity as so much consideration paid by the grantee to the grantor of the license inducing the expenditure, and had the effect of turning such license into an agreement which would be executed in equity. *Wynn v. Garland* (1857) 19 Ark. 23, 68 Am. Dec. 190.

Where adjoining landowners unite in constructing a system of drains for the benefit of their respective farms, each constructing that part which is upon his own land, neither can, after the other has expended money in the construction of the drains, interfere with the flow of water therein. This is placed upon the ground that where a license has been executed by the expenditure of money, or has been given upon a consideration paid, it is either irrevocable altogether, or cannot be revoked without remuneration. The court says it is the settled law of this state that where a license involving the expenditure of money has been so far executed that its withdrawal would operate as a fraud upon the party who expended money in reliance upon it, no revocation can take place without making compensation to the person injured by the withdrawal. *Ferguson v. Spencer*, 127 Ind. 66, 25 N. E. 1035. And that case was followed in *Messick v. Midland R. Co.* 128 Ind. 81, 27 N. E. 419; *Buck v. Foster*, 147 Ind. 530, 46 N. E. 920; and *Noble v. Sherman*, 151 Ind. 573, 52 N. E. 150.

Where adjoining proprietors enter into a scheme for draining their respective lands by constructing a ditch along what is supposed to be the division line, and they unite in doing the work, and maintain the ditch for many years, one party cannot, upon discovering that the ditch is entirely upon his property, restrain the other from making use of the ditch. This is placed upon the ground that a court of equity will give effect to a parol grant of an easement where there has been a valid consideration, where the grant is certain in its terms, and where there has been such a performance on the part of the grantee as would in the case of the sale of the fee take the case out of the statute of frauds. The court says that cases which permit a revocation of parol licenses under such circumstances lose sight of two principles. The first is that a license upon sufficient consideration, carried into execution by the incurring of expense by the licensee, is usually not revocable. The other is that in a court of equity part performance is frequently sufficient to take the case out of the statute of frauds. *Gilmore v. Armstrong*, 48 Neb. 92, 66 N. W. 998.

Where one of two adjoining landowners, who are engaged in constructing a levee along a

river which washes the property of both, gives the other permission to build a certain portion of it across a low place on the land of the grantor, he cannot, after completion of the work, remove it. This ruling is placed upon the ground of fraud and equitable estoppel. But *McFarland* concurs specially on the ground that a rule which applies to two coterminal owners of land, who unite in a continuous line of levee for the protection of both, would not apply to many other instances of parol licenses. *Grimshaw v. Belcher*, 88 Cal. 217, 26 Pac. 84.

Expenditure of money on the faith of an agreement between two lotowners for a right of way along an alley in consideration of a right of way over the lot of the other owner will prevent a revocation of the agreement. *Ebner v. Stichter*, 19 Pa. 19.

Where a building is erected on a common plan by owners of adjoining lots with the entrance to the upper floors by means of a stairway on one of the lots there will be an irrevocable license by the owner of the lot on which the stairway stands that it may be used for the benefit of the other lots. *Pierce v. Cleland*, 133 Pa. 189, 7 L. R. A. 752, 19 Atl. 352.

Executed agreements as to the apportionment of water between adjoining owners may be enforced. *Coffman v. Robbins*, 8 Or. 278; *Combs v. Slayton*, 19 Or. 99, 26 Pac. 661.

Thus, where, under a parol license, money is expended in constructing an aqueduct from a spring upon land of the licensor over his land for the common use of the licensor and licensee, equity will enjoin a revocation of the license. *Van Horn v. Clark*, 56 N. J. Eq. 476, 40 Atl. 203.

The New York court has not subscribed to this doctrine, but has held that the fact that the work is done for the benefit of both parties will not take the case out of the statute, nor authorize the interference of equity to enforce the license. *Crosdale v. Lanigan*, 129 N. Y. 604, 29 N. E. 824, Reversing 13 N. Y. Supp. 31, 36 N. Y. S. R. 575, where the agreement was upheld on the ground that a duty or obligation rested upon the licensor to the licensee, the performance of which was accomplished by the licensee, the obligation being not to interfere with the lateral support of the land of the licensee. The court says the case is somewhat analogous to the settlement by the parties of an uncertain boundary line, where, after one party has acted upon the faith of such settlement and made improve-

trine was announced as far back as 3 Ga. 82, in *Sheffield v. Collier*, and again in *Macon v. Franklin*, 12 Ga. 239, in which Judge Nisbet said: "The rule is, as stated, that a parol license is revocable; but it has some exceptions. If the enjoyment of it must be preceded necessarily by the expenditure of money, and the grantee has made improvements or invested capital in consequence of it, it becomes an agreement for a valuable consideration, and he is a purchaser for value." Citing *Winham v. McGuire*, 51 Ga. 578, and *Southwestern R. Co. v. Mitchell*, 69 Ga. 114. On the next page the author says the "distinction between an easement and a license is often so metaphysical, subtle, and shadowy as to elude analysis."

On the other hand, we find numerous authorities which hold that a mere parol license of this character is revocable at the will

ments, the licensor cannot then repudiate the settlement.

So an agreement between adjoining landowners that at joint expense they will carry water from a spring upon the land of one through pipes for the use of both is a mere license revocable at the pleasure of one on whose land the spring lies. *Cronkhite v. Cronkhite*, 94 N. Y. 323.

In the latter case, however, the facts are not similar to those in which the rule is usually applied, since the pipes were laid at joint expense from land of one of the parties, and there was no mutual action on the respective estates of the parties for the common benefit. However, there are cases applying the doctrine to facts similar to those in the *Cronkhite* case.

Thus, where, for the mutual benefit of the contracting parties, they agree jointly to construct a ditch for a common purpose, and each performs his portion of the labor and advances his share of the expenses, the performance will be sufficient to take the case out of the statute of frauds. *Gooch v. Sullivan*, 13 Nev. 78.

It has been held that where ditches are dug on the land of one party by an adjoining proprietor for the benefit of both, the right to their use would expire with the death of either. *Carter v. Page*, 26 N. C. (4 Ired. L.) 424.

4. What expenditure required.

Where a parol agreement relating to land has been so far partly performed that it will be a fraud upon the party doing the acts unless the agreement shall be performed by the other party, the court will relieve against this fraud, and apply the remedy by enforcing the agreement. It is not the parol agreement which lies at the foundation of the jurisdiction in such case, but the fraud. *Wheeler v. Reynolds*, 66 N. Y. 227.

If it is the prevention of fraud which gives the jurisdiction, it would seem that the expenditure under the contract must be so substantial that the licensee cannot be placed *in statu quo*, but must have a specific performance to avoid loss of his investment.

The placing of a small house of little value upon piles driven into the ground in accordance with permission of the owner of the land to go and put it on and leave it there so long as you are a mind to; "I will give you that place to live on it,"—is not enough to establish an equitable right to be quieted in the possession of the property. *Bohn v. Hatch*, 15 N. Y. Supp. 550, 39 N. Y. S. R. 404.

Permission to drain over the land of another 49 L. R. A.

of the licensor. *Cooley, Torts*, 2d ed. 360, says, after speaking of a license to erect a building on the land of another, and the right to remove the same: "But a license cannot be coupled with an interest in the lands, unless created by deed, or by such other instrument as is sufficient to convey an interest under the statute of frauds. Therefore rights of way, sales of growing trees, permission to flow lands permanently, or to carry water over or pipes under the land of another, are mere licenses, and revocable as such, unless created or made by deed." Citing the case of *Wiseman v. Lucksinger*, 84 N. Y. 31, 38 Am. Rep. 479, where it is held that "a mere license to drain is not made irrevocable by the fact that a valuable consideration was paid therefor, and that a right of drainage through the lands of another is an easement requiring for its enjoyment

for the consideration of \$7, followed by the construction of the drain at slight expense, will not create a partly performed contract which equity will enforce. *Wiseman v. Lucksinger*, 84 N. Y. 31, 38 Am. Rep. 479.

And that case was followed in *Munsion v. Reid*, 46 Hun, 399.

Expenditures in preparing a way for use are not sufficient at law to make a parol license conferring the right irrevocable. *Foster v. Browning*, 4 R. I. 47, 67 Am. Dec. 505.

The purchase of a lot adjoining a railroad track on the faith of a license to erect a grain house on the railroad land in connection with which the lot purchased is to be used is not such an expenditure as will render the license irrevocable. *Kipp v. Coenen*, 55 Iowa, 63, 7 N. W. 417.

But in Indiana, where a very liberal doctrine on this subject prevails, it is held that where a valid consideration has been given, and the contract executed so the party cannot be placed *in statu quo*, the amount of money or labor expended seems to make no difference in the principle. *Simons v. Morehouse*, 88 Ind. 391.

So, in a lower court in Pennsylvania it was held that a license to take sand from the property of the licensor cannot be revoked after the licensee has expended money on the faith of it. *Davis v. Souder*, 10 Phila. 113. In that case it was held sufficient expenditure of money that the licensee had made preparations to fulfil a contract for public improvements which he would not have done had he not obtained such license.

5. Erroneous applications of the doctrine.

There are cases in which the principle of specific performance has been applied, where there was no contract, no consideration, nothing but a mere verbal license followed by expenditures. In these cases not only must a contract be implied on the part of the licensor, but the expenditure must be made to do duty both as consideration and as part performance, which is contrary to the principles on which specific performance rests, for payment of consideration is not alone sufficient to justify specific performance, nor is expenditure without a contract. If the expenditure is regarded as payment of consideration there is no part performance. If it is regarded as part performance there is no consideration, hence no contract.

The leading case holding this doctrine is *Rerick v. Kern*, 14 Serg. & R. 267, 16 Am. Dec. 497, which held that a license may become an agreement on a valuable consideration; as

an interest in such lands which cannot be conferred by parol license. It can only be granted 'by deed or conveyance in writing.' Danforth, J., in delivering the opinion of the court, says: "A right awarded to the plaintiff to have his drain pass through the defendant's land is, in the terms of the judgment, an easement, and, for its enjoyment requires that the plaintiff shall have an interest in the defendant's land." Citing *Hewlins v. Shippam*, 5 Barn. & C. 221. The question was whether a right to a drain running through the adjoining lands could be conferred by parol license, and, after the fullest examination, it was decided that it could not; also citing *Cocker v. Cowper*, 1 Cromp. M. & R. 418,—a similar case. The plaintiff therein sued for the obstruction of a drain which had been originally constructed at his expense on the defendant's land by his con-

sent, verbally given. After it had been enjoyed for eighteen years the defendant obstructed it, and it was contended by the plaintiff that the license, having been acted upon, could not be revoked. But the court held that *Hewlins v. Shippam* was decisive to show that such an easement cannot be conferred except by deed. And the same, in substance, is held in *Cronkhite v. Cronkhite*, 94 N. Y. 323. In that case water had been carried in pipes across a tract of land under a parol license for forty years, and, although a consideration was paid, it was held to be revocable at the pleasure of the licensor or his successor in interest. See also *Wilkins v. Irvine*, 33 Ohio St. 138, upon the same question, where it was held that "a written license, without seal and unacknowledged, to enter upon and imbed water pipes in the land of another, with privilege to enter and re-

where the enjoyment of it must necessarily be preceded by the expenditure of money. And when the grantee has made improvements or invested capital in consequence of it he has become the purchaser for a valuable consideration. Such a grant is a direct encouragement to expend money, and it would be against all conscience to annul it as soon as the benefit expected from the expenditure is beginning to be perceived. Why should not such an agreement be decreed *in specie*? That a person should be let off from his contract by payment of a compensation in damages is consistent with no system of morals, but the common law, which was in this respect originally determined by political considerations, the policy of its military tenures requiring that the services to be rendered by the tenant to his feudal superior should not be prevented by want of personal independence. Hence the judgment of a court of law operates upon the right of the property, and the decree of a court of equity on the person. But the reason of this distinction has long ceased, and equity will execute every agreement for the breach of which damages may be recovered where an action for damages would be an inadequate remedy. In the case under consideration no objection to specific performance can be founded on the intrinsic nature of the agreement, nor, having been partly executed, on the circumstance of its resting in parol. It is to be considered as if there had been a formal conveyance of the right, and nothing remains but to determine its duration and extent. A right under a license when not specially restricted is commensurate with the thing of which the license is an accessory. Permission to use water for a mill, or anything else that was viewed by the parties as a permanent erection, will be of unlimited duration, and survive the erection itself if it should happen to be destroyed. Having in view an unlimited enjoyment of the privilege, the grantee has purchased, by the expenditure of money, a right indefinite in point of duration.

There is so much in the above argument that is not conformable to ancient equity landmarks that the case is not very valuable.

It was followed, however, in *M'Killip v. M'Ilhenny*, 2 Watts, 466; *Campbell v. McCoy*, 31 Pa. 263; *Cumberland Valley R. Co. v. McLanahan*, 59 Pa. 23; *Meigs's Appeal*, 62 Pa. 34. 1 Am. Rep. 372.

It is recognized in *Harrison v. Boring*, 44 Tex. 255, although the facts did not call for a decision of that precise question.

In *Funk v. Haldeman*, 53 Pa. 229, it said 49 L. R. A.

that though the proposition laid down in *Rerick v. Kern* is doubted, perhaps denied, in some states around us, it is not to be doubted that where large expenditures have been made under a written license rights are acquired which will be upheld both at law and in equity.

And in *Huff v. McCauley*, 53 Pa. 206, 91 Am. Dec. 203, the court says, in laying down its doctrine, the courts of Pennsylvania have gone beyond the common law, and beyond the rulings of courts of equity elsewhere.

But in *Thompson v. McElarney*, 82 Pa. 174, it is said the rule in *Rerick v. Kern* has been long and uniformly recognized in England.

In *Babcock v. Utter*, 1 Keyes, 397, the court says the note in 2 Am. Lead. Cas. 514, to *Rerick v. Kern*, 14 Serg. & R. 267, 16 Am. Dec. 497, so far as it attempts to sustain the soundness of that decision, is not very satisfactory in its reasoning, and the learned authors seem not to have found much in the way of authority to support it. The effort to sustain it appears to have deprived the note of the clearness and consistency which usually characterize the notes of that valuable work.

If a mining license is coupled with an interest growing out of expenditures made by the licensee pursuant to its requirements, it is not revocable at the pleasure of the licensor. *Silaby v. Trotter*, 29 N. J. Eq. 228.

The doctrine of part performance in reference to parol contracts respecting lands is well applicable to licenses executed, such as the right to maintain drainage ditches across another's land. *Wynn v. Garland* (1857) 19 Ark. 23, 68 Am. Dec. 190.

The execution of a parol license to erect a dam on the land of the licensor for the purpose of running a mill supplies the place of a writing to take the case out of the statute of frauds. *Lee v. McLeod*, 12 Nev. 280.

A parol license to flow land, when once executed, becomes irrevocable in equity. This is upon the ground that there has been such a part performance as will justify equity in compelling a conveyance of the right. *Hall v. Chaffee*, 13 Vt. 150.

In a note to *Hall v. Chaffee*, 13 Vt. 150, Judge Redfield says, if a license be given by parol, and expense incurred upon the faith of it, so that the parties cannot now be placed *in statu quo*, there would seem to be the same reason why a court of equity should grant relief as in any other contract for the sale of land or of any interest therein, *i. e.*, to prevent fraud.

The chief objection to that remark is the absence of the contract.

pair them, creates no interest in nor encumbrance upon the land, such as will disable the owner thereof from making a good and sufficient deed conveying a good title thereto." So, also, in the case of *Owen v. Field*, 12 Allen, 457, it was held that "an owner of land may at any time revoke his oral license to lay an aqueduct through the same; and, after doing so, he will not be restrained in equity from cutting off the aqueduct." Wood, in his valuable work on the Statute of Frauds (§ 10, p. 28), thus propounds the law on this question: "There are few instances in which a parol license to do acts upon the land of another is not revocable. In some of the states, as we have seen, it is held that a parol license which is executed, and has involved the expenditure of large sums of money, is not revocable, upon the ground that the party giving it is estopped from revoking it. But

Where improvements of a permanent nature have been made by a person on his own land, the enjoyment of which depends upon a right recognizable by the law, affecting the land of another and to which his consent is necessary, and where such consent is expressly proved or necessarily implied from the circumstances, and the improvements have been made in good faith upon it, equity will not permit advantage to be taken of the form of the consent, although not according to the strict mode of the common law, or within the statute of frauds, and to defeat such a purpose will, upon proper bill filed, enjoin the licensor from accomplishing his fraud, or when he asks relief it will be refused, or if granted, be allowed merely in the shape of compensation, but protecting the right of the licensee. *Raritan Water Power Co. v. Veghte*, 21 N. J. Eq. 463.

Where two proprietors of public land agreed that their division line should be along a certain creek, and that each should have one half of its waters for irrigation purposes, it was afterwards claimed that the one who had not originally bounded on the stream acquired no right in its waters, because a parol grant of an easement is void; but the court said there are many cases where a mere parol license which has been executed, and where investments have been made on the faith of it, has been held irrevocable; but the decision was actually placed upon the ground that the rights of the respective parties arose out of claims to public lands which, until confirmed, conveyed no title, and that the division occurred before the title was perfected, so that the title was in fact confirmed as it existed after the division. *Smith v. Green*, 109 Cal. 228, 41 Pac. 1022.

If money has been expended, and investments made, by reason of a parol license to an easement on the land of another and for the enjoyment of the same, such as to back water for the erection of a mill dam, the licensee is not liable to an action for keeping up such dam. *Winham v. McGuire*, 51 Ga. 578.

Where an easement has been granted by parol, the enjoyment of which must necessarily be preceded by the expenditure of money, or where the grantee has made improvements in good faith under the grant, or invested his capital in consequence of it, the grantee becomes the purchaser of the easement granted by parol for a valuable consideration, and will be entitled to have it specifically performed in equity unless the grantor will reimburse him his expenditure. *Wynn v. Garland* (1857) 19 Ark. 23, 68 Am. Dec. 190.

Where a lessor gives a license by parol to 49 L. R. A.

this doctrine seems to us to be in defiance of the statute, and to operate as a complete abrogation of its salutary provision in respect to the transfer of interests in land, and is an instance of judicial legislation which is wholly unwarranted. If a person, in view of the statute in this regard, of which he is presumed to have knowledge, sees fit to go on and make extensive and permanent improvements upon the lands of another without first investing himself with a legal right to enjoy them, it is difficult to see upon what ground a court of equity should interfere to protect him against the consequences of his folly, or why the owner of the land, who has merely consented to such erections or improvements, should have his estate thus burdened with a permanent easement, and be equitably estopped from revoking this authority and ridding his premises of a burden

drain water over the land left in his possession he cannot, after money has been expended in the construction of drains, revoke the license during the term of the lease. *Hansen v. Farmers' Co-Operative Creamery*, 106 Iowa, 167, 76 N. W. 652.

When consent is given to the use of land for the construction of a mill race the use from its nature must be regarded as designed to be permanent, and where money is expended on the strength of the consent an easement is granted which is irrevocable. *Decorah Woolen Mill Co. v. Greer*, 49 Iowa, 490.

In courts of equity the future enjoyment of an executed parol license granted upon a consideration, or upon the faith of which money has been expended, will be enforced,—at all events where adequate compensation in damages could not be obtained. This would be done on the two grounds of estoppel on account of fraud, and specific performance of a partly executed contract to prevent the fraud. *Snowden v. Wilas*, 19 Ind. 10, 81 Am. Dec. 370.

In *Parish v. Kaspere*, 109 Ind. 586, 10 N. E. 109, which was a case involving a claim to a right of way, the court says where a mere license is relied on, it must appear that there was a consideration paid for it, or it will be deemed revocable at the will of the person granting it. Where a consideration has been paid, or value has been parted with on the faith that the license is perpetual, then it cannot be revoked.

Where pipes are laid across land for the conveyance of water under a parol license, there is such an executed contract that chancery will direct a specific execution or restrain the licensor from disputing the right. The court says we are not without authority, if authority were required, to establish so plain a principle of justice, citing 2 Eq. Cas. Abr. 522. *Le Fevre v. Le Fevre*, 4 Serg. & R. 241, 8 Am. Dec. 696.

That case was followed in *Jackson v. Litch*, 62 Pa. 451.

If a parol license is given without consideration to use the water of a stream for a saw mill, in consequence of which the grantee goes to the expense of erecting a mill, the license cannot be revoked at the pleasure of the grantor. *Relick v. Kern*, 14 Serg. & R. 267, 16 Am. Dec. 497; *Strickler v. Todd*, 10 Serg. & R. 63, 13 Am. Rep. 649.

Expending money or labor in consequence of a license to divert a watercourse has the effect of turning such license into an agreement that will be executed in equity. *Relick v. Kern*, 14 Serg. & R. 267, 16 Am. Dec. 497.

A municipal corporation which has licensed

which the statute provides shall only be imposed in a certain mode." Angell on Water-courses (§ 169, p. 322), says: "The case of *Fentiman v. Smith* [4 East, 107] is clear and positive in its language. The plaintiff in that case claimed to have a passage for water by a tunnel over the defendant's land, and Lord Ellenborough lays it down distinctly: 'The title to have the water flowing in the tunnel over defendant's land could not pass by parol license without deed, and the plaintiff could not be entitled to it, as stated in his declaration, by reason of his possession of the mill; but he had it by license of the defendant, or by contract with him, and, if by license, it was revocable at any time.'" Washburn, in his work on Easements and Servitudes, on § 14, p. 431 [3d ed. *307], says: "It should, however, be stated that, as understood in England and most of the states, a parol license to construct a watercourse in one's land is revocable, and no title is thereby gained, either to the land, or to any right to maintain the watercourse. An enjoyment under such a license would neither be by grant nor adverse user." 1 Washburn on Real

Property (§ 10, p. 632, *400), says: "Another class of cases where the license may be revoked is where the act licensed to be done is to be done upon the land of the licensor, and, if granted by deed, would amount to an easement therein. If such license be by parol, it may be revoked, as to any act thereafter to be done, even though, in order to enjoy it, the licensee may have incurred expenses upon the premises of the licensor. Thus, where A, by B's license, laid an aqueduct across B's land, who then revoked it and cut off the pipe that conducted the water, the court, as a court of equity, refused to interfere, because B had a right to revoke the license at his pleasure." The law on this question is also stated in the sixth volume of the American & English Encyclopedia of Law (p. 18), under the head of *Easements*: "The right of drainage through the lands of another is an easement requiring for its enjoyment an interest in such lands, and cannot be conferred except by deed or conveyance in writing. It cannot be conferred by parol license, and a license to lay a drain does not vest any title or give any irrevocable easement in the land,

the erection of tanks in its streets to supply water for sprinkling purposes cannot revoke the license and require a removal of the tanks without compensating the builder. *Savage v. Salem*, 23 Or. 381, 24 L. R. A. 787, 31 Pac. 832.

In *Macon v. Franklin*, 12 Ga. 230, the court, in discussing the distinction between a license and a dedication, says, *inter alia*, if the enjoyment of the license must necessarily be preceded by the expenditure of money, and the grantee has made improvements or invested capital in consequence of it, it becomes an agreement for a valuable consideration, and he a purchaser for value.

In *Harvey v. Reynolds*, 12 Price, 724, 1 Car. & P. 141, where an agreement for a lease had been made, Baron Hulloock, in discussing the right of the landlord to treat the tenant as a trespasser, says all inconvenience resulting from giving license ought to be well considered before it be given; for when once granted, and the party has gone to expense in consequence, it cannot be revoked; and certainly not without tendering all the expense which may have been incurred.

In *Cook v. Pridgen*, 45 Ga. 331, 12 Am. Rep. 582, it is said the true distinction which will reconcile most of the authorities is between a permanent right, one in its nature such that the parties must have contemplated its continuance, and a mere permission to do a thing on land, which from the nature of the thing is temporary only. If it is a mere license it is in its nature revocable, since that was the intention of the parties. If it be intended to be irrevocable, it is ordinarily a grant, and must be in writing. But even a temporary license must be considered as intended to continue until the objects of the parties are attained. And equity will compel specific performance of a contract for an interest in land amounting to a permanent easement. So that if one under grant of an easement, though it be by parol, go into possession and make valuable improvements in pursuance of the grant, so that it will be a fraud upon the grantee to permit the statute of frauds, equity will decree a title. However, in that case it is said the permission to erect a structure was not a mere license, but a grant for motives satisfactory to the grantor. The grantees acted upon the grant, 49 L. R. A.

went into possession, expended large sums of money, and continued in possession for years.

In *Russell v. Watts*, L. R. 10 App. Cas. 590, 55 L. J. Ch. 158, 53 L. T. N. S. 876, 34 Week. Rep. 277, 50 J. P. 68, the Earl of Selborne said, if on a sale and conveyance of land adjoining a house to be built by the vendor, it is mutually agreed that the outer walls of that house may stand within the verge of the land sold, and should have in it particular windows opening upon and overlooking the land sold, and if the house is erected accordingly, the purchaser cannot afterwards build upon the land so as to prevent or obstruct the access of light to these windows.

In *Jackson v. Cator* (1800) 5 Ves. Jr. 688, a landlord was enjoined from cutting trees which were part of a plan of the tenant for beautifying the place, where the plan had been carried out at a considerable expense with the knowledge and acquiescence of the landlord. But this was put partly upon the ground that it was of benefit to the landlord by improving his property.

It will be observed that in some of the above cases the language goes beyond the necessities of the case, so that, although the court apparently subscribes to the doctrine that expenditure is sufficient to justify specific performance, it was not in fact required to do so. These rulings all rest upon the principle which actuated the Michigan court when, although not deciding the question, it said in *Maxwell v. Bay City Bridge Co.* 41 Mich. 453, 2 N. Y. 639, the injustice of a revocation after the licensee, in reliance upon the license, has made large and expensive improvements, is so serious that it seems a reproach to the law if it should fail to provide some adequate protection against it.

6. Cases involving public-service corporations.

There is a class of cases to which the principles governing the revocation of licenses have been applied, which in fact are governed by a wider principle. They involve corporations engaged in public service, so that the court is perhaps to some extent influenced by that fact in determining the effect of the license, and so makes rulings that might not be applicable in other cases.

Where a railroad company, having authority

even though a consideration is paid for the same. It is revocable at any time, even after twenty years' user; for, the use being by consent of the landowner, no prescriptive right is gained."

Now, while I find it extremely difficult to reconcile the conflict in authorities upon this question, which, as we have seen, is not influenced or controlled by the uniformly accepted and well-established rulings in regard to part performance or executed contracts, and the influence thereof in withdrawing the agreement from the effect of the statute of frauds, and which is not to be determined or settled in accordance with the usual presumption arising from possession, user, and the lapse of time, I am led reluctantly, under the peculiar facts of this case, to the conclusion, from the best examination I have been able to make of the authorities at my command, that a mere oral license to construct an underground drain by one lot-owner in a town to a neighboring lotowner, for the purpose of draining the lot of the licensee, although executed and in full use and

enjoyment, is revocable at the pleasure of the licensor, and that the fact of entire performance of the contract, even though with full consideration, will not entitle the licensee to the permanent use of the drain. This question is to some extent a new one in this state, and we are compelled to go beyond our borders, and examine the English and American authorities upon the subject, and in so doing have found an almost irreconcilable conflict in the rulings of the courts upon almost precisely the same state of facts; and the difficulty in arriving at the true state of facts from conflicting testimony, united with the feeling that is so frequently engendered by claims of this character, affords cogent arguments in favor of the conclusion that rights of this character should be conferred by deed, and that they should not depend for their validity upon the slippery memory of man, even where he is disposed to be fair and honest.

My conclusion, therefore, is that *the decree complained of must be reversed*, with costs.

to take land for the construction of its right of way upon making compensation therefor, enters under authority of the landowner pending arbitration proceedings to ascertain the compensation to be paid, and expends money in constructing the track, the landowner cannot, upon failure of the arbitration proceedings, revoke the license and compel the removal of the tracks. *Doe ex dem. Hudson v. Leeds & B. R. Co.* 16 Q. B. 796, 20 L. J. Q. B. N. S. 486, 15 Jur. 948.

Where a railway is authorized to be constructed over land upon making compensation to the owner the owner cannot, although compensation has not been made, interfere with the possession which has been enjoyed for many years. *Mold v. Wheatcroft*, 27 Beav. 510, 29 L. J. Ch. N. S. 11, 6 Jur. N. S. 2.

After possession has been taken by a railroad company of land for a right of way under a written contract founded on a valuable consideration, but not valid as a deed, and expenditures have been made in the construction of the road, the license cannot be revoked and the land recovered. *Hornback v. Cincinnati & Z. R. Co.* 20 Ohio St. 81.

A license to use land for a railroad right of way cannot be revoked after the tracks have been laid. *Fort Worth & N. O. R. Co. v. Sweatt*, 20 Tex. Civ. App. 543, 50 S. W. 162.

In *Baker v. Chicago, R. I. & P. R. Co.* 57 Mo. 265, where a parol license was given to a railroad company to enter upon the licensor's land to construct its tracks, the court held that after the track was finished the license could not be withdrawn because the railroad had not complied with conditions upon which the license was given so that ejectment could be maintained for the property. The court says the right to revoke a license ceases when it is necessary to the possession or enjoyment of a right of title arising from the act or conduct of the person who creates it. But the court further said that in that case the remedy of the landowner was adequate and ample to compel performance of the contract.

Where a landowner permits a railroad company to take possession of a strip of his land for a right of way and construct its works thereon, under a parol agreement for compensation at a future time, he cannot revoke his license and recover possession of the property. 49 L. R. A.

The court says in these great public works the least period of clear acquiescence so as to fairly lead the company to infer that the landowner intends to waive his claim for payment will be held to conclude the right to assert the claim in any such form as to stop the company in the progress of its works. The property owner does not, of course, lose his claim or the right to enforce it by all proper modes. *McAulay v. Western Vermont R. Co.* 33 Vt. 311, 78 Am. Dec. 627.

Where a landowner permits a railroad to be laid across the land under the belief that the builder has a right to take the land for that purpose, and permits it to be used for several years, he will not be permitted to require the removal of the road, but will be given compensation for the land taken. *Powell v. Thomas*, 6 Hare, 300.

After a landowner has permitted a railroad company to go upon his land and construct a right of way, and expenditures have been made upon the faith of it, he cannot recall the license so as to compel the company to remove from the property. *Texas & St. L. R. Co. v. Jarrell*, 60 Tex. 267.

The owner of land who allows the construction and use of a public canal through his lands, although claiming damages therefor from the beginning, will, after the lapse of a period of years, be estopped from asserting his claim to the land so taken. *Pleasant v. Cincinnati & W. Canal Co.* 2 Disney (Ohio) 100.

A consent in writing for a valuable consideration to permit a railroad track to be laid over the land of the licensor, although not under seal, may be specifically enforced after the tracks have been laid. *Williamston & T. R. Co. v. Battle*, 66 N. C. 548.

A landowner who permits a public bridge to be erected on his land without objection, merely claiming a fair compensation for the land, will be estopped from maintaining an action to recover the land after the bridge has been completed. This is put upon the ground that the party who is to be affected by the estoppel has by his own word or consent misled another into a course of action that, if the estoppel is not enforced, will work an injury to him who is thus misled. *Moses v. Sanford*, 2 Lea, 855.

Where a canal was authorized to be constructed over certain land upon compensation

made to the owner, and the owner permitted the construction without exacting the compensation, it was held that he could not afterwards recover possession of the land occupied by the canal, but must be satisfied with a reasonable compensation for it. The master of the rolls says: "The question argued before me is whether the facts of this case do not raise an equity which this court will enforce by preventing the . . . [landowner] from exercising . . . [his] legal right." And he continues: "I am of opinion that the question I have to determine is whether there has been such an appropriation of this land to the public as blinds the . . . [owner] in equity from disputing it." He decides against the landowner on the ground that he who stands by and encourages an act cannot afterwards complain of it, or complain of the enjoyment of that which he has permitted to be done. *Beaufort v. Patrick* (1853) 17 Beav. 60, 17 Jur. 682, 22 L. J. Ch. N. S. 489. And that case was followed in *Somerset Coal Canal Co. v. Harcourt*, 24 Beav. 571.

In all of the above cases it is evident that the specific performance of the contract accomplishes precisely what condemnation proceedings would, so that it is immaterial which is resorted to. So the Texas court, which is inclined to follow the opposite rule generally, in *Thomas v. Junction City Irrig. Co.* 80 Tex. 550, 16 S. W. 324, says that if the licensee has the power of eminent domain there is no reason why the strict rule of the common law in regard to the revocation of a parol license should not be given effect if the case calls for it. For in such case the licensee would have power at once to acquire the right by condemnation.

So, it has been held that the building of a railroad over land under a parol license does not prevent the revocation of the license, and an action for damages for trespass for thereafter running trains across the lands. *Baltimore & H. R. Co. v. Algire*, 63 Md. 319.

A parol license to construct a railroad over land of the licensor may be revoked at his pleasure. *Watson v. Chicago, M. & St. P. R. Co.* 46 Minn. 321, 48 N. W. 1129; *Kremer v. Chicago, M. & St. P. R. Co.* 51 Minn. 15, 52 N. W. 977; *Minneapolis Western R. Co. v. Minneapolis & St. L. R. Co.* 58 Minn. 128, 59 N. W. 983; *Beck v. Louisville, N. O. & T. R. Co.* 65 Miss. 172, 3 So. 252; *Wood v. Michigan Air Line R. Co.* 90 Mich. 334, 51 N. W. 263; *Minneapolis, St. P. & S. S. M. R. Co. v. Marble*, 112 Mich. 4, 70 N. W. 319.

A permanent right to maintain a railroad over the land of the licensor cannot be granted by parol. *Miller v. Auburn & S. R. Co.* 6 Hill 61, 64.

And that case is recognized in *Murdock v. Prospect Park & C. I. R. Co.* 73 N. Y. 579.

Parol consent that a railroad may be constructed over the land of the licensor may be revoked at any time notwithstanding a consideration was paid for it and expenditures have been made on the faith of it. *Hetfield v. Central R. Co.* 29 N. J. L. 571. And that case was recognized in *New Jersey Midland R. Co. v. Van Syckle*, 37 N. J. L. 496.

Where a right of way for an irrigation ditch can be acquired under right of eminent domain, a landowner will not be estopped to assert his right to compensation before permitting the construction of the ditch across his land, merely because, in accordance with his assurance that the ditch might be constructed over his land, expenditure has been made in prosecuting the work toward his land. *Stewart v. Stevens*, 10 Colo. 440, 15 Pac. 786.

Where the right to take land for a mill pond is conferred by statute an agreement as to the 49 L. R. A.

amount of damages to be paid therefor may be made by parol. *Short v. Woodward*, 13 Gray, 86.

So, a claim for damages for the erection of a dam which will flow another's property may be waived by parol. *Seymour v. Carter*, 2 Met. 520. And that case was followed in *Smith v. Goulding*, 6 Cush. 154.

On similar grounds, it has been held that after a railroad company has permitted a connection to be made with its tracks for the accommodation of a shipper at the latter's expense, it cannot require an agreement to its terms as a condition to the use of the tracks, but will be required to permit such use on reasonable terms. *Laird v. Birkenhead R. Co.* 1 Johns. 500, 29 L. J. Ch. N. S. 218, 6 Jur. N. S. 140.

b. Estoppel.

1. The principle involved.

There are cases in which a man will, because of his acts, be precluded from asserting his legal title. They are sometimes founded on the maxim that one who is silent when he ought to speak will not be permitted to speak when he desires to do so. A common example of this doctrine is where one stands by and sees a stranger purchase his property from a third person under the belief that he is acquiring a good title, without disclosing his own claim. In such cases he will not subsequently be permitted to assert his own title in derogation of the one so acquired.

In *Dann v. Spurrier* (1802) 7 Ves. Jr. 231, 3 Bos. & P. 399, 442, where a tenant sought specific performance of an agreement for a lease, on the ground that the landlord had permitted him to make improvements on the faith of a long term, which was dismissed for failure of proof, the Lord Chancellor says: "I fully subscribe to the doctrine . . . that this court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title." Within this rule is the case of a lessor knowing and permitting those acts which the lessee would not have done, and the other must conceive he would not have done, but upon an expectation that the lessor would not throw any obstruction in the way of his enjoyment. Still he must be the party to prove that case by strong and cogent evidence; leaving no reasonable doubt that he acted upon that sort of encouragement.

In *Kirk v. Hamilton*, 102 U. S. 77, 26 L. ed. 82, it is said that Lawrence, J., in *King v. Butterton*, in 6 T. R. 554, said: "I remember a case some years ago in which Lord Mansfield would not suffer a man to recover, even in ejectment, where he had stood by and seen the defendant build on his land."

Where a canal company agreed by parol to permit a manufacturer to use the water from the canal for his mill, and then permitted him to construct the mill with that expectation and use the water for some time, the court said the principle has often been recognized by the court that if one man stands by and encourages another to lay out money under the obvious expectation that no obstacle will be afterward interposed in the way of his enjoyment, the court will not permit subsequent interference with it by the one who encouraged the acts. But the statute of frauds is not discussed in the case. *Rochdale Canal Co. v. King* (1853) 16 Beav. 630, 22 L. J. Ch. N. S. 604, 17 Jur. 1001. Affirming the same principle in 2 Sim. N. S. 78, 20 L. J. Ch. N. S. 675, 15 Jur. 962.

However, that rule is not applicable where,

although improvements have been made upon the promise of a supply of water from a canal, the supply from that source is not necessary to the successful operation of the works, but a sufficient supply can be acquired from another source. *Bankart v. Tennant*, L. R. 10 Eq. 141, 30 L. J. Ch. N. S. 809, 23 L. T. N. S. 137.

In *Williams v. Jersey* (1841) 1 Craig & P. 92, 10 L. J. Ch. N. S. 149, 5 Jur. 426, where copper works were being operated in such a way as to constitute a nuisance to neighboring property, it was held that a person may so encourage that which he afterwards complains of as a nuisance as not only to preclude him from complaining of it in a court of equity, but to give the adverse party a right to the interposition of a court of equity in the event of his complaining of the nuisance at law.

In *Fleider v. Bannister*, 8 Grant, Ch. (U. C.) 257, which was a controversy over a right of way across private property upon the revocation of a license to use one already existing, it seems to be assumed by the court that there might be an equity to interfere with the legal right of revoking a license on the ground of encouragement on the part of the licensor, or forbearance and irreparable inconvenience on the part of the licensee.

This doctrine has by some judges been carried to extreme lengths.

In *Jackson v. Cator*, 5 Ves. Jr. 690, the Lord Chancellor cited *Clavering's Case*, where a person was carrying on a project of a colliery and had sunk a shaft at a considerable expense. Mr. Clavering saw the thing going on, and in the execution of the plan it was very clear the colliery was not worth a farthing without a road over his ground, and when the work was begun he said he would not give a road. The end of it was that he was made sensible that he was to give the road at a fair value.

There is a case of doubtful authority referred to in 2 Eq. Cas. Abr. 522, pl. 3, to the following effect: A diverted a watercourse, which being a nuisance to B, he brought his action, which was enjoined, it being proved that B saw the work when it was carrying on, and connived at it without showing the least disagreement, but rather the contrary.

The circumstances of the case are not set out. From anything that appears it may have been regarded as a mere abandonment of an easement similar to *Liggins v. Inge* (1831) 7 Bing. 682, 5 Moore & P. 712, *supra*, VI.

However, that case has been to a large extent the authority upon which the doctrine of estoppel has been applied to licensors.

Standing by and permitting expenditure without objection will not, of course, raise an estoppel in every case.

In *Stewart v. Stevens*, 10 Colo. 440, 15 Pac. 786, it is said that a landowner may be aware that a railroad company has surveyed the route for a railroad over his land, and has expended large sums of money in grading up to his land intending to enter his premises and build its road; but he may with impunity remain silent until the attempt is made to enter upon his land, and prevent the attempt by injunction.

2. Cases which have applied the doctrine against licensors.

Many cases are to be found which have applied the doctrine of estoppel against persons who have licensed others to do acts on their premises. Those cases will be cited here, and the correctness of the application of the doctrine considered in the next subdivision.

The rule that a mere naked parol license may be revoked does not extend to cases where the licensee, relying upon the grant, has, with the 49 L. R. A.

knowledge of the licensor, expended large sums of money. In such case the licensee has no right to revoke the license. *Buchanan v. Logansport*, C. & S. W. R. Co. 71 Ind. 265.

A parol license by an owner of land to an owner of adjoining land to construct and use perpetually a ditch over the land of the former for the purpose of draining the land of the latter, is irrevocable after it has been acted upon by the construction and use of the ditch. *Hodgson v. Jeffries*, 52 Ind. 334.

If the licensee enters upon the land, and expends money in the construction of buildings or other conveniences for the conduct of his business with the understanding that it is to have the right to use or occupy the ground permanently at its pleasure, it is too late to withdraw the license and enjoin the use of the land. One person is not permitted to deny a state of facts which his previous admissions or silence have induced another to believe existed, and upon which the other proceeded to act or expend money. *Lake Erie & W. R. Co. v. Michener*, 117 Ind. 465, 20 N. E. 254; *Nowlin v. Whipple*, 120 Ind. 596, 6 L. R. A. 159, 22 N. E. 669.

Where a parol license is given, upon the faith of which money is expended by the licensee, the licensor will be estopped from revoking the license unless the licensee can be placed *in statu quo*. *Lane v. Miller*, 27 Ind. 534; *Ogle v. Dill*, 55 Ind. 130.

The privilege of floating spars on a private stream, which does not involve the holding or occupation of real estate, is a mere license which may be granted by parol, and if based on a valid consideration it cannot be revoked after the licensee, in reliance on it, has conveyed his spars to the stream so that revocation would work great injury to him. The court says: "There are . . . some authorities which would allow a revocation of the license even under these circumstances; but we are not willing to follow them. It would be against all conscience to permit the defendant to revoke his license after the plaintiff had acted upon it so far that great damage must necessarily result from the revocation. Every reason upon which the doctrine of estoppel *in pais* rests, applies. It is a plain case where one party has by his conduct induced another to act in such a manner that he cannot be allowed to retract without serious injury to that other person." *Rhodes v. Otis*, 33 Ala. 600, 73 Am. Dec. 439.

Where the owner of water rights on a stream assents to the building of a dam by a third person, and the entry by him into contracts to furnish a water supply for a series of years, he cannot recall his consent during the time for which the contracts are to run. *Rislen v. Brown*, 73 Tex. 135, 10 S. W. 661.

A person has no right to revoke a license to the injury of the grantee in face of his contract or assurance to the contrary. *Chiles v. Wallace*, 83 Mo. 85; *Campbell v. Indianapolis & V. R. Co.* 110 Ind. 490, 11 N. E. 482; *Evansville & T. H. R. Co. v. Nye*, 113 Ind. 223, 15 N. E. 261.

After expenditures have been made on the faith of the license there will be an equitable estoppel to revoke it. *House v. Montgomery*, 19 Mo. App. 170; *Jones v. Loomis*, 19 Mo. App. 234; *Gibson v. St. Louis Agri. & Mechanical Assn.* 33 Mo. App. 165; *School Dist. v. Lindsey*, 47 Mo. App. 134.

Consent to the projection of the eaves of a house over the land of the licensor in consideration of the right to project eaves over other land of the licensee, when acted upon and executed by the parties, constitutes a license irrevocable so long as the house remains standing upon the premises. When a license of this character is granted, and the licensee by reason of it erects

a building on his own land to the enjoyment of which the right or easement created by the license is indispensable, the license cannot be revoked. The license having been executed, the owner of the estate out of which the easement is carved, or upon which the servitude rests, is estopped from denying its existence, or from interfering with or molesting its proper use and enjoyment. Such estoppel is as effectual to confer the right to the enjoyment of the easement as if the right thereto had been made the subject-matter of an express agreement. *Meek v. Breckenridge*, 29 Ohio St. 642.

To allow one to revoke a license when it was given to influence the conduct of another and cause him to make large investments would operate as a fraud, and warrant the interference of equity to prevent it under the doctrine of equitable estoppel. The court says an executed license is treated like a parol agreement in equity. It will not allow the statute to be used as a cover for fraud. It will not permit advantage to be taken of the form of the consent, although not within the statute of frauds, after large expenditures of money or labor had been invested in permanent improvements upon the land in good faith upon the reliance reposed in such consent. The ground of the jurisdiction is to prevent injustice or fraud. *Curtis v. La Grande Hydraulic Water Co.* 29 Or. 34, 10 L. R. A. 484, 23 Pac. 808, 25 Pac. 378. Followed in *McBroom v. Thompson*, 25 Or. 559, 37 Pac. 57, *Garrett v. Bishop*, 27 Or. 349, 41 Pac. 10, and *Bowman v. Bowman*, 35 Or. 281, 57 Pac. 546, but seriously shaken by *Lavery v. Arnold* (Or.) 57 Pac. 906, *infra*, VII. b. 3.

A parol license to lay an aqueduct to a spring of water on one's land is irrevocable during the existence of the aqueduct, and a court of equity on the ground of equitable estoppel will protect the licensee in the use of the aqueduct; and will grant and continue an injunction restraining the owner of the spring from interfering with the aqueduct until its decay; for a revocation of the license would operate as a fraud. *Clark v. Glidden*, 60 Vt. 702, 15 Atl. 358.

A parol agreement for a valuable consideration to permit a tram road to be constructed over the property of the licensor cannot, after it has been executed at considerable expense, be revoked because equity will hold the licensor estopped. *Tufts v. Copen*, 37 W. Va. 623, 16 S. E. 793.

Where the licensor stands by and permits and encourages the transaction, as a sale, and allows the licensee to go to expense upon the faith of a sale or vested interest, he will be estopped in equity from denying it, and it may be specifically enforced. *Meetze v. Charlotte, C. & A. R. Co.* 23 S. C. 2.

In *Fuhr v. Dean*, 26 Mo. 116, 69 Am. Dec. 484, it is said it may be that when acts have been performed upon the faith of a license the party giving it may be equitably estopped from revoking it to the injury of the other party, but the estoppel will be limited by the injury it is invoked to prevent.

In case of an alleged license to take down the finish at the outer end of a party wall and substitute another for it, the court held that when a person relies upon an expenditure upon the faith of a license as an estoppel, the evidence of the facts constituting the estoppel should be clear, and the expenditure should not be trivial. *McCarthy v. Mutual Relief Assn.* 81 Cal. 584, 22 Pac. 933.

3. Correctness of application of principle.

A reference to the cases in which the doctrine of estoppel has been applied will show that in some of them the facts were such that specific

performance might have been decreed, and in others there was direct encouragement to expend money by assurance of a title which perhaps would be a proper case for estoppel; but from the language used it is evident that in the minds of many judges a license followed by expenditure is ground for application of the doctrine of estoppel.

There are many elements of estoppel, however, which do not appear in this class of cases. Ordinarily to work an estoppel *in pais* there must be a misrepresentation of fact or an encouragement of one known to be acting under mistake of fact or holding out false hopes to him by a definite promise. None of these elements are present in case of a mere license.

In *Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406, the court states the element of estoppel *in pais* applicable to the one sought to be estopped as follows: That the person sought to be estopped has made an admission or done an act with the intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, inconsistent with the evidence he proposes to give or the title he proposes to set up.

Ordinarily, also, there must be some mutuality in estoppels although the application of this doctrine to estoppels *in pais* is not clearly defined. *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.* 112 Ill. 384, 54 Am. Rep. 243. There is certainly no mutuality in case of expenditure on the faith of a parol license.

A mere license cannot operate to estop the licensor in favor of the licensee, because a license must be mutual. *Nunnely v. Southern Iron Co.* 94 Tenn. 397, 28 L. R. A. 421, 29 S. W. 361.

In *Cayuga R. Co. v. Niles*, 13 Hun, 170, it is said the agreement cannot be enforced against the licensee.

In *White v. Wakely*, 26 Beav. 20, 28 L. J. Ch. N. S. 77, 4 Jur. N. S. 988, where the question was as to the liability of a tenant who had erected buildings on the waste land of the landlord to keep them in repair, the court acted on the principle of mutuality. The master of the rolls says, what would this court have done of the landlord had immediately after the house and buildings had been erected sought to evict the tenant, and to claim the benefit of the erections for his own use. "I entertain no doubt that this court would have interposed by injunction to prevent the landlord from obtaining the possession and benefit of the house and buildings which he had thus permitted to be erected." But the reason is stated as follows: This court "would have treated the permission of the landlord to build as equivalent to a permission on his part that the thing built should be treated as a part of the original demise."

Again, the basis for the cases which hold that where the owners of land have encouraged others to expend money upon it under an erroneous opinion of title they are prohibited from afterwards asserting their legal rights is fraud on the part of the landowner. Where the person making the expenditure knows the state of the title he makes it at his peril, and acquires no equitable rights against the owner thereby. *Babcock v. Utter*, 1 Keyes, 397. In a more full report of the same case in 1 Abb. App. Dec. 27, an additional opinion is given, in which it is stated that a mere verbal license to do an act or series of acts upon the land of the licensor necessarily excludes all idea of the right to do the acts by virtue of a contract or promise which equity might specifically enforce. It also excludes all idea of fraud or concealment on the part of the licensor in respect to his title, and of ignorance or mistake as to such

title on the part of the licensee. It presents the case simply of two persons acting voluntarily with their eyes open, each understanding fully and perfectly the situation of the other, and where the licensee does the act he is permitted by the license to do, and makes the expenditure necessary thereto, with perfect knowledge and consciousness on his part that he has acquired no interest in the lands of the licensor which the law can recognize or protect, and never expected to acquire any other interest than that conferred by the license. What is there in such a case for equity to act upon? Manifestly nothing. While equity will regard that as done which the parties agreed to do, and compel the specific performance of agreements between parties according to the original understanding and intention, and will interpose to protect an innocent person against mistake in matters of fact and the fraudulent acts or concealments of the other party, it can never lend its aid to confer upon one, as against another, rights or interests which were never in the contemplation of either, even by way of impediment. It was never any part of the office or jurisdiction of equity to shield or rescue men from the legitimate consequences of their own free and voluntary acts of imprudence or folly. To give by decree to one the title or the right to the perpetual use and occupation of the land of another simply because he had been imprudent enough to build or expend money upon it with the mere naked consent of such other without any stipulation whatever as to such title or right would be as repugnant to the principles of equity as to the rules of law.

In *East India Co. v. Vincent*, 2 Atk. 82, it is said there are several instances where a man has suffered another to go on with building upon his ground and not set up a right till afterwards, when he was all the time cognizant of his right, and the person building had no notice of the other's right, in which the court would oblige the owner of the ground to permit the person building to enjoy it quietly. But these cases have not been extended so far as where persons have treated upon an agreement for building, and the owner has not come to an absolute agreement. There, if persons will build notwithstanding, they must take the consequences, and this is not such an acquiescence on the part of the owner as will prevent him from insisting on his right.

The principle upon which courts of equity sometimes apply the doctrine of equitable estoppel is that the conduct of the licensor has been such that it would be a fraud on the licensee to permit him to deny that there was a contract for an interest in land, and hence so treat the case as one of a parol contract partly performed which the court will enforce. If both parties are aware of the fact that the erection is being made on property to which the builder has no title, and the owner has given the builder a license, there is no deception or misrepresentation. *Minneapolis Mill Co. v. Minneapolis & St. L. R. Co.* 51 Minn. 304, 53 N. W. 639.

Speaking of the application of the doctrine of estoppel in case of a parol license upon which expenditures have been made, the court in *Nowlin Lumber Co. v. Wilson*, 119 Mich. 406, 78 N. W. 338, says the legislature has emphatically said that title to land must rest upon something more tangible than parol agreements or understandings, and it should require something more than a hard case to justify the adoption of a rule which would seriously jeopardize land titles. The court further says, it is confidently believed that the doctrine that a parol license can become irrevocable by estoppels exists only where the courts have per-

mitted the doctrine of estoppel to override the statute of frauds.

An estoppel *in pais* will not be permitted to have the effect of dispensing with the requirements of a positive statute, even when the question arises between the parties to the transaction themselves. We can hardly say that when one man says to another you may take and keep this land forever, this, if followed by delivery of possession, should be as effectual as a deed. Parties must be held to act and agree with reference to the law of the land, and cannot be allowed to dispense with it at pleasure. *Eggleston v. New York & H. R. Co.* 35 Barb. 162.

Where upon license of a railroad company a side track was erected at the expense of the licensee, and expensive works constructed for the building of cars to be delivered to the railroad over the side track, it was held that there was no estoppel to revoke the license and disconnect the side track from the tracks of the licensor.

The licensee claimed that the right to use the side track was irrevocable on two grounds, (1) that it was acquired under contract; (2) that if there was no contract yet there was a permissive use under license which, having been acted upon by the expenditure of large sums of money on the faith of its indefinite continuance, had become irrevocable under the doctrine of equitable estoppel. The court said with reference to the first ground that there was no express contract. And upon the claim that the grant of a privilege which is necessary to a permanent business is presumed to be commensurate in duration with the business, and although at first but a license, and as such revocable, yet, when acted upon in the expenditure of money it becomes a contract for a valuable consideration, to be executed by a court of equity as a contract partly performed, the court said this point must depend upon the presumed intent of the parties that the privilege granted shall be commensurate with the business as a right in all events, and not as an arrangement depending upon the will of the parties for its continuance. The court, finding against such contract, proceeded to consider the question of license. It said at law an estate or interest in land can be created only by deed or grant under seal or by prescription; in equity such an interest may additionally be acquired by contract which, however, under the statute of frauds, must be in writing subject to the exception of the equity arising out of part performance of a verbal contract. A license can create no estate or interest in lands, and is revocable at the pleasure of the licensor so long as it remains a mere license not converted into a conveyance, grant, or contract, nor rendered irrevocable by estoppel. A mere license affecting lands is at law always revocable, even though granted for a valuable consideration, and although the licensee may have expended money under it. In equity the doctrine of equitable estoppel proceeds upon the ground of preventing fraud. Its effect when applied is to restrain a party from exercising his legal right, and this, even a court of equity cannot do, unless there has been on his part some conduct, declaration, or improper concealment, misleading an innocent person to his prejudice. That doctrine was said not to be applicable to the case before the court, because there were no acts on the part of the licensor which warranted the licensee to infer a relinquishment of its proprietary control over its soil. *Jackson & S. Co. v. Philadelphia W. & B. R. Co.* 4 Del. Ch. 180.

Where a village incurred expenses in constructing a system of sewers in reliance upon

a parol license to permit the discharge thereof into a stream flowing over the property of the licensor, the court held that the right, being for an interest in land, could only be conveyed by deed, and that if the village saw fit to proceed with its undertaking without seeking to obtain any right for the discharge of the sewage they are hardly in a position to invoke the doctrine of estoppel for the purpose of precluding the licensor from the assertion of his legal or equitable rights in the premises. *Dwight v. Hayes*, 150 Ill. 273, 37 N. E. 218, Affirming 49 Ill. App. 530.

One landowner will not be estopped from setting up his claim to a water right by merely acquiescing in the use of it by another and permitting him to incur expense on the faith of his acquiescence unless compensated for the license. *Lavery v. Arnold (Or.)* 57 Pac. 906. The court explains its former decisions by saying that the license, to be irrevocable, must result from some consideration paid by the licensee, or some benefit accruing to the licensor.

In *Wilton v. Harwood*, 23 Me. 131, which was a suit to compel specific performance of a parol contract to convey real estate, the court says that the rule that one who hears a bargain with a third person for an estate, and sees such third person pay for it, or expend money upon it, without making known his own title, will not be permitted in equity to disturb him in the enjoyment of the estate, cannot apply to cases of contract where all the parties to it fully understand the true state of the title, and one of them seeks relief against the other.

Where there is no concealment of the title, or of any fact bearing on the question, a parol license to build a dam which will flow the land of the licensor is void under the statute of frauds, and the doctrine of estoppel *in pais* does not apply. *Batchelder v. Sanborn*, 24 N. H. 474.

A parol agreement to permit one railroad company to extend its tracks upon the right of way of another for the purpose of connecting therewith is a mere license revocable at the will of the licensor, and will not operate as an estoppel, although the licensee has entered and made valuable improvements. *Richmond & D. R. Co. v. Durham & N. R. Co.* 104 N. C. 669, 10 S. E. 659.

An estoppel to revoke a license to construct a railroad track over property because of the expenditure of money in reliance thereon cannot be made available in a court of law, in an action to recover possession of the property. *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.* 102 Ill. 514.

A license to do an act on the land of the licensor cannot be changed to an equitable right on the ground of equitable estoppel. *Crosdale v. Lanigan*, 129 N. Y. 604, 29 N. E. 824.

And that case was followed in *Clifford v. O'Neill*, 12 App. Div. 17, 42 N. Y. Supp. 607.

One who, while owning and using a water privilege on a stream, assents to the erection of expensive machinery for the diversion of the water by another upon the same side of the stream above him, is not thereby estopped, upon subsequently purchasing the lands on the stream immediately opposite the machinery, from demanding that the water shall be restored to the original channel, though such restoration will cause great loss to the person who erected the machinery. This was, however, placed upon the ground that the right to the restoration existed in favor of the subsequently purchased land, so that the consent by one before owning it did not work an estoppel as against its rights. *Corning v. Troy Iron & Nail Factory*, 40 N. Y. 191.

But if a man stands by and allows a build-

ing to be erected on his land, and afterwards agrees as to the rent to be paid for it, he cannot dispute the right of the builder to use the land. *Mold v. Wheatcroft*, 27 Beav. 519, 6 Jur. N. S. 2, 29 L. J. Ch. N. S. 11 (*dictum*).

c. Trustee *ex maleficio*.

In a Pennsylvania case the doctrine of trust *ex maleficio* was resorted to, to uphold the right of the licensee.

The court says: The agreement is not a parol conveyance of an interest or easement in land, but a license to use it in a particular way without disturbing the title of the owner. To prevent the fraud which would result from the revocation of the license where two adjoining property owners have united in erecting a dam on the property of one, equity will turn the owner of the soil into a trustee *ex maleficio*. *Swartz v. Swartz*, 4 Pa. 353, 45 Am. Dec. 697. That doctrine was recognized in *Fleckinger v. Shaw*, 87 Cal. 126, 11 L. R. A. 134, 25 Pac. 268.

The basis of the doctrine is that equity will treat the person who perpetrated the fraud as a trustee *ex maleficio* on account of the fraud. *Wheeler v. Reynolds*, 66 N. Y. 227. However, in that case the court says: A mere refusal to perform a parol agreement, void under the statute of frauds, is in no sense a fraud either in law or in equity.

If refusal to perform such an agreement is not a fraud how can it be a fraud to revoke parol permission to place a burden on land which is indefinite in every element, and the licensee was bound to know gave no more than the most transitory right?

VIII. Doctrine of executed license.

The general rule is that when the license is executed it cannot be revoked so as to render illegal acts already done under it.

In *DeVaughn v. Minor*, 77 Ga. 809, 1 S. E. 435, the court says it recognizes the rule that if a party has been led to incur expense in consequence of having obtained a parol license from another to do an act, and the license has been acted upon, the other party cannot be permitted to recall his license and treat the first as a trespasser for having done the very act.

Where a landowner encourages another to build a house resting partly on his land he cannot, after the completion of the house, maintain an action for the trespass. *Short v. Taylor*, 2 Eq. Cas. Abr. 522, pl. 3.

Where a mill dam overflowing adjoining property was erected under license of the property owner, who sought to recover damages for the nuisance, the mill owner pleaded license to which the property owner replied the statute of frauds, but the court said it was a fraud in the plaintiff to attempt to make a private nuisance of that which was erected by his own license. *Dorrance v. Simons* (1795) 2 Root, 208.

Where an agreement by which one landowner undertakes to remove rock and dirt which obstructs the passage of light and air to his neighbor's house and renders it damp, in consideration that he may have a right to use the neighbor's wall as a partial support for his building and project his eaves over the neighbor's ground, has been executed, the neighbor will not be allowed to proceed against him for the trespass. *Fisher v. Moon*, 11 L. T. N. S. 623.

In *Sampson v. Burnside*, 13 N. H. 264, it is said that there had been no revocation of the license so that the acts done under it for which the action was brought were lawful, and the action could not be maintained.

In *Bradley v. Gill*, 1 Lutw. fo. 69, plaintiff brought an action against defendant for erecting a smith's shop within the plaintiff's house, and defendant pleaded that plaintiff advised him to dwell in the house and use his trade there, and that therefore he came to the house and dwelt there and in a convenient room thereof had erected a smith's forge; and the court held that the plea did not answer the declaration, and that the action would lie.

The principle of executed license has been carried in some cases to the extent of preventing the revocation of the license so as to require a removal of the burden after the expenditure has been made. But the license cannot be regarded as executed so far as the future enjoyment of the privilege is concerned. As to that the privilege must be regarded as a continuing one to which the doctrine of executed licenses does not apply.

One of the grounds upon which the non-revocability of the license was placed in *Saucer v. Keller*, 129 Ind. 475, 28 N. E. 1117, was that it had become an executed license.

A parol license given for a valuable consideration, to place a bridge abutment on the land of the licensor, will be valid until it is revoked, so that the licensor will not be justified in destroying the bridge and carrying away the material. The court, however, says that it is contended that the contract is not within the statute of frauds because it was executed by both parties. The authorities support this contention. There are numerous decisions establishing the distinctions between agreements executory and agreements executed in whole or in part. The statute of frauds is applicable to the former, not to the latter. *Ricker v. Kelly*, 1 Me. 117, 10 Am. Dec. 38.

In *Yunker v. Nichols*, 1 Colo. 561, where an irrigation ditch had been constructed under parol license, Belford, J., placed his concurrence in the judgment establishing the right in part upon the ground that the executed license could not be revoked.

In *Rindge v. Baker*, 57 N. Y. 221, 15 Am. Rep. 475, Commissioner Dwight in a separate opinion says at law a parol license, owing to the statute of frauds, is revocable at the pleasure of the licensor, notwithstanding the expenditure of money on his land by the licensee. In equity the rule is quite different. As a court of equity will take a parol contract for the sale of lands out of the statute of frauds when it is partly performed, it will, on the same principle, take an executed parol contract for an easement as equivalent to a grant under seal, where the parties cannot be restored to their original position.

In *Sheffield v. Collier*, 3 Ga. 82, where a parol license to overflow land for a mill pond had been partly executed by the construction of the dam and the collection of timber for the mill, the court held that it could not be revoked because it had become executed, founding the decision upon *Winter v. Brockwell* (1807) 8 East, 308, and *Liggins v. Inge* (1831) 7 Bing. 682, 5 Moore & P. 712. The court further says, where acts have been done by one party upon the faith of a license given by another, the latter will be estopped from revoking it to the injury of the former, and this even if the exercise of the right given by the license is of a nature to amount to the enjoyment of an easement or other incorporeal hereditament.

But in *Wingard v. Tift*, 24 Ga. 179, which was the case of a license to place a dam and fish traps in a stream, the court said a verbal license is within the statute of frauds, and therefore, whether acted upon or not, it is revocable at any time at the option of the licensor. It is further said the case of *Sheffield v. Collier*, 3 49 L. R. A.

Ga. 82, is perhaps not necessarily adverse to this view. In that case the two Colliers were joint tenants of the whole lot; each, therefore, by virtue of this tenancy, was rightfully in possession of the whole lot. The agreement between them amounted to an agreement to partition the land in a certain way,—such a way as to give to one brother the right to use the property that was to go to the other for certain purposes. Here was, at least, a plenty of consideration. In such a case it may, perhaps, be true that an action for trespass would not lie.

Where owners of adjoining property, one of whom is about to place a building on his lot, agree that the wall shall be placed on the line, and when the other shall build on his lot, he may have the use of it, but that until he does so a stairway leading to the second story of the building may be placed on his side of the line, the owner of the unimproved lot cannot, after the building has been erected on the faith of such agreement, revoke his consent and compel the destruction of the stairway. The court says: Regarding the contract as a mere license to erect an outside stairway, a large sum of money having been expended in the erection of said building on the faith thereof, the same has been executed by the builder, and must be deemed irrevocable. An executed parol license, however, may become an easement on the land of another, and may impose a servitude on one estate in favor of another. In answer to the objection that there was no consideration for the agreement, the court says a valuable consideration may consist of any benefit, delay, or loss to another party, and that there was a consideration within that definition. *Joseph v. Wild*, 146 Ind. 249, 45 N. E. 467.

In *Miller v. Auburn & S. R. Co.* 6 Hill, 61, 64, the court, in speaking of the cases in which an executed parol license has been held irrevocable, says these cases let in a verbal distinction under which, if retained and made applicable in its full extent, the statute of frauds would in many important cases be repealed. Oral licenses irrevocable would be made in effect to pass estates in freehold. The old established rule of the common law, that easements and other incorporeal hereditaments shall pass by deed only, would be nearly repealed. You have only to throw the grant in the form of a parol license, and on its being executed both the statute and common law are evaded.

A parol license to erect a dam which backs water upon the land of the licensor is executory as contradistinguished from an executed license, and as such is revocable. *Carter v. Harlan*, 6 Md. 20.

The doctrine that a license executed is revocable must be confined to those licenses under which, when executed, it cannot be claimed that any estate or interest in lands passes. *Clute v. Carr*, 20 Wis. 531, 91 Am. Dec. 442.

A parol license to construct a ditch over the land of the licensor may be revoked, even after the ditch is completed. The court says the authorities show that the rule that a license executed cannot be countermanded is not applicable to licenses which, if given by deed, would create an easement; but to license which if given by deed, would extinguish an easement. *Morse v. Copeland*, 2 Gray, 302.

IX. How far relief may be afforded.

If it becomes necessary for the licensor to go into equity to establish the revocation of the license some relief may be afforded to the licensee on the ground that he who seeks equity must do equity.

As a condition of permitting the revocation,

equity may, where the licensor comes before it seeking relief, require him to permit the removal of the fixtures, or, if that cannot be accomplished without material loss, it may require him to make just compensation therefor. *Flick v. Bell* (Cal.) 42 Pac. 813.

Where a landowner gives a parol license to one contemplating the erection of a mill, that he may take water from a lake on his land through a race to be dug also on his land, he cannot, after the mill and race are about completed at large expense, go into a court of equity to enjoin the use of the water and race. This was put upon the ground that he who seeks equity must do equity. *Payne v. Paddock*, Walk. Ch. (Mich.) 487.

Where the revocation would amount to a fraud equity will grant no affirmative relief founded on such revocation. *Veghte v. Raritan Water Power Co.* 19 N. J. Eq. 153.

A mill owner will not be entitled to affirmative relief against the maintenance of works above him on the stream which interfered with the ponding of water in his pond, if he consented to the erection of the works. *Hulme v. Shreve*, 4 N. J. Eq. 116.

Where persons were put into possession of real estate by their father, and made large outlays in erecting buildings thereon, the court held that the father could not take possession of the land again without allowing the sons the amount of the money they had laid out upon it, and that the money was a lien and charge upon the land as against the father. *Unity Joint Stock Mut. Bkg. Asso. v. King* (1858) 25 Beav. 79, 27 L. J. Ch. N. S. 585, 4 Jur. N. S. 470.

If a miner has been induced under a parol license to sink a shaft or run drifts, and if before proving the ground the license is revoked, he should have the six months' notice to quit recognized at common law to a tenant at will, unless the amount expended by him on the ground should be refunded. The court says, before declaring such an agreement void under the statute, a court should apply every principle of law to bring the parties *in statu quo*. It further says, we assume that the license in the present case was not absolutely void under the statute. It is only voidable. Not *ipso facto* void, but may be declared void by a competent tribunal on terms calculated to prevent fraud. *Bush v. Sullivan*, 3 G. Greene, 344, 54 Am. Dec. 506. And that case was followed in *Beatty v. Gregory*, 17 Iowa, 114, 85 Am. Dec. 546; *Harkness v. Burton*, 39 Iowa, 101.

When an owner of an estate has by parol granted an easement therein, upon the faith of which the other party has expended money which will be lost and valueless if the right to enjoy such easement is revoked, equity will compel the owner to indemnify him on revoking the grant. *Dillon v. Crook*, 11 Bush, 321.

If the structure is capable of being removed it is probable that a reasonable time would be given in all cases for removal. *Cornish v. Stubbs*, 39 L. J. C. P. N. S. 202, L. R. 5 C. P. 334, 22 L. T. N. S. 21, 18 Week. Rep. 547.

But ordinarily at law, although the licensee has incurred expense on the faith of the license, a tender of amends is not a condition precedent to a revocation. *Jamieson v. Millemann*, 3 Duer, 255.

A parol license to erect a dam on the land of the licensor may be recalled upon reasonable notice without liability for the expenditures made on the faith of it. *Kivett v. McKelthan*, 90 N. C. 106.

And in New Hampshire it is stated that the doctrine that a parol license cannot be revoked without first reimbursing the money expended, or doing what is equivalent to restoring the license *in statu quo*, was overruled in *Houston* 49 L. R. A.

v. Lafee, 46 N. H. 505; *Batchelder v. Hibbard*, 58 N. H. 269.

In case a license for a valuable consideration to erect a structure on land for the posting of bills, is revoked, an action will lie for the breach of contract. *Kerrison v. Smith* (1897) 2 Q. B. 445, 66 L. J. Q. B. N. S. 763, 77 L. T. N. S. 844.

Where a tenant has covenanted to deliver up at the end of the term all structures placed by him on the premises, he cannot plead a parol license to justify his taking away a building which he erected during the term. *West v. Blakeway*, 2 Mann. & G. 729, 3 Scott, N. R. 199, 218, 9 Dowl. P. C. 846, 5 Jur. N. S. 630.

X. Statutory changes.

If a corporation is given power by statute to acquire the right to divert water without deed, it may do so, although at common law such diversion would be an incorporeal hereditament which would necessarily be created by deed. *Raritan Water Power Co. v. Veghte*, 21 N. J. Eq. 463.

A parol license to flow lands is good under the Michigan statutes as a tenancy for a year. *Morrill v. Mackman*, 24 Mich. 279, 9 Am. Rep. 124.

Where action has been taken upon a parol license to shore up a party wall, pending the excavation of a cellar on the adjoining property as authorized by statute, the license cannot be revoked while the shoring is in place and before the foundation has been built up so as to support the wall, so as to render the licensee a trespasser for continuing the work until it becomes safe to remove the shoring. *Ketchum v. Newman*, 116 N. Y. 422, 22 N. E. 1052, reversing *Ketcham v. Newman*, 3 N. Y. S. R. 566.

XI. Conclusion.

The conclusion from the cases and the principles involved is that a parol license can never impose an irrevocable burden on land, because as soon as the burden is established it becomes an estate or an easement which is an interest of a higher grade than a license. That an easement can only be created by deed, and an agreement for an estate must be in writing under the statute of frauds. That the only equitable relief must be on the basis of a distinct promise for a definite interest, express or implied, forming part of a contract which may be enforced specifically. That estoppel cannot avail because fraud is a necessary ingredient of an estoppel, and there can be no fraud in permitting one to make expenditures which the licensor has a right to assume are made in contemplation of the unstable character of the title under the statute of frauds, for considerations satisfactory to the licensee. The majority of the cases accord with these principles, although many contain *dicta* at variance with them. Some cases, however, have been decided, in reliance upon such *dicta*, in a manner which, under strict legal principles, must be pronounced erroneous. It is noteworthy, however, that the courts in several of the states in which erroneous decisions have occurred have returned to correct principles in their later decisions: As examples of this, reference is made to *Walker v. Shackelford*, 49 Ark. 506, 5 S. W. 887; *Wilton v. Harwood*, 23 Me. 131; *Pitzman v. Boyce*, 111 Mo. 387, 19 S. W. 1104; *Carleton v. Redington*, 21 N. H. 291; *Lawrence v. Springer*, 49 N. J. Eq. 289, 24 Atl. 933; *Lavery v. Arnold* (Or.) 57 Pac. 906, and *Pifer v. Brown*. All of these cases, when compared with prior decisions from the same states as cited above, will be found to indicate a change towards more correct principles from earlier decisions or *dicta*.

H. P. F.

David BRYSON *et al.*

v.

Mary McSHANE *et al.*, *Appts.*

(.....W. Va.....)

*An aged person living alone in apparent destitution, without known friends or relatives, enters into a verbal contract with a husband and wife, whom she claims as kindred, to maintain, care for, support, clothe, and bury her, for her property, consisting of a small amount of personality, and several pieces of real estate of inconsiderable value; and in pursuance of such contract they move into and take charge of her and her property, and in all respects possible fully carry out and comply with their contract; but before the contemplated deed can be executed for such property, in consummation of such contract, she meets with an accident, which results in her death. At the instance of such husband and wife, a court of equity will specifically enforce such contract against persons asserting themselves to be heirs of the deceased by reason of remote relationship.

(April 21, 1900.)

APPEAL by defendants from a decree of the Circuit Court for Tyler County in favor of plaintiffs in an action brought to enforce specific performance of a contract to convey real estate. *Modified and affirmed.*

The facts are stated in the opinion.

Messrs. Howard & Handlan and *John J. Coniff*, for appellants:

Unless it is entirely clear that a contract was concluded, specific performance will not be decreed; but the court will leave the parties to their rights at law.

Waterman, Spec. Perf. Contr. pp. 170 *et seq.*

Contracts of this nature, which have been held to have been too uncertain for enforcement by specific performance, are very numerous.

Hamilton v. Harvey, 121 Ill. 469, 13 N. E. 210; *Japps v. Holt*, 58 N. C. (5 Jones, Eq.) 153; *Jordan v. Fay*, 40 Me. 130; *Hammer v. McEldowney*, 46 Pa. 334; *Carr v. Passaio Land Improv. & Bldg. Co.* 19 N. J. Eq. 424; *King v. Ruckman*, 20 N. J. Eq. 316; *Semmes v. Worthington*, 38 Md. 298.

This claim to the lands of Margaret Henrietta, deceased, rests on the alleged parol contract set out in the bill, and appellees try to establish it by loose declarations of hearsay witnesses as statements made by said Margaret Henrietta, which are brought to bear on this case after she is dead and gone and cannot contradict them. They should, therefore, undergo the closest and most careful investigation to avoid injustice being done to appellants.

Askew v. Carr, 81 Ga. 675, 8 S. E. 74;

*Headnote by DENT, J.

NOTE.—As to validity of agreement to give property at promisor's death, see *note* to *Krell v. Codman* (Mass.) 14 L. R. A. 850; *Wright v. Wright* (Mich.) 23 L. R. A. 196; *Kofka v. Rosicky* (Neb.) 25 L. R. A. 207; *Nowack v. Berger* (Mo.) 31 L. R. A. 810; *Swash v. Sharpstein* 49 L. R. A.

Gallagher v. Gallagher, 31 W. Va. 9, 5 S. E. 297; *Boggs v. Bodkin*, 32 W. Va. 566, 5 L. R. A. 245, 9 S. E. 891; *Harris v. Elliott*, 45 W. Va. 245, 32 S. E. 176; *Campbell v. Fetterman*, 20 W. Va. 398; *Baldenberg v. Warden*, 14 W. Va. 397; *Patrick v. Horton*, 3 W. Va. 23.

Payment of some taxes will not be such a consideration as will allow them to lay claim to the ownership of decedent's land, simply because they saw fit to pay her taxes.

High v. Pancake, 42 W. Va. 602, 26 S. E. 536.

In a suit to enforce specific performance of a parol contract or agreement to devise or convey real estate, possession is an essential part performance of such contract.

Goodwin v. Bartlett, 43 W. Va. 333, 27 S. E. 325; *Miller v. Lorentz*, 39 W. Va. 160, 19 S. E. 391; *Woods v. Stevenson*, 43 W. Va. 149, 27 S. E. 309; *Westfall v. Cottrills*, 24 W. Va. 763; *Blankenship v. Spencer*, 31 W. Va. 510, 7 S. E. 433; *Waterman*, Spec. Perf. Contr. p. 198.

The appellees have not shown possession of even the home farm, much less the other tracts, of which existence is merely hinted; they have not shown that they expended money or labor in valuable improvements, but have only shown that they cut and cleared one field of timber, repaired fences, and in fact made only such improvements as would occur in the ordinary course of husbandry.

Gallagher v. Gallagher, 31 W. Va. 9, 5 S. E. 297; 22 Am. & Eng. Enc. Law, p. 963; *Crim v. England*, 46 W. Va. 480, 33 S. E. 310; *Blankenship v. Spencer*, 31 W. Va. 510, 7 S. E. 433; *Townsend v. Hawkins*, 45 Mo. 286; *Miller v. Chetwood*, 2 N. J. Eq. 199; *Bean v. Valle*, 2 Mo. 126; *Park v. Leeuright*, 20 Mo. 85; *Charpiot v. Sigerson*, 25 Mo. 63; *Wiley v. Robert*, 31 Mo. 212; *Ells v. Pacific R. Co.* 51 Mo. 200; *Spalding v. Conzelman*, 30 Mo. 177; *Bowles v. Wathan*, 54 Mo. 261; *Sitton v. Shipp*, 65 Mo. 297; *Cronk v. Trumble*, 66 Ill. 428; *Huntington & K. Land Development Co. v. Thornburg*, 46 W. Va. 99, 33 S. E. 108.

If any contract or promise was made, it was one which would not pass an interest until the death of Margaret Henrietta.

Lauck v. Logan, 45 W. Va. 251, 31 S. E. 986.

Mr. Jackson V. Blair, for appellees:

While a parol agreement for the sale of land must be certain as to its terms, and clearly proved, this rule is to be applied in the courts below, which deal with the facts; and when such an agreement has been there found on conflicting evidence, and as found is certain in its terms, it must be taken as established within the rule, and the findings are conclusive in the court of last resort.

Beach, Modern Law of Contracts, § 946;

(Wash.) 32 L. R. A. 796; *Owens v. McNally* (Cal.) 33 L. R. A. 369; and *Svanburg v. Fosseen* (Minn.) 43 L. R. A. 427.

For specific performance of contract to convey property at death, see *Jaffee v. Jacobson* (C. C. A. 8th C.) 14 L. R. A. 352.

Dunkel v. Dunkel, 141 N. Y. 427, 36 N. E. 405.

The evidence establishes a sale of all the property, both real and personal, owned by Margaret Henrietta at the time of the contract, December, 1894, especially the 100 acres, 57 acres, and 35½ acres of land in Tyler county, and the house and lot in Moundsville. There can be no doubt what lands she sold. The records showed what she owned and the title she held. This was constructive notice, at least, to the Brysons as to what they were buying. Margaret put them in possession of all, of everything—if her oft-repeated declarations to divers disinterested witnesses are to be accepted as evidence.

Crim v. England, 46 W. Va. 480, 33 S. E. 310; *Campbell v. Fetterman*, 20 W. Va. 398; *Miller v. Lorentz*, 39 W. Va. 160, 19 S. E. 391.

The obligations of parties to each other are ascertained as well by what they say as by what they do,—admissions often giving the best and truest interpretation to contracts previously entered into, or doings showing what has previously been agreed to be, or promised should be, done.

Van Tine v. Van Tine (N. J. Eq.) 1 L. R. A. 155, 15 Atl. 249; *Wright v. Wright*, 99 Mich. 170, 23 L. R. A. 196, 58 N. W. 54.

Where a parol agreement is made for the sale of several lots of land, and one gross sum is to be paid for the land as an entirety, taking possession of one of the lots would be sufficient.

1 Devlin, Deeds, 2d ed. § 154; *Smith v. Underdunk*, 1 Sandf. Ch. 579; *Jones v. Peace*, 21 Wis. 654.

Where two persons live in the same house, of which one is the owner, an agreement by the latter to convey the house to the other in return for his support and care will, in the case of performance during the owner's life, be enforced against his heirs.

1 Devlin, Deeds, 2d ed. § 150; *Watson v. Mahan*, 20 Ind. 225.

There are things which money cannot buy, a thousand nameless and delicate services incapable of being the subject of explicit contract, which money is powerless to purchase. The law furnishes no standard whereby the value of such services can be estimated, and equity can make an approximation only in that direction by decreeing specific performance of the contract.

2 Beach, Modern Law of Contracts, § 957; *Brinton v. Van Cott*, 8 Utah, 480, 33 Pac. 218; *Kofka v. Rosicky*, 41 Neb. 328, 25 L. R. A. 207, 59 N. W. 788; *Jaffee v. Jacobson*, 4 U. S. App. 4, 14 L. R. A. 352, 48 Fed. Rep. 21, 1 C. C. A. 24; *Sharkey v. McDermott*, 91 Mo. 647, 60 Am. Rep. 270, 4 S. W. 107; *Maddox v. Rowe*, 23 Ga. 431, 68 Am. Dec. 535; *Benge v. Hiatt*, 82 Ky. 666, 56 Am. Rep. 912; *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773.

Dent, J., delivered the opinion of the court:

David and Anna Bryson, husband and wife, sue Mary McShane and others in the 40 L. R. A.

circuit court of Tyler county to compel specific performance of a verbal contract with Margaret Henrietta, deceased. The facts are as follows: Margaret Henrietta was an aged Irish woman, past sixty. She owned in her own right several tracts of land and a house and lot situated in Moundsville. On one of her tracts of land she resided in a little old smoke house, near her dwelling house thereon. This smoke house was 9 or 10 feet square, made out of heavy split rail timber, with a roof laid on it. It had no floor or flue. The occupant built a fire when needed in the center of the room, and permitted the smoke to pass out through a hole in the roof. Over some of the larger cracks some boards were nailed, while the lesser ones were left open. It was destitute of furniture, and was not a fit abode for a human being. The dwelling house was occupied by a tenant and his family, with whom this poor old woman would not live, because of ill feeling existing between them. She went filthy and shabby, and often begged her food from the neighboring farmers, although she had an abundance to support her in good circumstances had it been properly managed. Her land had grown up with filth, and the fences had decayed and fallen down, while her tenants neglected her, and looked only after their own interests. If she had any relatives, they gave her no attention whatever. Under these circumstances, she went to Moundsville, and made a proposition to David and Anna Bryson, the latter of whom she said was her cousin or niece and nearest relative, that if they would move onto her farm, and take care of her during the rest of her life, she would deed them all her property. They accepted her proposition, gave up their business, which was keeping a boarding house, and moved down and took possession of the dwelling house, the tenant moving out, and took Margaret Henrietta in with them. From the evidence, she surrendered to them full possession of all her property, and, as she told the neighbors, she intended now "to live like a lady." Mrs. Bryson took actual charge of the house and the old lady, and cleaned her up, and saw she had decent clothing. The neighbors testify that from then on she was transformed in appearance and dress, and so continued until the day of her death. She repeatedly told them that she had turned her property over to the Brysons. No writings were drawn up, but the parties were waiting until the weather was suitable, and then they were going to Middlebourne, the county seat, and have their contract put in proper legal form. The Brysons entered on the execution of their contract just before the holidays, and in the early spring, when they were all fighting fire to prevent the burning of the fences, the clothes of the old lady were in some way ignited, and before the flames could be extinguished she was so badly burned that in a few hours she died. The Brysons took her to Cameron, and buried her beside her brother and sister in the Catholic cemetery, according to her desire. They found that all her property had been returned delin-

quent and about to be sold for taxes, and redeemed it. They also paid other taxes on it. They paid all her doctor bills and funeral expenses, and in all respects fully complied with their contract. They had actual possession of the home farm by occupancy, and received just such possession of her other property as Margaret herself held. At least she continually, from the evidence of the witnesses, asserted that she had turned her property over to them, and that it belonged to them.

After her death, Mary McShane, claiming to be her nearest and only relative,—being a cousin on her mother's side, as she asserted, and proves only by her own uncorroborated evidence, except some others claim to have heard James Henrietta, brother of Margaret, say as much, to wit, that she was his nearest relative, and his heir at his death,—set up a claim to, and endeavored to take possession of, Margaret's property. In furtherance of this purpose, she instituted a suit in ejectment against the Brysons. Thereupon they filed their bill to enforce their contract. On a hearing, the circuit court decreed the plaintiffs all the property except the Moundsville house and lot, and this was left out for the reason that actual possession thereof was not shown by the Brysons. From this decree Mary McShane, and Owen McShane, her son, who had at her instance been appointed administrator of the personal property, and endeavored to take possession thereof, obtained this appeal.

They claim that the contract relied on is invalid by reason of the statute of frauds and an insufficient description of the property sought to be covered thereby. The plaintiffs insist that full performance of the contract on their part takes it out of the statute of frauds, and, as all Margaret Henrietta's property was included, no other description thereof was necessary. The last proposition is undoubtedly true; for, if the contract included all the property owned by Margaret, this is such description as can be made certain, and it need not be more specific; for it is a maxim of equity to regard that as certain which can be made so.

The uncontradicted evidence of the witnesses, corroborated by the circumstances, the loneliness, wretched, friendless condition of Margaret, and the fact that she regarded Mrs. Bryson as her nearest relative and best friend, fully sustain this view of the contract. In the light of the testimony, there can be but one conclusion, and this is that the plaintiffs were to have all her property. As shown by the tax receipts, the value of it was not very great, and, from the evidence, few were anxious to enter into the bargain made by the plaintiffs. It would certainly be a great hardship on them to permit the statute of frauds to defeat them of their well-earned reward.

The principal contention of the defendants is that the plaintiffs did not have such possession of the property as entitles them to specific performance. This seems to have been the view taken by the circuit court as to the house and lot in Moundsville. The

evidence certainly shows that Margaret surrendered to them entire possession of the property, including herself. Possession means simply the owning or having a thing in one's own power. *Brown v. Volkening*, 64 N. Y. 80. It implies a present right to deal with the property at pleasure, and to exclude other persons from meddling with it. *Sullivan v. Sullivan*, 66 N. Y. 41. The plaintiffs could not occupy all the properties at one time, but they could enter into her possession which she gave them. There is no evidence showing that anyone else had or claimed possession of any of the properties. In short, their possession, such as she gave them, has never been successfully disputed. By their contract, they were to have all the lands, but they could only actually occupy one of the properties, and this was the one at which their contract was to be fulfilled. In *Devlin, Deeds*, § 154, it is said that, "where a parol agreement is made for the sale of several lots of lands, and one gross sum is to be paid for the land as an entirety, taking possession of one of the lots would be sufficient." Specific performance can be enforced in a case of this character without regard to possession. In the case of *Brinton v. Van Cott*, 8 Utah, 480, 33 Pac. 218, it is held that, "where the part performance of an oral agreement to convey lands consists in the performance of services of such a peculiar character that it is impossible to estimate their value by any pecuniary standard, the contract can be specifically performed, even though possession of the land agreed to be conveyed was never in the vendee." *Rhodes v. Rhodes*, 3 Sandf. Ch. 279; *Watson v. Mahan*, 20 Ind. 225. This is a rule generally accepted. *Browne, Statute of Frauds*, § 463, note 2. Some jurisdictions refuse to recognize it, notably Indiana. *Austin v. Davis*, 128 Ind. 472, 12 L. R. A. 120, 26 N. E. 890. This rule is but the general doctrine of equity that specific performance of a contract will be enforced where adequate compensation cannot be had at law, and that persons who contract to perform peculiar services for peculiar compensation, having performed such services, are entitled to have the compensation contracted for, and to enforce a different value on their services, and to compel them to accept a less compensation for them, would be the perpetration of fraud and injustice against them. There are some services that are incapable of valuation in money. As to these the law permits individuals to make their own contracts. Old age is naturally repulsive. The hair grows gray, the eyes sunken, the skin wrinkled and brown, the flesh shrunken, the figure bent, the limbs weak and trembling, the will feeble, the tongue garrulous, the mouth toothless, the mind wandering, the habits careless and filthy, accompanied oftentimes with loathsome diseases, needing all the care and attention of childhood, without its purity, loveliness, and affection as a compensation. To meet this condition of life, a kind Providence has ordinarily provided the ties of blood and marriage, and parental, fraternal, and filial affection, with their re-

ciprocal duties and obligations of mutual care and support. Where these are lacking, through the want of near relatives, the aged are compelled to endure great hardship and neglect, unless Christian charity, noted for its rarity, intervenes in their behalf. The condition in which Margaret Henrietta was living at the time she entered into her contract with the Brysons was not only a disgrace to her relatives, if she had any, but was a reproach to the community in which she resided, and the Christian fellowship of the denomination to which she adhered. She was thoroughly neglected; so much so that the witnesses testify that there were not many people who would be willing to take care of her for her property. The present claimants of her property, undoubtedly holding their relationship in abeyance, if it existed, stood afar off, waiting for her demise.

These plaintiffs, moved by her importunity and necessities, and recognized by her as her nearest kindred, came to her assistance, and gave her the affectionate care of near relatives, so that her last days were a redemption from those which immediately preceded them. And now to deny them the compensation contracted for, in favor of those whose relationship is not asserted, either by word or action, until death seals her lips for ever, would be unjust and inequitable, contrary to her desire, and in violation of her expressed covenant.

The decree will therefore be modified so as to include the house and lot in Moundsville, and as thus amended will be affirmed, and the cause remanded.

Brannon, J.: I doubt only as to the Moundsville property.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

Thomas BRADFORD, *Plff. in Err.*,
v.

HANOVER FIRE INSURANCE COMPANY
of New York City.

(102 Fed. Rep. 48.)

1. An insurance agent is not liable to the company for loss on a risk which he was forbidden to take, where the policy was issued without his knowledge, consent, or ratification, by a clerk in his office who forged his name to it, where the wrong was not committed for his purposes, and he never consented to profit by it.
2. Authority to a clerk to deliver insurance policies does not include the delivery of policies upon which the clerk has forged his principal's signature, so as to make the principal responsible for the act.
3. Merely employing and retaining a clerk in an insurance office, without any ground for suspecting that he would abuse any confidence reposed in him, will not estop the agent from repudiating his act in forging the agent's name to a policy, where he was given no authority to sign the agent's name, and the agent had done nothing to make it appear that such authority was given him.

(May 14, 1900.)

ERROR to the Circuit Court of the United States for the Western District of Pennsylvania to review a judgment in favor of plaintiff in an action brought to recover damages for losses caused by defendant's agent. *Reversed.*

The facts are stated in the opinion.

Before *Dallas and Gray*, Circuit Judges, and *Bradford*, District Judge.

Messrs. Joseph M. Swearingen, John M. Buchanan, and William A. McConnell, for plaintiff in error:

The forgery of Mr. Bradford's name to

this policy was not within either the direct or the apparent scope of Hoyt's employment.

The doctrine that where one of two innocent persons must suffer, the loss should be borne by him who put the wrongdoer in a position of trust, is not applicable.

Wright v. Wilcox, 19 Wend. 342, 32 Am. Dec. 507; *Stevens v. Woodward*, L. R. 6 Q. B. Div. 318, 29 Moak, Eng. Rep. 645; *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168.

Messrs. Winfield S. Moore and Henry Rice, for defendant in error:

The fact that Thomas Bradford did not authorize his clerk to countersign this policy with his name is no defense to the action on the policy.

The Hanover Fire Insurance Company was bound if the insurance had been bargained for and if paid for, both of which were facts here, even if no policy had been issued at all.

Commercial Mut. Marine Ins. Co. v. Union Mut. Ins. Co. 19 How. 318, 15 L. ed. 636; *Idc v. Phoenix Ins. Co.* 2 Biss. 333, Fed. Cas. No. 7,001.

As the policy was in fact countersigned by the hand of one who acted within the apparent scope of his employment for Thomas Bradford, this could not be availed of for a defense by the Hanover Fire Insurance Company, notwithstanding the fact that such person had not been actually empowered to so countersign the policy by either Thomas Bradford or the Hanover Fire Insurance Company.

Universal F. Ins. Co. v. Block, 100 Pa. 535, 1 Atl. 523; *Bodine v. Exchange F. Ins. Co.* 51 N. Y. 117, 10 Am. Dec. 566; *Swan v. Weyertown F. Ins. Co.* 96 Pa. 37; *McGonigle v. Nussquahanna Mut. F. Ins. Co.* 168 Pa. 1, 31 Atl. 868; *Camden Consol. Oil Co. v. Ohio Ins. Co.* Fed. Cas. No. 2,337b; *Massachusetts L. Ins. Co. v. Eshelman*, 30 Ohio St. 647; *Filen-*

NOTE.—For power of clerk of Insurance agent to bind the company, see also *Arff v. Star Fire Ins. Co.* (N. Y.) 10 L. R. A. 600, and *note*; 49 L. R. A.

Steele v. German Ins. Co. (Mich.) 18 L. R. A. 85; and *W. B. Goode & Co. v. Georgia Home Ins. Co.* (Va.) 30 L. R. A. 842.

berger v. Protective Mut. F. Ins. Co. 89 Pa. 467.

Thomas Bradford is liable to the Hanover Fire Insurance Company for the loss resulting from the tortious act of his employee.

Hern v. Nichols, 1 Salk. 289; *Philadelphia & R. R. Co. v. Derby*, 14 How. 486, 14 L. ed. 502; *Lee v. Sandy Hill*, 40 N. Y. 448; *Locke v. Stearns*, 1 Met. 560, 35 Am. Dec. 382; *Independent Bldg. & Loan Asso. v. Real Estate Title Co.* 156 Pa. 181, 27 Atl. 62; *Higgins v. Waterliet Turnp. & R. Co.* 46 N. Y. 27, 7 Am. Rep. 293; *Barnard v. Coffin*, 141 Mass. 37, 6 N. E. 364; *Pownall v. Bair*, 78 Pa. 403.

Mr. Hoyt, the employee or subagent of Mr. Bradford, was in no way accountable to defendant in error.

Cartwright v. Hately, 1 Ves. Jr. 292.

If Mr. Bradford permitted Mr. Hoyt to deliver policies on his behalf, as and for the policies of the Hanover Fire Insurance Company, the assured, under such circumstances, had a perfect right to take the policy in full confidence that such policy was regularly and properly issued, and binding upon the company.

Dallas, Circuit Judge, delivered the opinion of the court:

The proceeding under review is an action of tort. It was brought by an insurance company, the defendant in error, against the plaintiff in error, to recover "damages resulting from the defendant's negligence and misfeasance in the discharge of his duties as agent of the plaintiff company in the business of insuring the owners of property, real and personal, from loss by fire." The cause of action as more specifically alleged was that, although the defendant had been instructed to insure no potteries, "yet the said defendant, well knowing his instructions and his duty in the premises, and wholly disregarding the same, negligently, wrongfully, and fraudulently issued" a policy of the plaintiff company, insuring the owners of a certain pottery against loss thereof by fire. The plea was "Not guilty." In pursuance of a stipulation in writing, the cause was tried by the court without the intervention of a jury, and the facts were found to be as follows:

"(1) By an instrument dated April 20, 1887, the defendant was appointed and constituted the agent of the plaintiff company, with authority to receive proposals for insurance against loss and damage by fire in New Brighton, Pennsylvania, and vicinity, to fix rates of premium, to receive moneys, and to countersign, issue, and renew policies of insurance, signed by the president and attested by the secretary of the plaintiff company subject to the rules and regulations of said company and such instructions as might from time to time be given by its officers. The defendant immediately accepted this appointment, and thereafter acted thereunder as the plaintiff's agent.

"(2) The defendant maintained an office at New Brighton, Pennsylvania, for the conduct of the insurance business, he being 49 L. R. A.

agent for several insurance companies, and in the prosecution of said business the defendant had in his employment one H. N. W. Hoyt, who not only did all the clerical work of said office, but also made daily reports of business to the plaintiff's general agents for the state of Pennsylvania at Wilkesbarre, and further, in the regular course of business and with the defendant's knowledge and by his authority, solicited insurance, collected premiums, and from time to time delivered policies of insurance to the persons insured.

"(3) The Mayer pottery works, situate in Beaver Falls, Pennsylvania, in the vicinity of New Brighton, had been insured by policies aggregating the sum of \$15,000, issued by companies other than the plaintiff company, and these policies the insured had procured through the defendant, as the representative of the companies. Shortly before July 1, 1896, Joseph Mayer, one of the proprietors of those works, addressed a letter to the defendant at New Brighton, calling his attention to the fact that these policies would expire on the last-mentioned date, and desiring information whether he (the defendant) would continue the insurance in companies represented by him. In response to this letter the said H. N. W. Hoyt visited said Mayer, and informed him that the policies would be renewed; and on July 1, 1896, said Hoyt, acting on behalf of the defendant, brought to said Mayer and delivered to him six policies of insurance, amounting together to \$15,000, against loss by fire upon the said pottery works and the contents thereof. One of the policies of insurance so delivered by said Hoyt to said Mayer was policy No. 307,782 of the Hanover Fire Insurance Company (the plaintiff company), dated July 1, 1896, signed by the president and attested by the secretary of the company, and purporting to be countersigned by Thomas Bradford, the defendant, as agent of the company, whereby, in consideration of the premium of \$37.50, that company insured J. & E. Mayer and the Mayer Pottery Company, Limited, for the term of one year from July 1, 1896, against loss by fire to an amount not exceeding \$2,500 to the Mayer pottery works, to wit, the pottery buildings and the contents of the same.

"(4) On the 8th day of July, 1896, the insured mailed a check for \$225, the amount of the premiums on said six policies, payable to the order of Thomas Bradford, in a letter addressed to him at New Brighton. On July 11, 1896, this check, indorsed by said Hoyt thus: 'For the credit of Thomas Bradford, Agent,' was deposited by Hoyt in the defendant's bank, to the credit of the defendant as agent, in his bank account as agent. The check was paid by the drawer to the bank.

"(5) Such risks as that covered by said policy No. 307,782 on July 1, 1896, were and long had been prohibited by the plaintiff company, and the defendant knew of this prohibition. Long before July 1, 1896, the defendant had received instructions from the

plaintiff company, through its proper officers, not to insure potteries.

"(6) Said policy No. 307,782 was not countersigned by the defendant personally, but said Hoyt countersigned the policy for and in the name of the defendant, by writing the defendant's name at the proper place. This he did without authority from the defendant, and without the defendant's knowledge. Hoyt delivered said policy to Mayer without the defendant's consent or knowledge. The defendant had no knowledge that this policy had been issued until after the fire and loss hereinafter to be mentioned.

"(7) The issuing of said policy No. 307,782 to J. & E. Mayer and the Mayer Pottery Company, Limited, was not reported to the plaintiff company, and the plaintiff had no knowledge whatever of the transaction until after the fire and loss had occurred.

"(8) On October 21, 1896, the said insured property of J. & E. Mayer and the Mayer Pottery Company, Limited, was destroyed by fire.

"(9) Afterwards suit was brought in the court of common pleas of Beaver county, Pennsylvania, at No. 224 of March term, 1897, by J. & E. Mayer and the Mayer Pottery Company, Limited, against the Hanover Fire Insurance Company (the plaintiff here), upon the said policy of insurance No. 307,782. On January 28, 1898, upon trial by jury, a verdict therein was rendered in favor of the plaintiff in the sum of \$2,529.20, and on February 8, 1898, judgment was entered on the verdict against the defendant therein in the sum of \$2,529.20 and costs, \$43.16. On February 10, 1898, the defendant therein paid to the plaintiff therein the amount of the judgment and costs, namely \$2,572.36.

"(10) Thomas Bradford, the defendant here, was not notified by the Hanover Fire Insurance Company to defend the said suit against the company upon the policy No. 307,782; but at the trial of that action he was called as a witness for the defense, and testified."

The court below rightly held that it was open to the defendant to show that the insurance company was not liable upon the policy in question, and therefore no question is presented under the tenth clause of the foregoing findings; but upon the facts stated in the preceding clauses judgment was entered in favor of the plaintiff for \$2,803.87, and we are now to consider whether or not this judgment was well founded in point of law. The learned judge based it upon two grounds, and, as there is no other upon which it could have been rested, we may dispose of the case by examining those grounds separately.

1. The principal is civilly responsible for some, but not for all, acts of his agent. This responsibility extends to the tortious acts of the agent, but only where they are committed for the principal's purposes and by his authority, either actual or apparent, or where he ratifies them, or accepts and retains some benefit from them. *Flower v. Pennsylvania R. Co.* 69 Pa. 210, 8 Am. Rep. 251; *Towanda* 49 L. R. A.

Coal Co. v. Heeman, 86 Pa. 418; *Brunner v. American Teleg. & Teleph. Co.* 151 Pa. 447, 25 Atl. 29; *Hower v. Ulrich*, 156 Pa. 412, 27 Atl. 37. In England, the principal's liability is, perhaps, somewhat more restricted. In his work on the Law of Torts, Pollock (Webb's ed. p. 388) defines it thus: "The necessary and sufficient condition of the master's responsibility is that the act or default of the servant or agent belonged to the class of acts which he was put in the master's place to do, and was committed for the master's purposes."

But the decisions of the courts of this country have, we think, settled the rule in accordance with our statement of it, and with this in mind we pass to the consideration of the facts of the case.

The declaration alleged that "the defendant negligently, wrongfully, and fraudulently issued and said policy;" and upon the truth of this allegation the existence of the asserted right of recovery was absolutely dependent. Did the facts as found maintain it? Bradford, personally, "did not disregard his instructions, nor did he negligently, wrongfully, or fraudulently issue or cause to be issued the policy of insurance now in controversy." This the court found in its answer to one of the points submitted. Bradford, therefore, did not himself commit the tort which was the basis of the action. Did he do so by another? Hoyt, the actual tortfeasor, was the agent of Bradford, with authority "to solicit insurance, to collect premiums, and to deliver policies." He forged the signature of Bradford to the policy, and he delivered that policy as and for a genuine one. But Bradford was not responsible for these unlawful acts merely because, for lawful purposes, Hoyt happened to be his agent. To make him responsible for them something more was requisite, and none of the conditions necessary to charge him was made to appear. Neither of the wrongful acts was committed for his purposes. The motive, whatever it was, was not his, but Hoyt's. It is also clear that Bradford neither expressly authorized them, nor ratified them, nor consented to profit by them.

But it is insisted that they were perpetrated in the line of Hoyt's employment, and with Bradford's apparent authority, and this contention presents the only serious question which is involved in the point now under consideration. Hoyt was not in fact authorized to sign Bradford's name, and the scope of his actual employment embraced the delivery only of policies which Bradford himself had signed. The signature in question was not so written as to indicate that it was made for Bradford, but as if made by him. It was simply a forgery. There was no assumption nor pretense of authority for it, and it is quite impossible to perceive that such authority apparently existed. The specific offense of Hoyt was one which Bradford himself was incapable of committing, and the act of the agent, therefore, was one which the principal not only could not have been justified in doing, but could not possibly have done. *Sceber v. Commercial Nat.*

Bank, 77 Fed. Rep. 957. Nor was Bradford responsible for Hoyt's delivery of this policy. He was authorized to deliver genuine policies,—not spurious ones; and of this particular transaction Bradford had no knowledge until after the fire and loss had occurred. If the forgery had been known by those to whom the policy was delivered, they certainly would not have been warranted in accepting it upon the supposition that its delivery was sanctioned by Bradford, or that, in making it, Hoyt was acting within the apparent scope of his employment. On the contrary, they must inevitably have seen that Bradford had not authorized it, and that Hoyt was grossly transcending the limits of his agency. The imposition which was consummated by the delivery had its inception in the forgery, and by that alone was the delivery made possible. Bradford did not—manifestly could not—authorize the forging of his own signature; and, this being so, we are unable to discern, in his delegation of power to deliver policies bearing his genuine signature, any apparent authority for the delivery of one falsely and feloniously subscribed. In short, we are of opinion that, as Hoyt's principal, Bradford could be held liable, if at all, only upon the theory that the agency of Hoyt vested in him authority to sign the name of Bradford; and as such authority, either actual or apparent, did not exist, it remains only to consider whether Bradford is precluded from repudiating the transaction which Hoyt fraudulently effected.

2. "When any person, under a legal duty to any other person to conduct himself with reasonable caution in the transaction of any business, neglects that duty, and when the person to whom the duty is owing alters his position for the worse because he is misled as to the conduct of the negligent person by a fraud of which such neglect is in the natural course of things the proximate cause, the negligent person is not permitted to deny that he acted in the manner in which the other person was led by such fraud to believe him to act." Stephen, *Ev. art.* 102. This statement was intended (see note 38) to properly apply the doctrine of estoppel *in pais* to the case of a negligent act causing fraud, and we think that it does so. The vital principle of that doctrine is that "he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted." *Dickerson v. Colgrove*, 100 U. S. 580, 25 L. ed. 619.

And in a case like the present, it is essential to the estoppel that the person sought to be estopped shall be legally chargeable with negligence which in the natural course of things caused the other person to be misled to his prejudice; and negligence in fact is, as to this point, the specific wrong expressly alleged in the declaration. But in what respect was Bradford negligent? The learned judge of the circuit court placed his liability upon the ground that he had "put the wrongdoer in a position of trust and con-

fidence, and thus enabled him to perpetrate the wrong." We cannot assent to this. It was not pretended that Bradford was not duly careful in employing Hoyt or in retaining him in his employment. So far as appears, no ground existed for suspecting that he would abuse any confidence which was or might be reposed in him. Moreover, the signing of Bradford's name was not confided to him, nor had Bradford done anything to make it appear that it was. The policy was not accepted in reliance upon any seeming or supposed authority of Hoyt to sign, but under the belief that Bradford had signed it; and this misleading belief was caused, not by any negligent act or omission of Bradford, but solely by the personal criminal conduct of Hoyt. Bradford, it is true, had made Hoyt his agent; but surely negligence cannot be imputed to him upon that ground alone. Such agencies are by no means uncommon, and the reported cases exhibit many instances of them. There was no more reason for supposing that the agent in this instance would be guilty of forgery than of any other offense, and his principal was under no obligation to prevent his commission of crime. The whole duty of Bradford in the matter was to see to it that no negligence of his own should, through any wrongdoing of Hoyt, occasion injury to another, and this duty does not appear to have been violated.

The true test of liability under this head was correctly applied by the supreme court of Pennsylvania in *Leas v. Walls*, 101 Pa. 57, 47 Am. Rep. 699. In that case one person had procured another to sign a promissory note, partly printed and partly in writing. In the form used there was a long blank for the insertion of the amount. The person who obtained the note had, before its execution, inserted in this blank the written word "eight" and had filled up the remaining portion of the blank, except a small space immediately after that word, with a scroll terminating with the printed word "dollars"; but, after execution, he added to the word "eight" the letter "y," so that as thus altered, it read "eighty" dollars. The action was brought by a bona fide purchaser of the note for value and before maturity, and yet the finding of the jury that there was no lack of ordinary care on the part of the maker of the note was expressly approved by the supreme court, and the judgment for defendant, which was entered upon that verdict, was affirmed. In its opinion, after referring to some of its earlier decisions, the court said: "These cases do not decide that the maker would be bound to a bona fide holder on a note fraudulently altered, however skillful that alteration might be, provided that he had himself used ordinary care and precaution. He would no more be responsible upon such an altered instrument than he would upon a skillful forgery of his handwriting. . . . In the common experience of men, very few persons write their words so closely together that a single letter cannot be added at the end of one of them without attracting attention."

And common experience, we think, equally supports our belief that no man of ordinary prudence would think of taking any precaution to preclude such a forgery of his signature as that for which the plaintiff in error in this case has been charged with responsibility.

We have examined a number of authorities, including those mentioned in the opinion of the court below and the additional cases cited by counsel; but we do not deem

it necessary to further extend this opinion by reviewing them. It is enough to say that we have given them careful consideration, and are entirely satisfied that, as a whole, they show the law to be in accordance with the views we have expressed.

The judgment of the Circuit Court is reversed, and the cause will be remanded to that court, with direction to enter a judgment for the defendant in the action.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

City of HURON, *Plff. in Err.*,
v.

SECOND WARD SAVINGS BANK.

(57 U. S. App. 593, 86 Fed. Rep. 272, 30 C. C. A. 38.)

1. A municipal corporation which has certified on the face of its bonds that they were issued for funding floating indebtedness, a lawful purpose, cannot repudiate them after they have reached the hands of bona fide holders, on the ground that the proceeds were actually intended and used to take up invalid warrants.
2. A municipal corporation is estopped from controverting statements made upon the face of its bonds as to the purpose for which they were issued, so as to invalidate them in the hands of bona fide purchasers.
3. Bonds do not contravene the limitation of municipal indebtedness which are issued to take up what the city is estopped to deny are just debts, although the total indebtedness exceeds the permitted amount.
4. That the indebtedness of a city was temporarily increased beyond the prescribed limit by the sale of bonds and failure to immediately apply the proceeds to retire existing indebtedness will not defeat them in the hands of a bona fide purchaser, where they might have been exchanged directly for the existing evidences of debt, so that there would have been no unlawful increase, which method duty required the municipal authorities to pursue.
5. Recitals by municipal officers who are invested with authority to perform a precedent condition to the issue of negotiable bonds, or with authority to determine when that condition has been performed, that the bonds have been issued "in pursuance of," or "in conformity with," or "by virtue of," or "by authority of," the statute, will preclude inquiry, as against an innocent purchaser for value, as to whether or not the precedent conditions had been performed before the bonds were issued.
6. The question of the validity of municipal bonds is one of commercial law, upon which the Federal courts are bound to exercise their own judgment.

7. Power to borrow money and issue bonds for all municipal purposes includes the power to do so to pay or refund indebtedness of the municipality.
8. The choice of the method by which the current expense warrants of a city shall be paid is left to the discretion of the council, where it has authority to levy taxes to pay such warrants, and to borrow money and issue bonds.
9. Powers and privileges granted to a city by special act or charter are not affected by general legislation on the same subject.
10. Unlimited power to issue bonds, granted to a municipal corporation by special charter, is not revoked by a general law giving such corporations power to issue bonds for specified purposes, where a proviso to the general law expressly provides that it shall not be construed to limit the powers theretofore conferred by any special charter.
11. Evidence of a certificate issued by the city clerk as to assessed valuation of the property in the city and the amount of indebtedness is not admissible in an action to enforce payment of bond coupons, where it does not appear that the holder of the bonds ever saw or relied upon it.
12. Error without prejudice is no ground for reversal.

(March 21, 1898.)

ERROR to the Circuit Court of the United States for the District of South Dakota to review a judgment in favor of plaintiff in an action to compel payment of the amount due on coupons cut from bonds issued by defendant. *Affirmed.*

Before *Sanborn* and *Thayer*, Circuit Judges, and *Philips*, District Judge.

Statement by *Sanborn*, Circuit Judge:

This is an action brought by the Second Ward Savings Bank, the defendant in error, against the city of Huron, the plaintiff in error, upon coupons cut from sixteen funding bonds of \$500 each, which that city issued on August 15, 1889. The defense was (1) that the bonds were issued to pay, and that their proceeds were devoted to the payment of, void warrants, which the city had issued to promote its selection as the capital of the state of South Dakota; (2) that these bonds created a debt in excess of the limitation prescribed by the organic act of the territory of Dakota; and (3) that the city

NOTE.—For estoppel of municipal corporations as to bonds, see also *Nelson v. Haywood County (Tenn.)* 4 L. R. A. 648; *Hutchinson & S. R. Co. v. Fox (Kan.)* 15 L. R. A. 401; *W. N. Coler & Co. v. Dwight School Twp. (N. D.)* 28 L. R. A. 649; and *Wilkes County Comrs. v. Call (N. C.)* 44 L. R. A. 252.
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had no power to issue funding bonds. The case was tried by the court. Objections were interposed to the complaint, to the bonds, coupons, and all the evidence for the defendant in error, and to the findings and judgment of the court upon the grounds outlined in this defense. The court made special findings, and rendered a judgment against the city. This was the case: The legislature of the territory of Dakota granted a special charter on March 8, 1883, to the city of Huron, which provided: "Sec. 7. The city council shall have power: . . . Part 28. To admit and allow all just claims against the city and direct the payment of such as are allowed. Part 29. To appropriate money and provide for the payment of the expenses and the indebtedness of the corporation. . . . Part 31. To levy and collect taxes not exceeding five mills on the dollar, for the purpose of providing a sinking fund with which to pay any future-bonded indebtedness of the corporation, and not exceeding ten mills on the dollar for all other municipal purposes in any one year, on all the property, real and personal, within the city limits, taxable according to the laws of the territory. Part 32. To borrow money, and, for that purpose, to issue the bonds of the city in such denominations, for such length of time, not to exceed twenty years, and bearing such rate of interest, not to exceed 7 per cent per annum, as the city council may deem best, said bonds to express upon their face 'under what authority and for what purpose they are issued, and may have interest coupons attached: "provided that such bonds may be issued only after an election at which a majority vote for their issue, and that they may not be sold for less than their par value. The organic law of the territory of Dakota, which was enacted in 1886, provided that no municipal corporation should ever become indebted exceeding 4 per cent on the value of the taxable property within such corporation, to be ascertained by the last assessment for territorial and county taxes previous to the incurring of such indebtedness, and that all bonds or obligations in excess of such amount should be void. Dak. Comp. Laws, § 112, p. 34. Four per cent of the value of the taxable property in the city of Huron, according to the last assessment previous to the issue of these bonds, was \$62,020.90; and at the time of their issue the city was indebted in the sum of \$70,698.99, \$54,500 of which was evidenced by bonds, and the remainder by warrants. The public records of the city showed the amount of taxable property and the amount of this indebtedness of the city. In 1887 the legislature of the territory of Dakota had passed a general law, which provided that any city in that territory might, upon a majority vote of its electors, incur a bonded debt which should not increase its total indebtedness above 4 per cent of the taxable property therein, for the purpose of erecting school buildings, purchasing fire apparatus, putting in waterworks, sinking public wells or cisterns, and putting in sewers, and improving streets. This law, however, con-

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tained this proviso: "And provided, that this act shall not be construed to limit or restrict the powers already conferred by any special charter upon the council of any city or municipal corporation." Id. §§ 1149, 1150, p. 257. Pursuant to an election held under its charter on April 2, 1889, at which a majority of the qualified electors of the city of Huron voted to authorize its city council to issue bonds to the amount of \$25,000, for the purpose of funding the floating indebtedness of the city, the sixteen bonds from which the coupons here in suit were cut were issued by the city council, and were sold in 1889 to Farson, Leach, & Co. for \$8,140. The ostensible purpose of these proceedings was to fund the floating debt of the city; but the real purpose, which was known to the citizens and officers of the city, was to raise money to pay the void warrants which the city had issued to carry on a political campaign to elect itself the capital of the state of South Dakota. The \$8,140 was actually used by the city to pay these warrants, and none of it was so used until twenty days after it had been paid into the city treasury by Farson, Leach, & Co. Each of these sixteen bonds was signed by the proper officers of the city, and sealed with its seal, and each contained these words: "The city of Huron, ten years after date, for value received, will pay to bearer the sum of \$500, at the American Exchange National Bank, New York, with interest thereon at the rate of 6 per cent per annum, payable semi-annually, according to the terms of the annexed coupons. Issued pursuant to an election held April 2, 1889, by authority granted by article 32, § 7, of the charter of the city of Huron, said charter approved by the legislative assembly of the territory of Dakota, March 8th, 1883. Issued for the purpose of funding the floating indebtedness of the city of Huron." The defendant in error purchased these bonds in the ordinary course of business from Farson, Leach, & Co. The city paid the first four coupons upon them, but declined to pay more.

Mr. A. W. Wilmarth, for plaintiff in error:

The organic law corresponds with and limits the powers of the legislature and municipalities of a territory in the same way and to the same extent that a Constitution of a state limits the powers of the legislature and municipalities within the state.

East St. Louis v. People ex rel. Gundlach, 124 Ill. 662, 17 N. E. 447; *State ex rel. Marinette, T. & W. R. Co. v. Tomahawk*, 96 Wis. 73, 71 N. W. 86.

Congress restricted the power of municipal corporations in the territories to become indebted in any manner or for any purpose, to any amount in the aggregate exceeding 4 per cent of the assessed valuation of the taxable property, and declared all bonds issued in excess of such amount to be void.

Shannon v. Huron, 9 S. D. 356, 69 N. W. 598.

Where certain purposes are enumerated in an act, those purposes imply the exclusion of

all others not fairly incidental to those enumerated.

Pullman's Palace Car Co. v. Central Transp. Co. 139 U. S. 64, 35 L. ed. 70, 11 Sup. Ct. Rep. 489; *Goodnow v. Ramsey County Comrs.* 11 Minn. 31, Gil. 12; *Farmers' & M. Nat. Bank v. School Dist. No. 53*, 6 Dak. 260, 42 N. W. 767.

Courts will not encourage the creating of debts by municipalities by the issuance and sale of negotiable securities to shut off all defenses by a city to a floating debt, by allowing that indebtedness to be funded into a negotiable security, without an express or necessarily implied power for that purpose.

Ashuelot Nat. Bank v. School Dist. No. 7, 12 U. S. App. 344, 56 Fed. Rep. 197, 5 C. C. A. 468.

Where a power exists to pay an indebtedness by the levy and collection of taxes for that purpose, such authority excludes the power to issue bonds in payment thereof.

Police Jury v. Britton, 15 Wall. 566, 21 L. ed. 251; *Merrill v. Monticello*, 138 U. S. 673, 34 L. ed. 1069, 11 Sup. Ct. Rep. 441; *Heins v. Lincoln*, 102 Iowa, 69, 71 N. W. 189; *New Orleans v. Clark*, 95 U. S. 644, 24 L. ed. 521; *Wazahachie v. Brown*, 67 Tex. 519, 4 S. W. 207; *State ex rel. Wood v. Board of Liquidation of City Debt*, 40 La. Ann. 398, 4 So. 122; *Middleport v. Aetna L. Ins. Co.* 82 Ill. 565.

It not being necessary to the existence of the city of Huron that such warrants should be funded, the power to fund does not exist.

Claiborne County v. Brooks, 111 U. S. 400, 28 L. ed. 470, 4 Sup. Ct. Rep. 489; *Nashville v. Ray*, 19 Wall. 468, 22 L. ed. 164; *Wall v. Monroe County*, 103 U. S. 78, 26 L. ed. 432; *Heins v. Lincoln*, 102 Iowa, 69, 71 N. W. 189; *Bogart v. Lamotte Twp.* 79 Mich. 294, 44 N. W. 612.

Having provided twice as much money to meet the current expenses as to meet the bonded indebtedness, the fair conclusion must follow that the legislature did not intend that the current expenses, the payment of which is provided for by taxation, should be funded in long-time bonds.

Shannon v. Huron, 9 S. D. 356, 69 N. W. 598.

It was necessary for the plaintiff to allege and prove that the warrants which were funded by his bonds were legal and binding obligations against the city of Huron.

Holliday v. Hilderbrandt, 97 Iowa, 177, 66 N. W. 89; *Anderson v. Orient F. Ins. Co.* 88 Iowa, 579, 55 N. W. 348.

The warrants, having been issued for a private purpose,—to wit, to aid Huron in securing the capital of South Dakota,—are illegal.

Citizens' Sav. & L. Asso. v. Topeka City, 20 Wall. 655, 22 L. ed. 455; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Curtis v. Whipple*, 24 Wis. 350, 1 Am. Rep. 187; *Whiting v. Sheboygan & F. du L. R. Co.* 25 Wis. 167, 3 Am. Rep. 30; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185; *Sharpless v. Philadelphia*, 21 Pa. 161, 59 Am. Dec. 759.

Said warrants are illegal, having been issued after \$3,000 of warrants were issued in 49 L. R. A.

excess of the taxes levied for the year in which they were issued.

Norton v. Shelby County, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1,121; *Marsh v. Fulton County Supers.* 10 Wall. 676, 19 L. ed. 1042.

The city is not estopped from showing any fact which did not exist, which was necessary to the legality of the bonds, or any fact which existed at the time the bonds were issued, which would render them illegal.

Coffin v. Kearny County, 12 U. S. App. 562, 57 Fed. Rep. 137, 6 C. C. A. 288; *McCracker County v. Provident Life & Trust Co.* 43 U. S. App. 21, 72 Fed. Rep. 623, 19 C. C. A. 44; *Citizens' Sav. & L. Asso. v. Perry County*, 156 U. S. 692, 39 L. ed. 585, 15 Sup. Ct. Rep. 547; *Merchants' Exch. Nat. Bank v. Bergen County Freeholders*, 115 U. S. 384, 29 L. ed. 430, 6 Sup. Ct. Rep. 88; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138; *Lake County Comrs. v. Graham*, 130 U. S. 674, 32 L. ed. 1065, 9 Sup. Ct. Rep. 654; *Carroll County Supers. v. Smith*, 111 U. S. 556, 28 L. ed. 517, 4 Sup. Ct. Rep. 539; *Citizens' Bank v. Terrell*, 78 Tex. 456, 14 S. W. 1003; *Quaker City Nat. Bank v. Nolan County*, 59 Fed. Rep. 660; *Francis v. Howard County*, 13 U. S. App. 126, 54 Fed. Rep. 487, 4 C. C. A. 460.

A requirement that bonds should state upon their face the purpose for which they are issued is reasonable, and the purchaser of such bonds is bound to take notice of such requirement.

If they do not state upon their face the purpose for which they are issued, and they are in fact issued for a purpose not authorized by law, they are void.

Barnett v. Denison, 145 U. S. 135, 36 L. ed. 652, 12 Sup. Ct. Rep. 819.

The bonds of the defendant in error were issued for a purpose not authorized by statute; the money received therefor was applied to the payment of illegal warrants. There is no estoppel against making this proof.

Ibid.; *Coffin v. Indianapolis*, 59 Fed. Rep. 221; *Aetna L. Ins. Co. v. Lyon County*, 44 Fed. Rep. 329; *Millerstown v. Frederick*, 114 Pa. 435, 7 Atl. 156; *Lake County Comrs. v. Graham*, 130 U. S. 674, 32 L. ed. 1065, 9 Sup. Ct. Rep. 654; *Shaw v. Independent School Dist.* 62 Fed. Rep. 911; *Doon Twp. v. Cummins*, 142 U. S. 366, 35 L. ed. 1044, 12 Sup. Ct. Rep. 220; *Kane v. Independent School Dist.* 82 Iowa, 5, 47 N. W. 1076; *Holliday v. Hilderbrandt*, 97 Iowa, 177, 66 N. W. 89.

Funding bonds to take up county warrants, or to fund a debt, part of which is in excess of the constitutional limitation, are void unless the valid can be distinguished from the invalid, notwithstanding any recitals they may contain.

Millerstown v. Frederick, 114 Pa. 435, 7 Atl. 156; *Lake County Comrs. v. Graham*, 130 U. S. 674, 32 L. ed. 1065, 9 Sup. Ct. Rep. 654.

Recitals in bonds are binding only as to matters of fact, and not as to matters of law, of which every person is bound to take no-

tice, and is conclusively presumed to have done so.

United States ex rel. Spitzer v. Cicero, 41 Fed. Rep. 83.

The execution, issue, and sale of bonds are not sufficient to create an estoppel without recitals.

Lynde v. Winnebago County, 16 Wall. 15, 21 L. ed. 275; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138; *Carroll County Supers. v. Smith*, 111 U. S. 556, 28 L. ed. 517, 4 Sup. Ct. Rep. 539; *Hopper v. Covington*, 118 U. S. 148, 30 L. ed. 190, 6 Sup. Ct. Rep. 1025; *Lake County Comrs. v. Graham*, 130 U. S. 674, 32 L. ed. 1065, 9 Sup. Ct. Rep. 654.

Where a bond recited that all the requirements and provisions of an act had been complied with, and the act required an ordinance or resolution to be passed before the city council could issue refunding bonds, and the said ordinance or resolution was not passed as required by said act, the city was without power to issue the bonds, and bonds issued without said resolution were illegal.

Hinkley v. Arkansas City, 32 U. S. App. 640, 69 Fed. Rep. 768, 16 C. C. A. 396.

It is not a part of the clerk's duty to make a certificate as a basis for selling bonds.

The burden of showing the authority for the clerk to act was upon the defendant in error. Having failed to do this, the admission in evidence of his certificate was error.

Hinkley v. Arkansas City, 32 U. S. App. 640, 69 Fed. Rep. 768, 16 C. C. A. 400; *National Bank of Commerce v. Granada*, 10 U. S. App. 692, 54 Fed. Rep. 100, 4 C. C. A. 212.

These two factors,—to wit, the assessed valuation, and the indebtedness of the city,—being all that was necessary to determine whether or not the plaintiff's bonds exceeded the limit of indebtedness, the defendant in error was charged with notice of the fact that its bonds exceeded the limit of indebtedness prescribed by law.

Dixon County v. Field, 111 U. S. 83, 28 L. ed. 360, 4 Sup. Ct. Rep. 315; *Lake County Comrs. v. Graham*, 130 U. S. 674, 32 L. ed. 1065, 9 Sup. Ct. Rep. 654; *Sutliff v. Lake County Comrs.* 147 U. S. 230, 37 L. ed. 145, 15 Sup. Ct. Rep. 318.

The bonds of the defendant in error, having been issued after the limitation of indebtedness had been reached, are not binding obligations against the city of Huron.

Helges v. Dixon County, 150 U. S. 183, 37 L. ed. 1045, 14 Sup. Ct. Rep. 71; *Sutliff v. Lake County Comrs.* 147 U. S. 230, 37 L. ed. 145, 13 Sup. Ct. Rep. 318; *Law v. People ex rel. Huck*, 87 Ill. 385; *Doon Twp. v. Cummins*, 142 U. S. 366, 35 L. ed. 1044, 12 Sup. Ct. Rep. 220; *McPherson v. Foster*, 43 Iowa, 48; *People ex rel. Seeley v. May*, 9 Colo. 80, 10 Pac. 641; *Shannon v. Huron*, 9 S. D. 356, 69 N. W. 598; *National L. Ins. Co. v. Huron Bd. of Edu.* 27 U. S. App. 244, 62 Fed. Rep. 778, 10 C. C. A. 637; *Nesbit v. Riverside Independent Dist.* 144 U. S. 610, 36 L. ed. 562, 12 Sup. Ct. Rep. 746; *Brenham v. German American Bank*, 144 U. S. 173, 36 L. ed. 390, 12 Sup. Ct. Rep. 559; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138; *Lake County Comrs. v. Rollins*, 130 U. 49 L. R. A.

S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651; *Lake County Comrs. v. Graham*, 130 U. S. 674, 32 L. ed. 1065, 9 Sup. Ct. Rep. 654; *Dixon County v. Field*, 111 U. S. 83, 28 L. ed. 360, 4 Sup. Ct. Rep. 315; *Northern Nat. Bank v. Porter Twp.* 110 U. S. 608, 28 L. ed. 258, 4 Sup. Ct. Rep. 254; *McClure v. Oxford Twp.* 94 U. S. 429, 24 L. ed. 129; *Kane v. Independent School Dist.* 82 Iowa, 5, 47 N. W. 1076.

The provisions in constitutions, that an indebtedness cannot exist in excess of a certain prescribed amount, are a part of the fundamental law of the state, and warrants, bonds, or judgments issued or rendered as an evidence of such prohibited debts are nullities and void.

Law v. People ex rel. Huck, 87 Ill. 398; *McPherson v. Foster Bros.* 43 Iowa, 62; *French v. Burlington*, 42 Iowa, 614; *Doon Twp. v. Cummins*, 142 U. S. 366, 35 L. ed. 1044, 12 Sup. Ct. Rep. 220; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138; *Litchfield v. Ballou*, 114 U. S. 190, 29 L. ed. 132, 5 Sup. Ct. Rep. 820.

The want of power to issue bonds extends to those issued against public policy.

Thomas v. Richmond, 12 Wall. 349, 20 L. ed. 453; *Austin v. Coggeshall*, 12 R. I. 329, 34 Am. Rep. 648; *Citizens' Sav. & L. Asso. v. Topeka City*, 20 Wall. 655, 22 L. ed. 455; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Curtis v. Whipple*, 24 Wis. 350, 1 Am. Rep. 187; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185; *Sharpless v. Philadelphia*, 21 Pa. 161, 59 Am. Dec. 759.

Mr. Rollin B. Mallory for defendant in error.

Sanborn, Circuit Judge, delivered the opinion of the court:

The first contention of counsel for the plaintiff in error in this case is that the bonds and coupons in controversy are void, although the former recite upon their face that they were "issued for the purpose of funding the floating indebtedness of the city of Huron," because they were in fact issued, and their proceeds were actually used, to pay city warrants which constituted no debt, but which the city of Huron had emitted in violation of its charter and of the organic act of the territory of Dakota. This proposition is without novelty. It presents the old questions which have often been answered by this and other courts: May a municipal corporation certify on the face of its bonds that it has issued them for a lawful purpose, and, after the bonds have been bought by an innocent purchaser for value, in reliance upon this certificate, defeat them by the plea that the certificate was false, and that they were actually issued for an unlawful purpose? May a city defeat the innocent purchaser of its bonds by diverting their proceeds, without his knowledge, from the lawful object for which it certified that it issued them? The plaintiff in error has had our answer to these questions.

In *National L. Ins. Co. v. Huron Bd. of Edu.* 27 U. S. App. 244, 62 Fed. Rep. 778, 10 C. C. A. 637, the citizens and officers of this

city, with the intention of using the proceeds of bonds for the unlawful purpose of persuading the people of South Dakota to select that city as their capital, took the necessary steps to issue them for the lawful purchase of a school site and the erection of a school building, certified that they were issued for that purpose, and then diverted their proceeds to the illegal object, and undertook to defeat the bona fide purchasers of the bonds by the plea of their own wrong. This court answered that plea in these words: "It is no defense for this corporation, as against these bona fide purchasers, that during all this time it intended to use, and has since used, the money it raised from these bonds for the unlawful purpose of conducting a campaign for the state capital. . . . Such a plea cannot be entertained in a court of justice. The corporation is estopped from denying that these bonds were issued to raise money for a school site and school buildings."

In *West Plains Twp. v. Sage*, 32 U. S. App. 725, 69 Fed. Rep. 943, 16 C. C. A. 553, the township, with the intention of using the proceeds of its bonds for the unlawful purpose of paying town scrip issued to purchase a sugar factory, took the necessary steps to issue, and certified that it had issued, the bonds to refund its indebtedness, then used the proceeds to take up the void scrip, and pleaded its own iniquity as a defense to its bonds. This court said: "It is no defense for this township, against the action of an innocent purchaser who has invested his money in these bonds, that the township board, and the voters of the township who authorized the board to issue them, knew that the township had no indebtedness to refund, and that all these records and declarations were false, and were made to evade the law. Against a bona fide purchaser, the township is estopped from denying that these bonds were issued to refund its outstanding indebtedness."

In *Kiowa County Comrs. v. Howard*, 49 U. S. App. 642, 83 Fed. Rep. 296, 27 C. C. A. 531, this court again held that a municipal corporation which had recited in its bonds that they were issued "to refund its matured and maturing indebtedness heretofore legally created by said county" could not be heard to say to an innocent purchaser that a part of the indebtedness so refunded was void.

In *Jasper County v. Ballou*, 103 U. S. 745, 26 L. ed. 422, the supreme court held that where the people of a county, at an election held under a refunding act, voted to issue new bonds to exchange for old ones, such a vote recognized the original bonds as binding and subsisting obligations, and that the city was thereby estopped from setting up that they were invalid because voted for at an election called by the supervisors instead of the county court, and that where at an election held according to law the people authorized their proper representatives to treat outstanding county obligations as properly authorized by law for the purpose of settling with the holders, and the settle-

ment had been made, the validity of the obligations could no longer be questioned.

In *Graves v. Saline County*, 161 U. S. 350, 40 L. ed. 732, 16 Sup. Ct. Rep. 526, the Supreme Court held that a county was estopped from contesting the validity of refunding bonds which had been issued to pay old bonds which were void under the decisions in *Eagle v. Kohn*, 84 Ill. 292; *German Sav. Bank v. Franklin County*, 128 U. S. 526, 32 L. ed. 519, 9 Sup. Ct. Rep. 159.

In *Cadillac v. Woonsocket Inst. for Sav.* 16 U. S. App. 546, 558, 58 Fed. Rep. 935, 939, 7 C. C. A. 574, 578, the circuit court of appeals for the sixth circuit held that the recital in the refunding bonds that they were "issued . . . for the purpose of extending the time of payment of bonds formerly issued by said city," pursuant to an ordinance entitled "An Ordinance Authorizing New Bonds of the City of Cadillac to be Issued in Place of, and to Extend the Time of Payment of, Former Bonds of Said City Falling Due," estopped the city from defending an action by an innocent purchaser of the bonds on the ground that the former bonds were void.

The defendant in error did not issue or procure the issuance of these bonds. This is not a case in which the officers of a municipality have violated the will of their constituents, and abused their power to rob them. It is a case in which all the people of a city, in a burst of wild enthusiasm, promoted or consented to the action of its representatives. The citizens of Huron must have known the real purpose for which these bonds were to be issued when they voted for them. Anyone who owned taxable property in that city could have prevented the issue or the payment of the capital campaign warrants, or the issue of these bonds, by a simple petition to any court which had jurisdiction. This thing was not done in a corner, or in the dark, or in haste. The electors of Huron voted to issue these bonds on April 2, 1889, but they were not issued until August 15, 1889, more than four months after the notice of the election and the vote. The city council was vested with the power and charged with the duty "to admit and allow all just claims against the city, . . . and provide for the payment of the expenses and indebtedness of the corporation," and it was authorized "to borrow money, and for that purpose to issue the bonds of the city." It issued these bonds pursuant to the vote of the qualified electors of that city. It wrote upon the face of each of them the words "issued for the purpose of funding the floating indebtedness of the city of Huron," and sent them forth into the commercial world, to be sold upon this statement, when every officer of that city, every member of its city council, and many, if not all, of its citizens, knew that these bonds were issued to pay void warrants which evidenced no debt. Why did not the city council write the truth into these bonds? Why did it not write "issued for the purpose of paying the void warrants put forth by the city of Huron to elect itself the capital of the state?" The reason is ob-

vious. The truth would not have persuaded investors to purchase the bonds. The words "floating indebtedness" have a clear and well-understood meaning in the commercial world. They do not mean void paper semblances of obligations which neither create nor evidence a debt. They mean "that mass of lawful and valid claims against the corporation, for the payment of which there is no money in the corporate treasury specifically designed, nor any taxation or other means of providing money to pay, particularly provided." *People ex rel. Cooke v. Wood*, 71 N. Y. 371, 374. When the city council of Huron, the body which alone had the power to determine the validity of claims against that city, put forth bonds in which it declared that they had been issued to fund the floating indebtedness of the city, it made the representation best calculated to assure purchasers of the incontestability of the bonds, and most likely to induce them to buy. This was the reason why it inserted this declaration rather than the statement of the truth in the face of these bonds. The Second Ward Savings Bank, the defendant in error, is a corporation doing business in Milwaukee, in the state of Wisconsin. The charter of the city of Huron informed it that its city council had the power to determine the validity of all claims against that city. Some time after August 15, 1889, this bank found in the market in Chicago or Milwaukee these sixteen bonds, issued by authority of a vote of the people of the city of Huron, and by direction of its city council, in which that council represented that they had been issued to fund the floating indebtedness of the city. The council and the city knew whether or not they had been so issued, and whether or not their proceeds had been applied to that purpose; and the bank did not know. It had the right to rely, and the city intended that it should rely, on the representation contained in its bonds; and now that the bank has bought them in reliance upon that statement, it would be a monstrous perversion of justice to permit the city to defeat their collection because its statement was false. As against this bank, the city is conclusively estopped from claiming that the bonds were issued for, or that their proceeds were applied to, any other purpose than the payment of the valid floating indebtedness of the city. For all the purposes of this action, the warrants paid with the proceeds of these bonds must be deemed to be the legal evidences of a just debt of the municipality.

A municipal corporation is estopped from defending an action by an innocent purchaser to collect its negotiable bonds which recite that they were issued for the purpose of funding the bonds, warrants, or floating debt of the corporation, either on the ground that the warrants or bonds which they were issued to satisfy were void, or that the apparent debt which they were issued to pay was fictitious. See the cases cited above, and *Ashley v. Presque Isle County Supers.* 16 U. S. App. 656, 675, 60 Fed. Rep. 55, 66, 8 C. C. A. 455, 466; *Meyer v. Brown*, 65 Cal. 49 L. R. A.

583, 4 Pac. 25, 625, 26 Pac. 281; *Moran v. Miami County Comrs.* 2 Black, 722, 17 L. ed. 342; *Hauckott v. Ottawa*, 99 U. S. 86, 96, 25 L. ed. 363, 365; *Ottawa v. First Nat. Bank*, 105 U. S. 342, 343, 26 L. ed. 1127.

The fact that a municipal corporation has diverted the proceeds of its negotiable securities from the lawful purpose for which they appear on their face to have been issued to an unlawful purpose is no defense to an action upon them by an innocent purchaser who had no knowledge of or part in the diversion or waste. *National L. Ins. Co. v. Huron Bd. of Edu.* 27 U. S. App. 244, 255, 62 Fed. Rep. 778, 784, 10 C. C. A. 637, 644; *West Plains Twp. v. Sage*, 32 U. S. App. 725, 733, 69 Fed. Rep. 943, 946, 16 C. C. A. 553, 556; *Anderson County Comrs. v. Beal*, 113 U. S. 227, 240, 28 L. ed. 966, 5 Sup. Ct. Rep. 433; *Cairo v. Zane*, 149 U. S. 122, 137, 37 L. ed. 673, 678, 13 Sup. Ct. Rep. 803; *Macey v. Williamson County Ct.* 72 Ill. 207.

Another proposition which is zealously argued in this case is that these bonds are void because they create a debt in excess of the limitation prescribed by the organic act of the territory of Dakota. It is conceded that, at the time these bonds were issued, the indebtedness of the city of Huron already exceeded the limitation prescribed by that act. But, as we have already shown, the warrants which these bonds refunded must, for all the purposes of this case, be deemed to have evidenced a just debt of the city, and bonds which are issued to fund a valid indebtedness neither create any debt nor increase the debt of the municipality which issues them. They merely change the form of an existing indebtedness. *Lake County Comrs. v. Platt*, 49 U. S. App. 216, 79 Fed. Rep. 567, 569, 25 C. C. A. 87, 89; *E. H. Rollins & Sons v. Gunnison County Comrs.* 49 U. S. App. 399, 80 Fed. Rep. 692, 698, 26 C. C. A. 91, 98; *Opinion of Justices*, 81 Me. 602, 18 Atl. 291; *Powell v. Madison*, 107 Ind. 110, 8 N. E. 31; *Los Angeles v. Teed*, 112 Cal. 319, 44 Pac. 580; *Marion County Comrs. v. Harvey County Comrs.* 26 Kan. 181, 201; *Hotchkiss v. Marion*, 12 Mont. 218, 29 Pac. 821; *Miller v. School Dist. No. 3*, 5 Wyo. 217, 39 Pac. 879.

It is insisted, however, that the issue of these bonds did temporarily increase the debt of the city because their proceeds were not applied to any of the warrants until twenty days after these proceeds were paid into the treasury, and that, during this time while both the bonds and the refunded warrants were outstanding, the debt was increased. In support of this contention, counsel cites *Doon Twp. v. Cummins*, 142 U. S. 366, 378, 35 L. ed. 1044, 1048, 12 Sup. Ct. Rep. 220; *Shaw v. Independent School Dist.* 62 Fed. Rep. 911; *Coffin v. Indianapolis*, 59 Fed. Rep. 221, and *Etna L. Ins. Co. v. Lyon County*, 44 Fed. Rep. 329, 342.

The case in hand, however, is clearly distinguishable from these cases by the fact that the defendant in error bought these bonds of a third party in the open market, without notice of the fact that the debt of

the city was increased by their issue, or of any other defect in them, while holders of the bonds in the cases cited took them with notice of their defects. In *Aina L. Ins. Co. v. Lyon County*, the bonds disclosed the amount of the contemporaneous issue, and this issue, standing alone, was in excess of the constitutional limitation of the debt of the county. In the case at bar, the entire issue voted was far within the limitation of the organic act, and the bonds did not disclose even this amount. *Coffin v. Indianapolis* was an action by a bidder to recover from the city money which he had deposited as a purchaser of bonds which he discovered were illegal, and refused to accept before they were delivered. In *Shaw v. Independent School Dist.* the holder of the refunding bonds had received them in exchange for old bonds which he held, and which he knew had been issued in violation of the constitutional limitation. In *Doon Twp. v. Cummins*, 142 U. S. 367, 372, 378, 35 L. ed. 1044, 1046, 1048, 12 Sup. Ct. Rep. 220, the plaintiff did not buy the bonds for value, in good faith, and without notice of any defect from one to whom they had been issued by the corporation, as the bank did in this case, but he was himself the person to whom they were originally issued, and he knew when he took the first ten bonds that the district exceeded the constitutional limit of its indebtedness in issuing them, and that it intended to exceed that limit still more. The opinion of the majority of the court in that case was that, where the debt of a municipal corporation already exceeded the constitutional limitation, the exchange of new bonds for old, bond for bond, would not increase the debt of the corporation, and would not be inconsistent with the constitutional limitation, but that if the new bonds were sold, and their proceeds were subsequently used to pay the old bonds, there would be a temporary increase of the debt, which would violate the limitation and invalidate the new securities. The distinction seems to be more nice than real, and, in view of the vigorous dissent which is recorded with the opinion, we may be permitted to doubt whether it will ever be made again. Conceding, however, that it is well taken, it establishes the proposition that there was a practical and legal method by which the bonds here in question might have been issued by the city of Huron without increasing its indebtedness, and without violating the limitation found in the organic act. They might have been exchanged for warrants, dollar for dollar. Was not the bank which purchased these bonds in the open market, without notice of any defect, warranted in presuming that this method had been pursued? It was the only method by which the city could legally issue refunding bonds in 1889. The legal presumption was that the city and its officers had complied with the law, and had issued them in a legal manner. The city put forth each of these bonds with this recital on its face: "Issued pursuant to an election held April 2, 1889, by authority granted by article 32, § 49 L. R. A.

7, of the charter of the city of Huron." If the decision of the supreme court in *Doon Twp. v. Cummins*, is to be adhered to, the exchange of these bonds for the warrants, dollar for dollar, was a condition precedent to their lawful issue under this charter, and it was a condition which it was within the power, and which it was the duty, of the officers who signed these bonds to comply with. The recitals of the officers of a municipality who are invested with the authority to perform a precedent condition to the issue of negotiable bonds, or with authority to determine when that condition has been performed, that the bonds have been issued "in pursuance of," or "in conformity with," or "by virtue of," or "by authority of" the statute, preclude inquiry, as against an innocent purchaser for value, as to whether or not the precedent conditions had been performed before the bonds were issued. *National L. Ins. Co. v. Huron Bd. of Edu.* 27 U. S. App. 244, 266, 268, 62 Fed. Rep. 778, 792, 793, 10 C. C. A. 639, 651, 652, and cases there cited; *Independent School Dist. v. Stone*, 106 U. S. 183, 187, 27 L. ed. 90, 91, 1 Sup. Ct. Rep. 84; *Coloma v. Eaves*, 92 U. S. 484, 23 L. ed. 579; *Douglas County Comrs. v. Bolles*, 94 U. S. 104, 24 L. ed. 46; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. ed. 548; *Anderson County Comrs. v. Beal*, 113 U. S. 227, 238, 239, 28 L. ed. 966, 970, 5 Sup. Ct. Rep. 433; *Cairo v. Zane*, 149 U. S. 122, 37 L. ed. 673, 13 Sup. Ct. Rep. 803; *Evansville v. Dennett*, 161 U. S. 434, 443, 40 L. ed. 760, 763, 16 Sup. Ct. Rep. 613.

There was a legal method by which these bonds could have been issued by the city. The city certified that they had been issued according to law. If, upon any theory, the bonds of a municipality can be valid, an innocent purchaser has the right to presume that they are so, and that the recitals in them are true; and, after he has completed his purchase, that presumption is conclusive upon the corporation. *E. H. Rollins & Sons v. Gunnison County Comrs.* 49 U. S. App. 399, 80 Fed. Rep. 692, 699, 26 C. C. A. 91, 98; *Evansville v. Dennett*, 161 U. S. 434, 443, 446, 40 L. ed. 760, 763, 764, 16 Sup. Ct. Rep. 613; *Chaffee County Comrs. v. Potter*, 142 U. S. 355, 363, 364, 35 L. ed. 1040, 1043, 12 Sup. Ct. Rep. 216.

The truth is that where an innocent purchaser buys, of others than the municipality or its agents, negotiable bonds, which recite that they were issued to fund the debt or the obligations of the municipality, the question of excessive indebtedness does not arise, and the purchaser is not required to consider or inquire concerning it, because, if the old debt was refunded in the legal method pointed out in *Doon Twp. v. Cummins*, the debt of the municipality could not be increased, and the purchaser may well rest on the legal presumption that the legal method was adopted. The result is that the legal presumption and the recitals in these bonds preclude the city of Huron from defeating them on the ground that they increased its indebtedness. We have not arrived at this conclusion without a careful examination of the decisions of the

supreme court of Iowa in *Sioux City & St. P. R. Co. v. Osceola County*, 45 Iowa, 168; *Austin v. Colony Dist. Twp.* 51 Iowa, 102, 49 N. W. 1051, and *Holliday v. Hilderbrandt*, 97 Iowa, 177, 66 N. W. 89. But this is a question of commercial law upon which the national courts are bound to exercise their own judgment. In so far as the decisions of the supreme court of Iowa are not in accord with the views expressed in this opinion, they do not commend themselves to our judgment, and are in conflict with the rules and principles which have been established by the decisions of the Supreme Court of the United States and of this court to which we have adverted, and which must govern this case. We cannot yield our own opinion, and depart from these rules, to follow the decisions in Iowa. The decisions of the Supreme Court are controlling in this court, and they commend themselves to our reason and judgment.

Another objection to these bonds is that the city of Huron was without power to issue them. The position is not entitled to extended consideration, because the power granted by the charter of the city of Huron is plenary. It was general, not special. It was not limited to specified purposes, but was to borrow money and issue bonds for all municipal purposes. It was "to borrow money, and for that purpose to issue bonds of the city in such denominations, for such length of time, not to exceed twenty years, and bearing such rate of interest, not to exceed 7 per cent per annum, as the city council may deem best." Charter of Huron, pt. 32. The whole is greater than any of its parts, and includes them all. The power to borrow money and issue bonds for all municipal purposes includes the power to do so to pay or refund the indebtedness of the municipality. *Portland Sav. Bank v. Evansville*, 25 Fed. Rep. 389; *Simonton, Municipal Bonds*, § 126; *Quincy v. Warfield*, 25 Ill. 317, 79 Am. Dec. 330; *Morris & W. v. Taylor*, 31 Or. 62, 49 Pac. 600; *Galena v. Corwith*, 48 Ill. 423, 95 Am. Dec. 557; *Hyde Park v. Ingalls*, 87 Ill. 13; *Rogan v. Watertown*, 30 Wis. 259, 268. There is nothing in the cases of *Police Jury v. Britton*, 15 Wall. 566, 21 L. ed. 251; *Merrill v. Monticello*, 138 U. S. 673, 684, 34 L. ed. 1069, 1074, 11 Sup. Ct. Rep. 441; *Heins v. Lincoln*, 102 Iowa, 69, 71 N. W. 189, 191; *New Orleans v. Clark*, 95 U. S. 644, 24 L. ed. 521; *Waxahatchie v. Brown*, 67 Tex. 519, 4 S. W. 207; *State ex rel. Wood v. Board of Liquidation of City Debt*, 40 La. Ann. 398, 4 So. 122; *Middleport v. Aetna L. Ins. Co.* 82 Ill. 565; *Bogart v. Lamotte Twp.* 79 Mich. 294, 44 N. W. 612; *Brenham v. German American Bank*, 144 U. S. 173, 182, 36 L. ed. 390, 394, 12 Sup. Ct. Rep. 559; *Coffin v. Kearny County*, 12 U. S. App. 562, 57 Fed. Rep. 137, 6 C. C. A. 288; or *Shannon v. Huron*, 9 S. D. 356, 69 N. W. 598,—in conflict with this conclusion. No court has held in any of these cases that the unlimited power to borrow money and issue bonds for all municipal purposes excludes the power to do so to fund or pay municipal debts. In *Police Jury v.*

Britton no power to issue bonds was granted to the parish, and the court simply held that this power was not to be inferred from the grant of general powers of administration. In *Merrill v. Monticello* a power was given to issue bonds for specified purposes, and the court held that this was not a grant of power to issue them for purposes not specified, on the familiar principle, *Expressio unius est exclusio alterius*. In *Brenham v. German American Bank* and *Heins v. Lincoln* it was held that a mere power to borrow money without authority to issue bonds did not include the power to emit negotiable securities to evidence the debt. In *Coffin v. Kearny County* the statute expressly forbade the issue of bonds at the time when they were put forth; and in *Shannon v. Huron* the power to issue bonds was not under discussion at all. The other cases cited are as wide of the mark.

It is insisted, however, that the power granted by the charter to the city council to pay current expense warrants of the city by a levy of a tax implies the exclusion of the power to fund such warrants by the issue of negotiable bonds. The contention would be worthy of serious consideration if the express power to issue negotiable bonds was not also granted to the city council by this charter, but the charter grants to the council authority "to appropriate money and provide for the payment of the expenses and indebtedness of the corporation," and gives it both the power to levy taxes, and the power to borrow money and issue bonds for this purpose. It cannot be that the grant of both these powers excludes either, and the choice of the method by which the indebtedness of the city should be paid is left to the discretion of the council. That discretion has been exercised, and now that bona fide purchasers have bought the bonds in reliance upon its exercise, it is too late for the courts to review it.

Another position of counsel for the plaintiff in error is that the unlimited power to issue bonds granted to the city council in 1883 by the charter of this city was revoked or restricted to the power to issue them for the specified purposes of erecting public school buildings and other buildings for city purposes, procuring fire apparatus, putting in waterworks, sinking public wells and cisterns, putting in sewers and improving streets, named in the general law of 1887. *Dak. Comp. Laws*, §§ 1149, 1150, p. 257. The position is untenable (1) because the charter of the city of Huron is a special act, and the act of 1887 is a general law, and powers and privileges granted by a special act or charter are not affected by general legislation on the same subject, but the special charter and the general laws must stand together, the one as the law of the particular case, and the other as the general law of the land. (*Gowen v. Harley*, 12 U. S. App. 574, 584, 56 Fed. Rep. 973, 979, 6 C. C. A. 190, 196; *Dill. Mun. Corp.* 4th ed. § 87; *South Carolina v. Stoll*, 17 Wall. 425, 436, 21 L. ed. 650, 655); and (2) because the act of 1887 carries a proviso which expressly de-

clares that it shall not be construed to limit or restrict the powers theretofore conferred by any special charter upon the council of any city or municipal corporation. The conclusion of the whole matter is that the bonds and coupons, together with the facts that the defendant in error purchased them for value in the ordinary course of business, and that the coupons were not paid, established a good cause of action, and none of the objections to the complaint, to the evidence of these facts, or to the judgment, can be sustained.

A single error in the trial of the case was well assigned. It was that the trial court admitted in evidence proof, and found as a fact, that the city clerk of the city of Huron issued a certificate on August 14, 1889, of the amount of the assessed valuation of the property within the city of Huron, and

of the amount of that city's indebtedness. That certificate was immaterial, and should not have been received in evidence or noticed. It does not appear that the defendant in error ever saw or relied upon it, and it could in no way affect the rights of the parties to this litigation. The findings of the court, however, are ample to sustain its judgment after discarding its reference to this certificate, and it conclusively appears from the record and the findings that its admission in evidence could not have prejudiced the plaintiff in error. Error without prejudice is no ground for reversal. *Smiley v. Barker*, 55 U. S. App. 125, 83 Fed. Rep. 684, 687, 28 C. C. A. 9.

The trial below was conducted without prejudicial error; the judgment was founded in reason, and sustained by authority, and it must be affirmed.

CONNECTICUT SUPREME COURT OF ERRORS.

STATE of Connecticut

v.

John A. McKEE, *Appt.*

(.....Conn.....)

1. An act making it a penal offense to sell, or offer to sell, land, or give a paper principally made up of criminal news, police reports, and pictures and stories of bloodshed, lust, and crime, does not violate Const. art. 1, § 5, providing that every citizen may freely speak, write, and publish his sentiments on all subjects, or § 6, providing that no law shall be passed to restrain the liberty of speech or of the press.
2. The legislature has power to declare that certain acts shall constitute a criminal offense, on the ground that they endanger public morals, although such acts may not be sufficient to sustain an indictment at common law for nuisance or libel.
3. The courts will not construe language so as to invalidate an act, when it is fairly susceptible of a construction consistent with validity, but will give effect to a legitimate legislative purpose plainly indicated, if it can reasonably be done.
4. The constitutionality of a statute is a question of law, to be settled by the court, and is not to be submitted to the jury.
5. The gist of the offense committed by a violation of Pub. Acts 1895, p. 558, prohibiting the sale, or offering for sale, of papers, books, or magazines devoted to the publication of criminal news, police reports, and pictures or stories of crime, is the massing of such immoralities in one publication, whatever the motive, and that the paper is mainly devoted to such matters.
6. A complaint under Pub. Acts 1895, p. 558, prohibiting the sale of papers, books, or magazines devoted to the publication of criminal news, police reports, or pictures or

stories of deeds of bloodshed, lust, and crime, is sufficient if the offense is charged in the words of the statute, and it need not state that the prohibited matter is obscene, blasphemous, scandalous, or libelous.

7. The question whether the matter published by a newspaper comes within the statutory definition is for the court, in a prosecution for selling a paper devoted to the publication of criminal news in violation of statute, where the sale and the fact that the paper was devoted to the publication of the class of matter contained therein are admitted.
8. The whole paper alleged to have been sold must go to the jury in a prosecution for unlawfully selling a paper devoted to the publication of criminal news.

(May 22, 1900.)

APPEAL by defendant from a judgment of the Superior Court for New Haven County convicting him of violating the statute against selling newspapers principally made up of criminal news, etc. *Reversed.*

Statement by **Hamersley, J.:**

The offense was charged as follows: "John A. McKee," etc., "on the 3d day of September, A. D. 1899, unlawfully did sell to Philip Lentenback, offer, and have in his possession with intent to sell and offer, a certain paper devoted to the publication and principally made up of criminal news, police reports, pictures, and stories of deeds of bloodshed, lust, and crime, which said paper then consisted of twelve pages; and at the top or head of the first of said pages were printed the words and figures following, to wit: 'Waterbury Herald. Vol. 11. No. 602. Waterbury, Conn. Sept. 3, 1899. Price, five cents;' and at the top or head of each succeeding page of said paper were printed the words and figures following, to wit, 'Sunday Herald, Sept. 3, 1899;' against the peace," etc. The information contained three other counts, each charging the sale on

NOTE.—For constitutional freedom of speech and of the press, see *Cowan v. Fairbrother* (N. C.) 32 L. R. A. 829, and *note*; also *State v. McCabe* (Mo.) 34 L. R. A. 127; and *State v. Tugwell* (Wash.) 43 L. R. A. 717.
49 L. R. A.

a different date of a different issue of the same paper. The defendant demurred to the complaint. The demurrer was overruled. The finding of the court (Roraback, J.) shows that upon the trial the state's attorney offered in evidence a copy of the paper described in each count. The court, upon objection by the accused, ruled that the papers were admissible, as tending to prove the charge in the information, and that they should go to the jury. The defendant excepted. The papers so admitted are marked as exhibits, and appear in the record. By agreement, the state's attorney and attorney for accused marked the articles to which they desired to call attention as supporting their respective claims. The defendant presented in writing requests to charge in the form of an extended and argumentative charge. The court declined to charge as requested. The charge as given contained the following passages:

"First. In my opinion, gentlemen, the law upon which this prosecution is brought is a constitutional and valid one; but, under the limitations already stated, you are the judges of the law as well as of the facts, and it is for you to say on all the evidence, and under the law as you find it to be, and as you conscientiously believe it to be, whether the accused is guilty or not guilty of the crime charged against him. The statute upon which this prosecution is based reads as follows: 'Every person who shall sell, lend, give, or offer, or have in his possession with intent to sell, transport, lend, give, or offer any book, magazine, pamphlet, or paper devoted to the publication or principally made up of criminal news, police reports, or pictures and stories of deeds of bloodshed, lust, or crime, shall be punished,' etc. As I have stated to you, this statute, in my opinion, is constitutional, and a valid police regulation.

"Second. A paper comes within the description of the offense alleged in the information, and also within the prohibition of the statute, if it is devoted to, or principally made up of, either criminal news, or police reports, or pictures and stories of deeds of bloodshed, or pictures and stories of lust, or pictures and stories of crime. Criminal news,' within the intendment of the statute, means reports and articles concerning, relating to, and setting forth acts or conduct involving criminal wrongdoing. 'Police reports,' within the intendment of the statute, means articles and statements concerning the doings of the police in the detection, arrest, or prosecution of criminals. 'Pictures and stories of deeds of bloodshed,' within the intendment of the statute, means recitals or narratives, either true, false, or fictitious, or of or relating to or involving deeds concerning the shedding of human blood, such as assaults, murder, manslaughter, and the like, and accompanied by representations of persons, forms, or scenes connected with, depicting, or portraying such stories.

"Third. The statute provides that the paper must be devoted to, or principally made up of, the news, reports, or pictures and stories

mentioned in the statute. 'Devoted to the publication of' the matters in question, within the intendment of the statute, means that such matters are conspicuously and with especial prominence set forth and displayed therein. 'Principally made up of' the matters in question, within the intendment of the statute, means that the matters in question shall appear in the paper in such quantity, prominence, and arrangement as to form or become a leading feature or characteristic of such paper. The words 'devoted to the publication of,' or the words 'principally made up of,' taken separately or together, do not necessarily imply or mean that any certain percentage of the space or that the entire paper shall be filled or occupied with the matter in question. These words and phrases do imply that their prohibited matter shall be a prominent and leading characteristic or feature of the publication; that special attention shall be devoted to the publication of the prohibited items. It is a question for the jury to determine whether or not these papers, or any of them, offered in evidence in support of the information, are devoted to the publication or principally made up of criminal news, police reports, or pictures and stories of deeds of bloodshed, lust, or crime, within the rules already stated to you. It is also a question of fact for the jury to determine, upon all the evidence in the case, whether the accused or his agent, under the rules given, on or about the days alleged in the information, sold or offered, or had in his possession with intent to sell or offer, said papers, or any of them, as charged in the several counts of the information.

"Fourth. In your deliberations you will carefully examine each paper in evidence with the count based thereon, and determine as a matter of fact whether or not these papers, or any of them, come within the definition and prohibition of the statute in question."

The appeal assigns error (1) in overruling the demurrer; (2) in refusing to charge as requested; (3) in the charge as given in each of the four passages above quoted; (4) in admitting in evidence the whole paper described in each of the counts.

Messrs. L. N. Blydenburgh and DeForest & Klein, for appellant:

The constitutional liberty of speech and of the press implies a right to freely utter and publish whatever the citizens may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals.

Cooley, Const. Lim. p. 518.

Can there not be a book or paper devoted to, and principally made up of, police reports, and yet be absolutely free from blasphemy, obscenity, scandal, falsehood, and malice, from each and all of them?

Every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so, always, that he does not injure any other person in his rights, person, property, or reputation; and so, always, that he does not thereby disturb the public peace, or attempt to subvert the government.

2 Story, Const. 4th ed. § 1880.

The legislature has no power to pass any law to prevent any person from publishing anything that does not injure any other person in his rights, person, property, or reputation, or does not disturb the public peace, or attempt to subvert the government.

The right to print carries with it the right to sell.

Cooley, Const. Lim. 6th ed. chap. 12, 518; Cooley, Const. Law, 302; *Cincinnati Gazette Co. v. Timberlake*, 10 Ohio St. 548, 78 Am. Dec. 285; *Sweeney v. Baker*, 13 W. Va. 182, 31 Am. Rep. 757; 13 Am. & Eng. Enc. Law, pp. 510-512.

This act furnishes no fixed boundary which will with uniformity determine when innocence trespasses upon the domain of crime.

The act in question is unconstitutional. It limits the freedom of the press in respect to publications which are protected by constitutional limitation which determines, controls, and fixes a limit to legislative enactment. It gives no certain rule of criminality. It makes the doing of acts which do not mitigate or alter the evil to the public, (if any there be), a ground of immunity from conviction or punishment. Upon the same proof the court and jury are left to fix the test of criminality with no absolute rule for their guidance. It punishes the exercise of a constitutional right to publish a criminal trial, and narrations of attempted or accomplished detections of crime.

A definite allegation that the publication is of a character which would bring it within the police power of prohibition is necessary.

In all cases the rule is, that it shall in some way appear in the information that the matter is of a class which the state has a right to prohibit, either by setting up the matter, or excusing its being spread upon the record.

The accused has the right of demurrer or in some way from the record to be able to say to the court that if all charged be true it is no crime. Some cases hold that that can be accomplished by a bill of particulars when an excuse for not putting the matter on record is pleaded.

Com. v. Holmes, 17 Mass. 336; 14 Enc. Pl. & Pr. pp. 1158, 1159; *Succarinen v. United States*, 161 U. S. 450, 40 L. ed. 766, 16 Sup. Ct. Rep. 562; *Com. v. McCance*, 104 Mass. 162, 29 L. R. A. 61, 41 N. E. 133; *United States v. Bennett*, 16 Blatchf. 338, Fed. Cas. No. 14,571.

The statute leaves to each separate jury the duty of fixing the test of criminality upon exactly the same set of proof.

Messrs. William H. Williams and Alfred N. Wheeler, for appellee:

Ordinarily it is sufficient to charge a statutory offense in the words of the statute. 49 L. R. A.

State v. Costello, 62 Conn. 128, 25 Atl. 477; *State v. Cady*, 47 Conn. 44; *State v. VanWye*, 136 Mo. 227, 37 S. W. 938; *Strohm v. People*, 160 Ill. 582, 43 N. E. 622; *United States v. Bennett*, 16 Blatchf. 338, Fed. Cas. No. 14,571; *Rosen v. United States*, 161 U. S. 29, 40 L. ed. 606, 16 Sup. Ct. Rep. 434, 480; *Dunlop v. United States*, 165 U. S. 486, 41 L. ed. 799, 17 Sup. Ct. Rep. 375.

The statute is constitutional.

State v. VanWye, 136 Mo. 227, 37 S. W. 938; Black, Const. Law, pp. 300, 472, 480; Cooley, Const. Lim. pp. 422, 451; Tiedeman, Pol. Power, p. 190; *Re Banks*, 56 Kan. 242, 42 Pac. 693; *United States v. Harmon*, 45 Fed. Rep. 414; *Harman v. United States*, 50 Fed. Rep. 921; *Ex parte Jackson*, 96 U. S. 727, 24 L. ed. 877; *Re Rapiere*, 143 U. S. 110, 36 L. ed. 93, 12 Sup. Ct. Rep. 374.

Several states have enacted statutes calculated to prevent the publication and sale of papers of the character in question.

State v. VanWye, 136 Mo. 227, 37 S. W. 938; *Strohm v. People*, 160 Ill. 582, 43 N. E. 622; *Re Banks*, 56 Kan. 243, 42 Pac. 693; *State v. Sykes*, 28 Conn. 225.

The accused was responsible for the acts of his agent.

State v. Curtiss, 69 Conn. 86, 36 Atl. 1014; *Williams v. Hendricks*, 115 Ala. 277, 41 L. R. A. 650, 22 So. 439.

The jury are not so far judges of the law as to be required or permitted to decide upon the constitutionality of a statute nor, indeed, to determine the proper construction of a statute,—all of which is exclusively within the province of the court.

State v. Main, 69 Conn. 123, 36 L. R. A. 623, 37 Atl. 80.

The construction of the statute adopted by the court was the proper one.

State v. VanWye, 136 Mo. 227, 37 S. W. 938; *Strohm v. People*, 160 Ill. 582, 43 N. E. 622; *Re Banks*, 56 Kan. 242, 42 Pac. 693.

If the paper was characterized by any one of the objectionable features mentioned in the statute, the conviction must be sustained.

State v. Burns, 44 Conn. 149.

The character and construction of the articles in the paper were properly left to the jury.

Broschart v. Tuttle, 59 Conn. 1, 11 L. R. A. 33, 21 Atl. 925.

Hammersley, J., delivered the opinion of the court:

The demurrer to the complaint was properly overruled. The only reasons specified in the demurrer that call for notice are these: "(3) Because it [the act of 1895, on which the prosecution was brought] restricts the constitutional right to publish the truth; (4) because it is not alleged that the matter is obscene, blasphemous, scandalous, or libelous."

There is no constitutional right to publish every fact or statement that may be true. Even the right to publish accurate reports of judicial proceedings is limited. The substance of the rule is briefly stated by Judge Cooley in his work on Constitutional Limitations: "If the nature of the case is such as

to make it improper that the proceedings should be spread before the public, because of their immoral tendency, or of the blasphemous or indecent character of the evidence exhibited, the publication, though impartial and full, will be a public offense, and punishable accordingly." Cooley, Const. Lim. p. 449. This rule applies with a far wider range to ordinary matters.

If the fourth specification implies a claim that the power of the state to punish acts as injurious to the public health, safety, or morals is limited to acts within the adjudicated scope of the common-law offenses of nuisance and libel, it is unfounded. These elastic common-law crimes are based on the broad principle that conduct injurious to public health, safety, and morals may be restrained and punished by the state, although the same conduct, if harmless, cannot validly be prevented. Though defined by an unwritten law, the crimes in fact, like most common-law rules, depend on legislative authority, and may be restricted or extended by the same power. Upon a prosecution of the common-law offense, the question whether the conduct charged is injurious may be a question of fact for the jury; but there are cases in which the legislature may withdraw from the offenses certain specified acts as not injurious, or may declare certain conduct to be injurious, and make such conduct a statutory offense. When this is done, the injurious nature of the conduct is determined, subject, in some instances, to judicial review by the legislature, and is not a question of fact involved in a prosecution under such statute. *State v. Main*, 69 Conn. 123, 133, 36 L. R. A. 623, 37 Atl. 80; *State v. Cunningham*, 25 Conn. 195, 203. The definition of the perversion of the press to the injury of public morals as the equivalent of conduct which at common law had been punished upon indictment for libel is inadequate and unsound. It substitutes the effect for the cause. The law of libel, as related to such conduct, rests upon the principle of the power and duty of the state to protect each citizen from malicious injury, and society from attacks upon its safety, as well as from the pollutions of immorality, and is coincident in its range with a large portion of the field covered by that principle, but does not mark its limits. This erroneous view was set forth with much ingenuity and ability in the argument of counsel reported in the comparatively recent case of *Re Rapier*, 143 U. S. 110, 36 L. ed. 93, 12 Sup. Ct. Rep. 374, but the decision involved a condemnation of the view, although the opinion deals mainly with conclusions, without detailing the reasons, owing, as the court states, to the death of Mr. Justice Bradley, who had been assigned to vindicate the conclusions. If such an attempt to bottle up a broad principle of free government in the definite results of its past application could be made successful, it would, in effect, seriously narrow the freedom of speech and press as now understood, as well as cripple the state in affording that protection to the individual and the public from wrongful acts

which is a necessity to the enjoyment of real freedom. It is therefore immaterial whether or not the conduct described in the statute has heretofore been held to be sufficient to support an indictment at common law for nuisance or libel. The legislature has declared that it does endanger public morals, and this it has the power to do, unless the court can say that such declaration is plainly unfounded.

If the fourth specification simply implies that an information, under the statute, must contain an allegation that the prohibited publications are obscene, etc., it is wholly without merit. But the force of the demurrer is not entirely confined to the specified reasons. If for any reason the statute, or that portion of it under which the accused was prosecuted and punished, is unconstitutional or void, the demurrer should have been sustained. The offense charged in the information is a violation of one of the provisions of § 2 of "An Act Relating to Obscene Literature," passed in 1895 (Pub. Acts 1895, p. 558). Possibly, the section may be framed with looseness; may in some particulars be open to a construction inconsistent with its evident purpose, and invite judicious revision; but it is the duty of the court to give effect to a legitimate legislative purpose plainly indicated, if it can reasonably be done, and not to construe language so as to invalidate an act when the language is fairly susceptible of a construction consistent with validity. *State v. Brennan's Liquors*, 25 Conn. 278, 289; *Hartford Bridge Co. v. Union Ferry Co.* 29 Conn. 210, 227; *Wilton v. Weston*, 48 Conn. 325, 338; *State v. Lewis*, 51 Conn. 113, 127; *Miles v. Strong*, 68 Conn. 273, 287, 36 Atl. 55.

This act is evolved from one directed to the suppression of obscene literature, passed in 1834, and which appears in successive revisions, until and including that of 1875. In the last-named revision it reads as follows:

"Sec. 3. Every person who shall . . . sell," etc., "any printed matter, drawing, or paper, of an obscene character, . . . shall be fined.

"Sec. 4. Every person who shall . . . introduce into any family, college, academy, or school any printed or engraved matter containing obscene language, . . . or any drawing or figure of an obscene character, shall be fined." Gen. Stat. p. 513.

In 1879 the scope of § 4 was extended, and the section amended to read as follows: "Every person who shall sell or lend, or introduce into any family," etc., "any obscene, lewd, or lascivious book, pamphlet, paper," etc., "or other publication of indecent nature, . . . shall be fined." Pub. Acts 1897, p. 428. In 1885 the scope of § 3 was extended, for the purpose of covering "obscene and immoral publications," by the repeal of the section, and the substitution of the following:

"Sec. 1. Every person who shall buy, sell," etc., "any obscene or indecent book, pamphlet, paper," etc., "shall be punished by a fine," etc.

"Sec. 2. Every person who shall sell," etc., "any book, magazine, pamphlet or paper devoted wholly or principally to the publication of criminal news, or pictures and stories of deeds of bloodshed, lust or crime, shall be fined." Pub. Acts 1885, p. 433.

It is evident that this enlargement of § 3 was believed to cover the evil of introducing indecent literature into families, etc., which was punished by § 4 as amended in 1879; for this provision was dropped (without any prior repeal) in the Revision of 1888. It is also evident that the legislature here declares the dissemination of publications of the kind specified to be dangerous to public morals, and that the designated publications are in fact such as deal with information of acts and conduct which are wicked, and in violation of moral obligations, like lawless deeds of bloodshed, lustful or lascivious conduct, crimes, or offenses involving similar immorality, and with matters of that nature, made attractive in the treatment by pictures and by stories. The phrase "criminal news" is used in its wide signification of information of wicked and immoral acts of recent occurrence or discovery. The legislature, in effect, declares the concentration of items of this nature for circulation in publications devoted wholly or mainly to their collection to be of immoral tendency, calculated to induce, especially among the young, the immoralities they are thus incited to dwell upon, and so to endanger the public morals. It is impossible to say that this declaration is without reason, or that such publications do not tend to public demoralization, as truly as descriptions of mere obscenity. The statute, therefore, seeks to protect the public from this danger by punishing the selling and other dissemination of the designated publications.

In the Revision of 1888, § 1537 re-enacts the provisions against obscene publications contained in § 3 of the Revision of 1875, as enlarged by § 1 of the act of 1885, and § 1538, like § 2 of the act of 1885, punishes the spread of the specified immoral publications; thereby covering the evil of their introduction into families, schools, etc., so effectually as to induce the omission from the Revision of § 4 of the Revision of 1875 as amended in 1879. Section 1538 does not differ from § 2 of the act of 1885, except in punctuation, and we do not think that difference alters the meaning. In 1895 the various sections of the Revision of 1888 directed against the publication of obscene and immoral literature were amended, and grouped in "An Act Relating to Obscene Literature." Pub. Acts 1895, p. 558. The principal alterations relate to punishment. Section 1533, as thus amended, reads: "Every person who shall sell," etc., "any book, magazine, pamphlet, or paper, devoted to the publication or principally made up of criminal news, police reports, or pictures, and stories of deeds of bloodshed, lust, or crime, shall be punished." The offense here described is essentially the same as that described in § 2 of the act of 1885. It may be committed in different ways. One, which 49 L. R. A.

is the offense charged in the information, is the selling, or having in possession with intent to sell, a newspaper mainly devoted to detailing recent violations of moral obligations through acts of lawless violence; through conduct induced by lust; through crime; to illustrating such conduct by pictures; to revealing such conduct by stories. It is immaterial whether the paper is devoted to setting forth such immoralities in one or more of the manifestations last above indicated. In either case, the offense is committed. The radical difference between the demoralizing effect of facts stated only as incident to the legitimate purposes of science or literature, and the same facts, separated from their surroundings, and massed for attractive presentation so as to fill the mind of the reader only with the immoralities they suggest, is too patent to need comment. The gist of the offense consists in disseminating by means of the newspaper, which finds its way into families, reaching the young as well as the mature, a selection of immoralities so treated as to excite attention and interest sufficient to command circulation for a paper devoted mainly to the collection of such matters.

We cannot say that the act of 1895, in so far as it defines and punishes this offense, is void, and very clearly it does not violate any constitutional provision relating to the freedom of the press. Article 1 of our Constitution contains a statement of certain "essential principles of liberty and free government," which constitute an underlying condition on which the delegation of power to the several governmental agencies is made, and so operate as limitations on the exercise of the sovereign power granted in broad terms to the legislative, as well as to the executive and judicial departments. *State v. Conlon*, 65 Conn. 478, 489, 31 L. R. A. 55, 33 Atl. 518; *Norwalk Street R. Co.'s Appeal*, 69 Conn. 576, 589, 39 L. R. A. 794, 37 Atl. 1080, 38 Atl. 708. Among these, the most important and vital are the right to participate in the exercise of political power, and the right to the free exercise and enjoyment of religious profession and worship, as declared in the first four sections of the article. A corollary to these rights is the right to the free expression of opinion on public measures and men, and on religious tenets and controversy. This corollary is expressly declared in the following two sections of the article, viz.:

"Sec. 5. Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty.

"Sec. 6. No law shall ever be passed to restrain the liberty of speech or of the press."

The primary meaning of "liberty of the press," as understood at the time our early constitutions were framed, was freedom from any censorship of the press; from "all such previous restraints upon publications as had been practised by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and the duties of

rulers." *Com. v. Blanding*, 3 Pick. 313, 15 Am. Dec. 214. But this fundamental guaranty goes further. It recognizes the free expression of opinion on matters of church or state as essential to the successful operation of free government, and it also recognizes the free expression of opinion on any subject as essential to a condition of civil liberty. The right to discuss public matters stands, in part, on the necessity of that right to the operation of a government by the people, but, with this exception, the right of every citizen to freely express his sentiments on all subjects stands on the broad principle which supports the equal right of all to exercise gifts of property and faculty in any pursuit in life; in other words, upon the essential principles of civil liberty as recognized by our Constitution. Every citizen has an equal right to use his mental endowments, as well as his property, in any harmless occupation or manner; but he has no right to use them so as to injure his fellow citizens, or to endanger the vital interests of society. Immunity in the mischievous use is as inconsistent with civil liberty as prohibition of the harmless use. Both arise from the equal right of all to protection of law in the enjoyment of individual freedom of action, which is the ultimate fundamental principle. This truth is plainly expressed in the language of §§ 3 and 5. The liberty protected is not the right to perpetrate acts of licentiousness, or any act inconsistent with the peace or safety of the state. Freedom of speech and press does not include the abuse of the power of tongue or pen, any more than freedom of other action includes an injurious use of one's occupation, business, or property. In truth, freedom of speech and press, like freedom of other action, is necessarily protected by the first four sections of the article; and §§ 5 and 6 are not essential for that purpose, unless so far as they erect an arbitrary bar to any form of censorship of the press.

The general right to disseminate opinions on all subjects was probably specified mainly to emphasize the strong necessity to a free government of criticism of public men and measures. But it is specified as one of the conditions of civil liberty, and, like other conditions of a similar nature, it necessarily involves the protection of those who may suffer from the wrongful exercise of any common right. The idea of immunity from molestation for the harmful use of opinion was perhaps not undreamed of in the convention of 1818, but it certainly was held to be inconsistent with true freedom. It may be significant of the views of the framers of our Constitution that a section of article 1 contained in its first draft, which prohibited the molestation of any person for his opinions on any subject whatever, was under consideration of the convention during most of its session, and finally rejected without dissent. *Journal Const. Conv. Conn.* pp. 18, 55, 75.

The notion that the broad guaranty of the common right to free speech and free thought contained in our Constitution is intended to 49 L. R. A.

erect a bulwark or supply a place of refuge in behalf of the violators of laws enacted for the protection of society from the contagion of moral diseases belittles the conception of constitutional safeguards, and implies ignorance of the essentials of civil liberty. The act of 1895 is valid in so far as it punishes the offense of which the accused was convicted. It is not necessary to consider other provisions of the act. Portions of a statute may be valid, although other portions may be unconstitutional. *State v. Wheeler*, 25 Conn. 290, 299. We say nothing as to the policy of such legislation. The only question before us is the one of validity. Legislation may or may not be adapted to accomplish a valid and beneficial purpose, and its utility or futility is for the consideration of the legislature. Somewhat similar statutes have been enacted in other states, and their validity has been sustained on the general lines we have indicated, although our attention has not been called to any case precisely analogous. *State v. Van Wye*, 136 Mo. 227, 234, 37 S. W. 938; *Re Banks*, 56 Kan. 243, 42 Pac. 693; *United States v. Harmon*, 45 Fed. Rep. 416; *Re Rapier*, 143 U. S. 110, 134, 36 L. ed. 93, 12 Sup. Ct. Rep. 374.

It was competent for the state's attorney to charge the offense in the words of the statute. *State v. Carpenter*, 60 Conn. 97, 106, 22 Atl. 497; *State v. Costello*, 62 Conn. 128, 131, 25 Atl. 477; *Strohm v. People*, 160 Ill. 582, 584, 43 N. E. 622.

The errors alleged in denying the requests to charge are sufficiently considered in the discussions of the charge as given. To a large extent, the requests were so framed that the court properly refused to incorporate them in the charge. It is not for counsel to frame the charge of the court.

The first passage in the charge to which objection is made is not open to the error assigned. The court correctly charged that the statute, in so far as it created the offense for which the defendant was prosecuted, is a constitutional and valid law. But it did err in telling the jury that they were judges of its constitutionality. The validity of a statute is a question of law, to be settled by the court, and the jury are bound to accept the opinion of the court as the law for the case. *State v. Main*, 69 Conn. 123, 132, 36 L. R. A. 623, 37 Atl. 80.

The second passage objected to could hardly have injured the defendant. It relates to the interpretation of the language of the statute, *viz.*: "Criminal news, police reports, or pictures and stories of deeds of bloodshed, lust, or crime." As we have seen, this language means wicked and immoral acts and conduct, set forth in the form of news; that is, accounts of events of that nature, or in the form of statements of, or articles concerning, the doings of the police in the detection and prosecution of offenses of that nature, or in the form of pictures as well as stories of matters of that nature, *i. e.* deeds of bloodshed, of lust, or of crime, which is a violation of law involving wicked and immoral acts and conduct. This language designates one class of matter, *i. e.*

wicked and immoral conduct, as manifested in one or more of the forms specified. *Strohm v. People*, 160 Ill. 586, 43 N. E. 622.

The third passage objected to contains material error. The gist of the statutory offense is the massing of these immoralities in one publication for circulation, and demands that the paper shall be mainly or principally devoted to the publication of such material. The law cannot be evaded by intermingling other material, whether for the purpose of evasion, or of securing attention to the main subject-matter, so long as the principal resulting effect is the circulation of this massed immorality; but that main result must appear, or the offense is not committed. The offense does not depend on the motive. It is immaterial whether the motive is the gain to be derived from the circulation, the advertising, or the involuntary contributions of those desirous of escaping publicity, or is simply the gratification of a malicious disposition, or is a genuine conviction of the reforming efficiency of a portrayal of all manifestations of crime and immorality; but the offense does depend upon the devotion or dedication of the columns of the paper mainly to the publication of the matters designated by the statute. The charge, therefore, in stating that the offense may be committed whenever the objectionable matter is a leading feature of the paper, or special attention is devoted to the publication of the prohibited items, fails to state the full meaning of the statute. It may be doubtful whether such an imperfect statement in this case in fact injured the defendant, but it is possible that it did. The court properly left to the jury the determination as a question of fact whether the papers in evidence were thus devoted to the publication of material claimed to be within the statutory description.

The charge on the question of agency is hardly as full as it should be, in view of the evidence and claims. The papers were sold at the defendant's shop, in his absence. If sold by one acting under the express or implied authority of the defendant to make that sale, the charge that the defendant sold is proved. There is a distinction between a civil and a criminal case in respect to the effect on the responsibility of the master of a mere general authority given to a servant. In a criminal case, the authority must cover the specific act complained of. In statutory offenses consisting in the sale of articles in violation of regulations for securing public

order, the authority to a servant to sell the particular article charged as sold by the master may, without proof of any specific authority, be inferred from various circumstances, such as the relation of shopkeeper and selling clerk, coupled with proof that the article sold was placed by the master in the shop among other things that were to be sold; carelessness or negligence of the master in providing or keeping the articles sold, and other evidence that legally tends to prove that the sale was made with the knowledge or consent of the master; provided such evidence does in fact satisfy the jury beyond a reasonable doubt that the servant in selling the article acted in pursuance of authority from the master. *State v. Curtiss*, 69 Conn. 86, 39, 36 Atl. 1014; *Com. v. Stevens*, 153 Mass. 421, 11 L. R. A. 357, 26 N. E. 992.

In the fourth passage objected to the court seems to instruct the jury to determine, as a matter of fact, without aid from the court, whether the publications in evidence are such as the statute describes. The question whether the defendant sold a paper devoted to the publication of matters described in the statute was properly submitted to the jury as one of fact. But if the fact of the sale and the fact that the paper sold was devoted to the publication of a class of matter therein contained were uncontested or admitted, then the question whether that class of matter comes within the statutory definition may be treated by the court as one of law. So, where all the elements are contested, the court, in submitting the whole question to the jury as one of fact, may instruct them as to the principles by which they should be guided in determining the application of the statute to the publication, and may express its opinion that the printed matter in evidence is or is not such as the statute designates. *Haight v. Cornell*, 15 Conn. 74, 83; *Donaghue v. Gaffy*, 54 Conn. 257, 266, 7 Atl. 552; *Rosen v. United States*, 161 U. S. 29, 42, 40 L. ed. 606, 16 Sup. Ct. Rep. 434, 480.

The court did not err in admitting the several exhibits. They are before us, and it is clear that they tend to prove the allegations of the charge. The whole paper alleged to be sold in violation of the act must go to the jury. It is proper for the attorney to designate the articles he claims to be within the statutory definition, and this was done.

There is error, and a new trial is ordered.

The other Judges concur.

FLORIDA SUPREME COURT.

STATE of Florida *ex rel.* Rita PEREZ *et al.*
v.
Joseph B. WALL, Judge of the Sixth Judicial Circuit.

(.....Fla.....)

*Under § 967, Rev. Stat., husbands of an
*Headnote by MABRY, J.

aunt and niece are so related to each other by affinity as to disqualify the one from sitting as judge in a case in which the other is an interested party.

(November 7, 1899.)

PETITION for a writ of mandamus to compel defendant to take cognizance of and

NOTE.—As to disqualification of judge for relationship to party, see also *Ex parte Harris* (Fla.) 6 L. R. A. 713 (as to affinity); *Robinson* 49 L. R. A.

v. Southern P. Co. (Cal.) 28 L. R. A. 773; and *First Nat. Bank v. McGuire* (S. D.) 47 L. R. A. 413.

determine an action pending in Hillsboro County which he had refused to do on the ground of disqualification. *Denied.*

The facts are stated in the opinion.

Messrs. Gunby & Gibbons and Charles C. Whitaker for relators.

Messrs. Sparkman & Carter for respondent.

Mabry, J., delivered the opinion of the court:

This is a proceeding by mandamus to compel the Hon. Joseph B. Wall, judge of the sixth judicial circuit, to take cognizance of and determine a certain cause pending in Hillsboro county, in said circuit, wherein Solon B. Turman is complainant, and Rita Perez *et al.* are defendants, and in which it is made to appear that said judge has refused to act on the ground that he is disqualified.

The ground of disqualification relied on by the judge in his answer is that his wife and the father of the wife of complainant, Solon B. Turman, were brother and sister of the full blood, and that his (the judge's) wife and the wife of Solon B. Turman were still living. The question is whether the husbands of an aunt and niece of the full blood are so related to each other as to disqualify the one from sitting as judge in a case in which the other is an interested party.

Our statute provides that "no judge of any court shall sit or preside in any cause to which he is a party or in which he is interested, or in which he would be excluded from being a juror by reason of interest, consanguinity or affinity to either of the parties; nor shall he entertain any motion in the cause other than to have the same tried by a qualified tribunal." Rev. Stat. § 967.

It has been correctly stated that "the common law was watchful over the purity of the jury trial, and, to secure the fair administration of justice, guarded against the influence of those passions most likely to pervert the judgments of men in deciding upon the conduct and controversies of their fellow men." *Jaques v. Com.* 10 Gratt. 690. Challenges were allowed to the polls *in capite*, which were exceptions to particular jurors, and they were also either principal or to the favor. "A third ground of challenge to the polls is *propter affectum*,—as that a jurymen is of kin to either party within the ninth degree." 2 Tidd, Pr. 853. And this was a principal challenge. The venire facias commanded the sheriff to summon twelve good and lawful men of the body of the county, qualified according to law, by whom the truth of the matter might be the better known, and who were in no wise of kin to either party, to make the jury. *Id.* 778. Under this writ, relations by affinity were excluded from the jury. As Lord Coke says, "affinity," in one sense, is taken for "consanguinity" or "kindred,"—as in the writ of venire facias; that affinity is a principal challenge of a juror, and equivalent to consanguinity, when it is between either of the parties,—as if the plaintiff or defendant marry the daughter or cousin of the juror, 49 L. R. A.

or the juror marry the daughter or cousin of the plaintiff or defendant, and the same continues, or issue be had. Co. Litt. 157.

It has been decided by this court that relationship, either by consanguinity or affinity, to one of the parties to a suit, within the ninth degree, is, by the common law, a ground of principal challenge of a juror. *O'Connor v. State*, 9 Fla. 215; *Morrison v. McKinnon*, 12 Fla. 552. It was held in *Ex parte Harris*, 26 Fla. 77, 6 L. R. A. 713, 7 So. 1, that affinity is the tie between a husband and the blood relatives of the wife, and between a wife and the blood relatives of the husband; but it does not exist between the blood relatives of either party to the marriage and those of the other, and consequently no affinity existed between a brother of a wife and the brother of her husband, so as to disqualify the husband's brother from presiding in a trial where the wife's brother was charged with crime. The principle stated that no affinity exists between the respective blood relatives of either party to the marriage is unquestionably true, and was decisive of the case; and it is also true, as a general rule, that affinity only exists between a husband and the *consanguinei* of his wife, and, *vice versa*, between a wife and the *consanguinei* of her husband. The dictionaries generally define direct affinity to be the relation brought about by marriage between a husband and the kindred of his wife and between a wife and the kindred of her husband.

Under the rule stated, Judge Wall is related by affinity to Solon B. Turman's wife within the ninth degree, whether we reckon according to the canonical rule or by the civil law, she being the niece of the full blood of the judge's wife, and he could not, of course, preside in a case where she was an interested party. But how stands it when the niece's husband is a party? It was decided in *Kelly v. Neely*, 12 Ark. 657, 56 Am. Dec. 288, that in such a case the judge was disqualified. In Tennessee it was held that a judge was not disqualified by affinity to sit in a case where his wife's sister's husband was an interested party. Judge Cooper, in speaking for the court (*Hume v. Commercial Bank*, 10 Lea, 1, 43 Am. Rep. 200), says that "affinity, as distinguished from consanguinity, signifies the relation which each party to a marriage, the husband and the wife, bears to the kindred or blood relations of the other. The marriage having made them one person, the blood relations of each are held as related by affinity in the same degree to the one spouse as by consanguinity to the other;" but "the relationship by affinity does not extend further, and hence the maxim *Affinis mei affinis non est mihi affinis*,—a person related by affinity to one who is related to me by affinity is not related to me by affinity." The rule stated is all right, but its application to the facts of the case causes us trouble. A judge undoubtedly is related by affinity to his wife's sister, her blood relative; but the sister's husband is not so related under the rule, according to this decision, because he is the *affinis* of his wife. We do not think it can be maintained that a

husband is related to his wife by affinity. They are embraced in the definition of neither affinity nor consanguinity, but are regarded in law, as correctly stated by Judge Cooper, as one person. If we undertake to apply the rule of affinity to the relation of husband and wife, we cannot exclude the husband from sitting in a case where his wife has the right to sue alone, and is an interested party, as they are not related to each other by affinity or consanguinity; and no one would ever suppose that this was permissible. We admit that a decided majority of the American courts, as shown by cases cited, in applying the rule of affinity, have announced conclusions that would not disqualify a judge to sit in a case where the husband of his wife's niece was an interested party (*Higbe v. Leonard*, 1 Denio, 186; *Eggleston v. Smiley*, 17 Johns. 133; *Rector v. Drury*, 4 Chand. (Wis.) 24; *Chinn v. State*, 47 Ohio St. 575, 11 L. R. A. 630, 26 N. E. 986; *Kirby v. State*, 89 Ala. 63, 8 So. 110; *Deupree v. Deupree*, 45 Ga. 415; *Oneal v. State*, 47 Ga. 229; *Johnson v. Richardson*, 52 Tex. 481; *Moses v. State*, 11 Humph. 232; *Bigelow v. Sprague*, 140 Mass. 425, 5 N. E. 144; *Rank v. Shevey*, 4 Watts, 218; *Ohase v. Jennings*, 38 Me. 44; *Tegarden v. Phillips*, 14 Ind. App. 27, 42 N. E. 549), but they proceeded upon the theory, it seems to us, that the relation of husband and wife is one of affinity, and the rule as to such relation is applied. We are of opinion that they should be regarded as one person in law, so far as the question under consideration is concerned, and this will disqualify a judge where any blood relative of his wife, within the ninth degree, or the husband or wife of such relative, is an interested party. Principal challenges or to the favor of jurors proceeded upon the ground that they were biased in favor of one of the parties, and thereby rendered unfit to determine the truth of the matter to be submitted to them. When they were interested in the matter to be tried, or were of kin to either party in the ninth degree, there was such a manifest presumption, in law, of partiality, as to set them aside as for a principal cause of challenge; and when the challenge was to the favor it was determined by triors. Our statute disqualifies a judge when he would be excluded from being a juror by reason of in-

terest, consanguinity, or affinity to either of the parties; and whatever interest, consanguinity, or affinity that would, in law, exclude a juror as for principal cause of challenge, will disqualify the judge. The statement of the rule by Chitty in his book on Criminal Law (vol. 1, pp. 541, 542) is as follows: "The third description of challenges are those which arise *propter affectum*, or on the ground of some presumed or actual partiality in the jurymen who is made the subject of objection; for the writ, requiring that the jury should be free from all exception, and have no affinity to either party, must evidently include both these grounds of challenge. If, therefore, the juror is related to either party within the ninth degree, though it is only by marriage, a principal challenge will be admitted." In *Mounson v. West*, 1 Leon, 88, it is stated that it had been held a principal challenge where the sheriff's wife was sister to plaintiff's wife, and where the brother of the defendant's wife had married the daughter of the sheriff; and it was decided by Chancellor Walworth (*Paddock v. Wells*, 2 Barb. Ch. 331) that "relationship by affinity may also exist between the husband and one who is connected by marriage with a blood relative of the wife. Thus, where two men marry sisters, they become related to each other in the second degree of affinity, as their wives are related in the second degree of consanguinity." See also note to *Cain v. Ingham*, 7 Cow. 478; *Marshall v. Eure*, 1 Dyer, 37b; and *New York & N. H. R. Co. v. Schuyler*, 28 How. Pr. 187.

Our judgment is that, whenever a judge will be disqualified to sit in a case because a blood relative of his wife is a party, he will likewise be excluded when the husband or wife of such relative is a party, as they should be regarded as one person in interest and in law, so far as the matter in litigation is involved. The result is that the peremptory writ of mandamus will be denied, and it will be so ordered. As the writ must be denied on the ground stated, we do not consider the propriety of the remedy resorted to in this case. See *State ex rel. Burbridge v. Call* (decided at this term) 26 So. 1016.

Order to be entered denying peremptory writ.

VIRGINIA SUPREME COURT OF APPEALS.

WARD'S ADMINISTRATORS *et al.*, *Appts.*,
v.

F. R. CORNETT *et al.*

(91 Va. 676.)

1. An answer denying usury, directly

NOTE.—Usury in agreement for interest after maturity.

The question how far an agreement for an illegal rate of interest after maturity of the debt will be regarded as usurious seems to depend somewhat on the effect which holding it to be usurious will have. The penalty for usury is 49 L. R. A.

responsive to the special interrogations of a bill of discovery in aid of an injunction suit against a sale under a deed of trust securing a bond, is to be taken as evidence in favor of defendant.

2. A provision in a bond for a greater than the legal rate of interest after maturity, by way of a penalty to insure

so different under the various statutes that the effect of a decision in one state might be entirely different in another. Thus, if in one state the taking of usury is a criminal offense, or subjects the offender to a forfeiture of the whole claim, while equity relieves against penalties, the court might be inclined to regard the agreement as

prompt payment of the debt, does not render the bond usurious.

3. An answer to an interrogatory as to usury, in a suit to enjoin enforcement of a bond in which no interest is provided for until maturity, but usurious interest afterwards, which states that legal interest until maturity made up part of the face of the bond, and that the illegal interest was a penalty for not paying at maturity, will not be excluded from evidence for contradicting the bond.
4. Evidence to prove usury must be such as to establish it beyond a reasonable doubt.
5. A deed of trust to secure payment, "with interest," of an extended bond which provided for usurious interest as a penalty for not paying it at maturity will not be usurious, since, the illegal interest being a penalty, the bond will only bear legal interest after maturity as before.

(July 11, 1895.)

a penalty to be relieved against, while if the only result of the taking of usury is the loss of the interest, while equity does not relieve against penalties, the tendency might be to regard the agreement as one for usury to be forfeited. The decisions in these cases would reach practically the same result while deciding directly opposite on the principal question involved. So, in looking for precedents it becomes necessary to take the difference in the statute law into consideration.

Lump sum, a penalty.

The decisions bearing upon this question run back to a time before the taking of interest was permitted, when a provision might be inserted in the contract providing for the return of a large addition to a loan in case of failure to pay at maturity.

In 1 Shepherd's Touchstone, *62, it is said that if I lend a man £10 for a year, and the obligation be that if the borrower pay not the £10 within the year, that then he shall pay £20 for it, this is not usury.

If a man oblige himself to pay nineteen marks at a certain day, and, if he does not pay at that day, he obliges himself in the same deed to pay seventeen marks, this is not usury, but a penalty. 26 Edw. III. 17, cited in Vin. Abr. *Usury*. In Garret v. Foot, Comb. 133. Holt, J., said: If I covenant to pay £100 a year hence, and, if I do not pay it, to pay £20, it is not usurious, but only in nature of a *nomine pena*.

Not usury if debtor can relieve himself.

It is generally held that the agreement will not be usurious if the debtor can relieve himself from paying the additional amount by prompt payment.

If by prompt payment the debtor can relieve himself from payment of an amount which is called for by the contract as a commission for collection, the insertion of the agreement to pay such amount in the contract will not be usury. Campbell v. Shields, 6 Leigh, 517.

In Lloyd v. Scott, 4 Pet. 205, 7 L. ed. 833, the court, among other general propositions pertaining to the question of usury, lays down the following: If a person agree to pay a specific sum exceeding the lawful interest, provided he does not pay the principal by a day certain, it is not usury. By a punctual payment of the principal he may avoid payment of the sum stated which is considered as a penalty.

Where the note, if not paid when due, was to be discharged in oats at a price that would make the amount excessive, the court held that 49 L. R. A.

A PPEAL by plaintiffs from a judgment of the Circuit Court for Grayson County in favor of defendants in an action brought to enjoin proceedings for selling land under a deed of trust given to secure a bond which was alleged to be usurious. *Affirmed*.

The facts are stated in the opinion.

Messrs. Walker & Caldwell, for appellants:

More than legal interest is reserved on the face of the note, and it is *prima facie* usurious.

Tyler, *Usury*, p. 106.

Where there is no latent ambiguity in the writing, parol evidence will not be admitted to explain it.

Levy v. Gadsby, 3 Cranch, 180, 2 L. ed. 404.

Where a contract imports usury upon its

if by prompt payment the maker could have avoided everything but the amount which was honestly due from him, there was no usury. *Cutler v. How*, 8 Mass. 257.

But if this cannot be done the contract will be usurious. *Cutler v. Johnson*, 8 Mass. 266.

The mere fact that the note provides for interest at a usurious rate after maturity does not render the contract void because the borrower may avoid payment of the usurious interest by prompt payment of the principal. *Lawrence v. Cowles*, 13 Ill. 577; *Barnes v. Whitaker*, 22 Ill. 606; *Gould v. Bishop Hill Colony*, 35 Ill. 324; *Wilday v. Morrison*, 66 Ill. 532; *Witherow v. Briggs*, 67 Ill. 96; *Downey v. Beach*, 78 Ill. 53; *Peavler v. McLaughlin*, 20 Ill. App. 536.

A note payable two years from date with interest at 50 per cent per annum from due until paid is not usurious. The court says it would be contrary to all reason and justice to allow the maker to violate his agreement by not paying when due, and then set up a consequence of his own breach of the contract as a protection against all liability thereon. *Wight v. Shuck*, 1 Morris (Iowa) 325; *Shuck v. Wight*, 1 G. Greene, 128.

Long v. Storie, 10 Eng. L. & Eq. 182, 8 Hare, 542, 21 L. J. Ch. N. S. 521, 16 Jur. 349, recognizes the authority of the cases holding that if it is within the power of the borrower to discharge himself by paying the principal sum and legal interest within a certain time, it will not be usury if he is required to pay beyond the legal rate for detaining the money beyond that time.

Agreement for reduction for prompt payment.

In *Roberts v. Trenayne*, Cro. Jac. 507, it is said: If I lend to one, £100 for two years to pay for the loan £30, and if he pay the principal at the end of one year he shall pay nothing for interest, this is not usury, for the party hath his election, and may pay at the first year's end and so discharge himself.

A contract to pay at a future day a sum larger than the actual debt and lawful interest, but dischargeable by payment of the debt and interest before that day, is not usurious unless a mere shift to avoid the usury laws, but the excess will be held a penalty and relieved against in equity. *Chaffe v. Landers*, 46 Ark. 364.

If the agreement is to take less than the agreed interest in case of prompt payment, and there is a great arrear, the court will not relieve. *Brown v. Barkham*, 1 P. Wms. 652.

Whenever the debtor by the terms of the contract can avoid payment of a larger by the

face,—as, an express reservation of more than legal interest,—inquiry is at an end.

2 Rice, Ev. pp. 1302, 1303; *Turner v. Turner*, 80 Va. 381; *Bank of United States v. Waggener*, 9 Pet. 399, 9 L. ed. 171; *Davis v. Stout*, 126 Ind. 25; *Campbell v. Shields*, 6 Leigh, 517.

Defendants seek to avoid the consequences by setting up a parol contemporaneous agreement to the effect that the 8 per cent was a penalty, and not usury,—thus violating the rule that parol evidence cannot alter a written contract.

In the bills for discovery and relief the answers, including affirmative statements of fact pertinent to the discovery sought, may be overthrown by the testimony of two witnesses, or of one witness with corroborating circumstances alone, or by documentary evidence.

payment of a smaller sum at an earlier date, the contract is not usurious, but conditional, and the larger sum becomes a mere penalty against which equity will relieve. *Moore v. Hylton*, 16 N. C. (1 Dev. Eq.) 429.

A promise to pay a certain amount at a future date, but in case of an earlier payment the debt to be satisfied by less, is not usurious. *Jordan v. Lewis*, 2 Stew. (Ala.) 426.

Provision for interest only in case of default.

An agreement to pay interest from date if the note is not paid at maturity is not usurious. *Rogers v. Sample*, 33 Miss. 310. 69 Am. Dec. 349; *Gully v. Remy*, 1 Blackf. 69; *Satterwhite v. McKie*, Harp. L. 397; *McNairy v. Bell*, 1 Yerg. 502, 24 Am. Dec. 454; *Rumsey v. Matthews*, 1 Bibb, 242, overruling the prior unreported case of *Smith v. Gough*.

Where a bond provides for interest "from date" if not punctually paid the interest from date to maturity will be regarded as a penalty, and not enforceable. *Dinsmore v. Hand*, Minor (Ala.) 126; *Fugua v. Carriel*, Minor (Ala.) 170, 12 Am. Dec. 46. That was decided, however, with reference to cases where the interest was not higher than allowed by law.

And it was followed in a case of promissory notes in which more than the rate mentioned by the statute was stipulated for, in *Henry v. Thompson*, Minor (Ala.) 209. But that decision was under a statute which permitted any rate of interest upon which the parties might agree in writing.

A provision for interest from date if the principal is not paid at maturity will be a penalty which cannot be enforced. *Waller v. Long*, 6 Munf. 71.

But in Georgia it was held that if the note is to bear interest "from date if not promptly paid" the agreement for interest will be regarded as stipulated damages, and may be recovered. *Alexander v. Troutman*, 1 Ga. 469.

Higher rate legal.

Of course, if the higher rate is not more than is allowed by law there can be no claim of usury, however it may be regarded as to the question of penalty.

A higher rate of interest after maturity will not be illegal if it is no higher than is justified by the laws of the state where the contract was made. *DeHass v. Dibert*, 28 U. S. App. 559, 30 L. R. A. 189, 70 Fed. Rep. 227, 17 C. C. A. 79.

In the absence of statutory restriction any rate of interest may be stipulated for after maturity. *L. R. A.*

Thompson v. Clark, 81 Va. 422; *Lyons v. Miller*, 6 Gratt. 438, 52 Am. Dec. 129; *Jones v. Abraham*, 75 Va. 470; *Moore v. Ullman*, 80 Va. 311.

The language used in the contract shows that it was not the intention of the parties that this stipulation should operate simply as a penalty to enforce prompt payment.

Carroll County Sav. Bank v. Strother, 28 S. C. 504, 6 S. E. 313; *Sanner v. Smith*, 89 Ill. 123, 31 Am. Rep. 70; *Truby v. Mosgrove*, 118 Pa. 89, 11 Atl. 806; *Spain v. Hamilton*, 1 Wall. 604, *sub nom. Spain v. Brent*, 17 L. ed. 619; *Lloyd v. Scott*, 4 Pet. 214, 7 L. ed. 836.

Messrs. R. Crockett and T. H. Cornett, for appellees:

Whenever, by the terms of a contract, the debtor can avoid the payment of a larger sum by the payment of a smaller at an earlier

turity. *Capen v. Crowell*, 66 Me. 282; *Eaton v. Bolsonnault*, 67 Me. 540, 24 Am. Rep. 52.

A provision in a note for "interest at 15 per cent after maturity" is not a penalty, but is recoverable under the contract. *Hubbard v. Callahan*, 42 Conn. 524, 19 Am. Rep. 564.

If the higher rate of interest after maturity is a legal one, the court will not refuse to enforce it as a penalty. *Havemeyer v. Paul*, 45 Neb. 373, 63 N. W. 932; *Omaha Loan & T. Co. v. Hanson*, 46 Neb. 870, 65 N. W. 1058.

Statutory limitation.

The statutes governing the District of Columbia do not permit a greater rate of interest than 6 per cent after maturity. *May v. Shepherd*, 1 Mackey, 430.

By the Minnesota laws of 1887 a provision for an increased interest after maturity works a forfeiture of the entire interest on the contract. *Chase v. Whitten*, 51 Minn. 485, 53 N. W. 767.

The statute changed the law in Illinois so that after its passage no agreement could be made for payment of higher than the legal rate after maturity. *Barton v. Farmers' & M. Nat. Bank*, 122 Ill. 355, 13 N. E. 503; *Peavler v. McLaughlin*, 20 Ill. App. 536.

Under the Louisiana statutes no agreement is legal which stipulates for damages for the nonpayment of money beyond the legal rate of interest. *Griffin v. Creditors*, 6 Rob. (La.) 216; *Re Leeds*, 49 La. Ann. 501, 21 So. 617.

Under the Tennessee statutes a contract for an amount above the legal rate of interest after maturity is usurious. *Richardson v. Brown*, 9 Baxt. 242; *Bang v. Phelps & B. Windmill Co.* 96 Tenn. 301, 34 S. W. 516.

But the Mississippi court took exactly the opposite view of the Tennessee statute in *Vacarro v. Asher* (Miss.) 11 So. 531, and upheld a contract which, according to the Tennessee statute, would have been void.

The change in the Tennessee law by which the contract was made illegal occurred in 1877 (*Stephenson v. Landis*, 14 Lea, 433), while the note in the *Vacarro* Case was dated in 1890, so there would seem to be no doubt that it was prohibited by the Tennessee law.

Under the Texas statutes a contract for higher than the legal rate for failure to pay at maturity is usurious. This is placed on the ground that the statute defines interest as the compensation which was allowed "for the . . . detention of money" which the court construes to be where the debt having become due the debtor withholds its payment without

day, the contract is not usurious, but conditional, and the larger sum is considered a penalty.

10 Bacon, Abr. 283; *Moore v. Hylton*, 16 N. C. (1 Dev. Eq.) 429; *Tyler, Usury*, 90, 101, 374; 2 Minor, Inst. 348; *Spain v. Hamilton*, 1 Wall. 604, sub nom. *Spain v. Brent*, 17 L. ed. 619; 7 Wait, Act. & Def. 608; *Wilson v. Dean*, 10 Iowa, 432.

If the payment of the greater rate is to be made upon the happening of any contingency over which the debtor has control, it is not usury.

Tyler, Usury, 77; *Sumner v. People*, 29 N. Y. 337.

A provision in a promissory note for the payment of a greater per cent than legal interest after maturity, if inserted for the purpose of securing prompt payment, does not render the contract usurious.

a new contract giving him the right to do so. So that what would have been deemed a penalty under the common law is to be regarded as interest under the statute. *Parks v. Lubbock*, 92 Tex. 635, 51 S. W. 322, Overruling (Tex. Civ. App.) 50 S. W. 406.

A provision in a note for 5 per cent interest upon principal and overdue interest after maturity, until the note is paid, is not an agreement as to interest, but an attempt to stipulate the damages, and upon failure to perform, the damages provided by statute will be given as damages,—that is, the legal rate of interest. *Mason v. Callender*, 2 Minn. 350, Gil. 302, 72 Am. Dec. 102; *Talcott v. Marston*, 3 Minn. 339, Gil. 238; *Kent v. Bown*, 3 Minn. 347, Gil. 246; *Newell v. Houlton*, 22 Minn. 19.

An agreement to pay a sum of money by a certain day, and more than legal interest afterwards by way of penalty if the debt is not punctually paid, is not usurious. But under the Iowa statutes the promise to pay the penalty beyond the legal interest cannot be enforced. *Gower v. Carter*, 3 Iowa, 244, 66 Am. Dec. 71; *Wilson v. Dean*, 10 Iowa, 432.

The objection to the unlawful interest must be raised, and will not be interposed by the court on behalf of a debtor who does not seek to protect himself. *Bidwell v. Whitney*, 4 Minn. 76, Gil. 45.

In case of sales, etc.

Contracting for a difference in price in case of prompt payment, in a note given for the purchase price of property, is not usurious. *Garity v. Cripp*, 4 Baxt. 86.

But in Louisiana it is held that a stipulation in a note given for the price of property sold on credit, that if not paid at maturity it shall bear the highest conventional interest from the date of the note until paid, is usurious, because it is presumed that the price included the loss to accrue from the delay in payment. *Stone v. Tew*, 9 Rob. (La.) 194; *Stafford's Succession*, 12 Rob. (La.) 178.

In case of a sale of houses with a deferred payment at legal interest, possession to be immediately given to the vendee, and agreement that for want of prompt payment the vendee shall pay a rent at more than the legal interest, this is no usury. *Spurrler v. Mayoss*, 1 Ves. Jr. 527, 4 Bro. Ch. 28.

In *Herbert v. Salisbury & Y. R. Co. L. R. 2 Eq. 221*, 14 Week. Rep. 706, which was the case of a sale of land where the question of usury was not raised, it seems to be assumed that in case the higher rate for nonpayment at a particular time was a penalty, equity would relieve against 49 L. R. A.

Downey v. Beach, 78 Ill. 53; *Jones v. Berryhill*, 25 Iowa, 292; *McNairy v. Bell*, 1 Yerg. 502, 24 Am. Dec. 454; *Gambrel v. Doe ex dem. Rose*, 8 Blackf. 140, 44 Am. Dec. 760; *Gower v. Carter*, 3 Iowa, 244, 66 Am. Dec. 71; *Rogers v. Sample*, 33 Miss. 310, 69 Am. Dec. 349; *Fisher v. Anderson*, 25 Iowa, 28, 95 Am. Dec. 761; *Gruell v. Smalley*, 1 Duv. 358; *Graeme v. Adams*, 23 Gratt. 225, 14 Am. Rep. 135; *Winslow v. Dawson*, 1 Wash. (Va.) 118; *Groves v. Graves*, 1 Wash. (Va.) 1; 3 *Parsons*, Contr. 7th ed. 125, note; *Beete v. Bidgood*, 7 Barn. & C. 453; *Wait, Act. & Def. § 5*, p. 711; *Tyler, Usury*, 104.

A contract is not usurious which may be explained upon any other hypothesis.

1 *Barton*, Law Pr. 549; *Stephen, Ev., Reynolds' ed.* pp. 121, 122; *Browne, Parol Ev. § 36*, p. 64; *Reger v. O'Neal*, 33 W. Va. 159, 6 L. R. A. 427, 10 S. E. 375; *Campbell v.*

it, although in that case it was held that the higher rate was not a penalty, but a valid part of the contract to which the purchaser was bound.

If under the contract the debtor cannot by prompt payment relieve himself from usurious interest the contract will be usurious, as, where the debt is to be paid in merchandise and a commission allowed the creditor at a certain amount per package of an estimated value, so that the commission must be paid in any event, and will be more than legal interest, the contract will be invalid. *Pollard v. Baylor*, 4 Hen. & M. 232.

But that case was overruled in *Pollard v. Baylor*, 6 Munf. 433, because of a mistake of fact in supposing that the debtor could in no event have relieved himself from the payment of illegal interest.

There is no usury in a sale of goods on credit with a proviso that in case the money is not paid at the time when due the vendee shall allow the vendor a half penny an ounce per month until the debt is discharged, although that amounts to more than the legal interest, so as to avoid the contract of sale. This was put expressly on the ground that the transaction was a sale and not a loan; but the court says whenever it is within the power of a known borrower of money to pay the principal within a limited time without interest the reservation of a larger sum than the statute allows upon nonpayment is no usury, because usury is an agreement originally to pay the principal with interest above the legal rate. *Floyer v. Edwards*, 1 Cowp. 112.

Various constructions.

The agreement has been construed as a penalty in the following cases:

Where a note was for the full amount of principal and interest for the time it was to run, and was made payable in instalments with the proviso that failure to pay any instalment when it should become due would render the whole sum immediately payable, it was held that there was no usury because the increased amount was only a penalty to enforce prompt payment. *Wells v. Girling*, 4 J. B. Moore, 78, Gow. 21.

Where the whole debt with interest coupons to maturity is to become immediately payable upon default in payment of an instalment of interest the provision will be construed as a penalty against which equity will relieve. *Moore v. Cameron*, 93 N. C. 51.

A stipulation for illegal interest after matur-

Shields, 6 Leigh, 517; *Graeme v. Adams*, 23 Gratt. 225, 14 Am. Rep. 135.

A party by calling for a fact by answer thereby admits such an answer to be evidence of that fact.

Story, Eq. § 1623; 3 Greenl. Ev. § 289; 4 Minor, Inst. part 2, pp. 1438, 1439.

No express words are necessary to form a penalty.

Rixey v. Pearre Bros. 89 Va. 113, 13 S. E. 498.

Riley, J., delivered the opinion of the court:

The only question presented by the appeal is whether the bond executed by B. E. Ward to E. Mallissee Cornett on July 1, 1878, for \$1,275, is usurious or not. It reads as follows:

\$1,275.00. July 1, 1878.

On or before the first day of October, 1880, I promise to pay E. Mallissee Cornett or or-

der, one thousand two hundred and seventy-five dollars, lawful money, without plea or offset, for value received, rate of interest agreed to be eight per cent per annum after first day of October, 1880, until paid; and I hereby waive the benefit of my homestead exemption as to the payment of this debt.

Witness my hand and seal.

[Seal]

B. E. Ward.

On October 28, 1878, B. E. Ward conveyed 200 acres of his land by deed of trust to secure the above bond. It was provided in the deed of trust that, if he failed to pay the bond by the 1st of October, 1880, then the trustee, upon the direction of the obligee in the bond, should sell the land to pay the debt. It was further secured by a second deed of trust, along with another bond for \$975, to F. R. Cornett, bearing date May 15, 1880, and payable one day after date, on 300 acres of land, which included the 200 acres conveyed in the first deed. The second deed bore

ity will be regarded merely as a penalty, and the contract may be enforced for the face of the note and legal interest. *Weyrich v. Hobelman*, 14 Neb. 432, 18 N. W. 436; *Upton v. O'Donahue*, 32 Neb. 565, 49 N. W. 267; *Richardson v. Campbell*, 34 Neb. 181, 51 N. W. 753.

A stipulation for higher than legal rate of interest after maturity will be regarded as a penalty, and will not render the note usurious. *Fisher v. Otis*, 3 Pinney (Wis.) 78, 3 Chand. (Wis.) 83.

In the following cases the contract has been construed as usurious:

A note providing for payment of the principal "with interest thereon after maturity until paid at the rate of 10 per cent per annum payable annually; value received," is usurious on its face. *Union Mortgage Bkg. & T. Co. v. Hagood*, 97 Fed. Rep. 360.

Where the note stipulates for the payment of illegal interest after maturity, "as agreed for negotiating and carrying this loan so long as it remains unpaid," the stipulation cannot be considered as a penalty to enforce prompt payment, but will violate the statute against usury. *Carroll County Sav. Bank v. Strother*, 28 S. C. 504, 6 S. E. 318.

An agreement by which the purchaser of two notes for \$100 and \$125 respectively is to have a third note for \$100, in case the others are not paid within ten days after maturity, is forbidden by the usury laws. *Fry v. Coleman*, 1 Grant, Cas. 445.

If the note is to bear a certain rate of interest until maturity and 2 per cent per month thereafter until paid, the provision for such monthly interest cannot be treated as a penalty. *Miller v. Kempner*, 32 Ark. 573.

A provision for interest at a certain per cent, and if not paid when due the note "shall bear interest at the rate of 1 per cent per month," cannot be treated as a penalty. *Thompson v. Gerner*, 104 Cal. 168, 37 Pac. 900.

Where the note is made with interest payable annually at an unlawful rate from "due until paid," and the payee receives semiannual interest in advance at the usurious rate for a series of years after the maturity of the note, the contract will be held to be usurious, as the facts are sufficient to rebut the idea that the rate of interest specified was inserted with a view to secure prompt payment. *Sanner v. Smith*, 89 Ill. 123, 31 Am. Rep. 70.

But a mere delay in bringing suit after maturity at the request of the maker as a personal

favor, there being no valid extensive time of payment, will not indicate that the delay was a mere device for securing unlawful interest. *Funk v. Buck*, 91 Ill. 575.

Express penalty.

If the additional amount to be paid is penalty, and not interest, it is not usury. *Oliver v. Oliver*, 2 Rolle, 469.

In *Hawkins*, P. C. chap. 82, § 3, it is said that it has been resolved that an agreement to pay double the sum borrowed or other penalty, on the nonpayment of the principal sum at a certain day, is not usury, because it is in the power of the borrower wholly to discharge himself by repaying the principal according to the bargain.

In § 19 it is said the reservation of a greater sum than is allowed by statute for interest upon the nonpayment of the principal at the end of the year is not usurious within the statute, because it is within the power of the borrower to avoid the payment of the money so reserved. But if the original agreement was that the money should not be paid at the time appointed, but the contract was given that form to avoid the statute, the agreement will be void.

Understanding that loan shall continue.

It is usually held that if the understanding is that the loan shall continue after maturity the contract for unlawful interest will be usurious.

If from the language of the note it appears that the parties when making it understood that a provision for the payment of increased interest after maturity beyond the rate permitted by law was not peremptory, but that the maker would be indulged provided he paid the increased rate of interest, such provision will render the note usurious; but if the provision was intended to enforce a prompt payment, and the increased rate was a penalty for default, it is valid. *Union Mortgage Bkg. & T. Co. v. Hagood*, 97 Fed. Rep. 360.

Where the note is made payable in thirty days with unlawful interest after maturity, but the lender agrees to let it run a year, the transaction will be usurious. *Pike v. Crist*, 62 Ill. 461.

A note payable one day after date, and if not paid at maturity to draw 20 per cent interest, is usurious if it was the understanding of the parties that it should not be paid when due, but should draw the rate of interest specified. *Osborn v. McCowen*, 25 Ill. 218.

date October 25, 1880. The trustee, after the death of B. E. Ward, was proceeding, at the request of the beneficiary, to sell the land to pay said bonds when the administrators of the decedent and his heirs at law filed a bill to enjoin the sale. In their bill they charged that the debts secured by the deeds of trust were usurious, and called upon F. R. Cornett and E. Mallissee Cornett, to discover, upon oath, the rate of interest called for in the bonds, and the rate of interest agreed to be paid by B. E. Ward, whether specified on the face of the bonds or agreed verbally to be paid for the moneys lent to him; in what manner the amount specified in each bond was made up; and whether any device, either directly or indirectly, was resorted to by which interest in excess of the legal rate was charged or agreed to be paid for the loan or forbearance of the money specified in the said bonds. They were also called upon to state what payments, if any,

had been made on the bonds, or either of them.

There is nothing in the record or in the answers to the bill to indicate usury in the bond of \$975, or in another bond for \$1,000 secured by deed of trust on land of B. E. Ward, and referred to in the record, and they may be dismissed from further consideration. The answer of F. R. Cornett and E. Mallissee Cornett was specific and positive as to the bond for \$1,275, and was based upon personal knowledge. They stated, in substance, that the consideration of the bond was \$1,125, cash lent to B. E. Ward on July 1, 1878, of which amount the sum of \$250 belonged to E. Mallissee Cornett, to whom the bond was made payable, and the residue to F. R. Cornett, to whom she assigned it for value on January 1, 1880. They further answered that B. E. Ward thought at first that he could repay the loan promptly at the end of two years, but, to suit his convenience and

If the agreement to pay the usurious rate for forbearance is not made until the maturity of the note the transaction will be usurious. *Shirley v. Welty*, 19 Ill. 623, 71 Am. Dec. 244.

The contract at legal interest for a specified time is not avoided by a contemporaneous agreement not intended as a means of avoiding the usury law, that at the option of the borrower the time of payment may be extended by the payment of more than the legal rate of interest for the period of extension. *Stein v. Swensen*, 44 Minn. 218, 46 N. W. 360.

But in one case it was held that where the note provided for 20 per cent per annum from maturity, and that the note may run at above rate for two years, interest to be paid annually, it was held not void, the provision being merely for a penalty which would entitle the lender to recover legal interest. *Conrad v. Gibbon*, 20 Iowa, 120.

Notes held valid.

In *Wernwag v. Mothershead*, 3 Blackf. 401, a contract for \$5 per week interest after maturity on \$432 principal was upheld.

An agreement to pay a debt at a certain time in certificates at the rate of twenty shillings in certificates for every twenty-six pence of debt, but if not paid then, at the rate of twenty shillings in certificates for every thirteen pence of debt, is not usurious. *Groves v. Graves*, 1 Wash. (Va.) 1.

The mere fact of indorsement of interest paid at the higher rate after maturity does not afford evidence of usury. *Burke v. Raab*, 4 Ill. App. 338.

An undertaking to pay a certain sum if convenient during the lifetime of the promisor, with a direction to her executor to pay it with 20 per cent added if not paid during her lifetime, is not usurious because to constitute usury the obligation to pay more than the legal rate must be absolute on the face of the transaction. *Watson v. McClanahan*, 13 Ala. 57.

A contract expressly providing for damages in case of failure to pay promptly is not usurious. *Gambrill v. Doe ex dem. Rose*, 8 Blackf. 140, 44 Am. Dec. 760.

In *Burton's Case*, 5 Coke, 69, £100 was loaned upon the agreement that the borrower should grant the lender a rent of £20 upon condition that if the loan was repaid before the rent was appointed to be paid, the rent should cease, and the court said it was a purchase conditional of such rent, and no usury. It was in the election of L. R. A.

tion of the grantor to have paid the said £100, and to have frustrated the rent, so that the grantee (as the nature of usury is) was not assured of any recompense for the forbearance of his £100 for a year, and the said rent is but a penalty to the grantor and assurance to the grantee for the payment of the £100.

Equitable relief.

One of the results of holding that the extra sum is a penalty and not usury is to bring the cases within the rule that equity will relieve against penalties.

If the interest is to be increased in case of failure to pay promptly that is in the nature of a penalty against which equity will relieve. *Strode v. Parker*, 2 Vern. 316.

Equity will relieve against the stipulation for more than the lawful rate after maturity. *Daniels v. Ward*, 4 Minn. 168, Gil. 113; *Brockway v. Clark*, 6 Ohio, 45.

In *Nicholls v. Maynard*, 8 Atk. 520, it is said that if a mortgage is made at a certain per cent interest, and contains a proviso that in case the interest is not paid within a certain time after it is due the mortgagor shall pay a higher per cent, this is a mere penalty relievable in equity.

A contract to pay a larger sum at a future day upon nonpayment of the sum agreed to be paid at a prior day is not usurious, but the increased sum will be considered as a penalty, and relieved against in a court of equity upon compensation being made, and that compensation is legal interest. *Winslow v. Dawson*, 1 Wash. (Va.) 118.

But this rule does not obtain in all jurisdictions.

The agreement to pay the higher rate will not be a penalty from which the court will relieve. *Wilkerson v. Daniels*, 1 G. Greene, 179.

The excessive rate of interest after maturity may be recovered to the time of payment. *Davis v. Rider*, 53 Ill. 416.

The penalty may be enforced. *Smith v. Whitaker*, 23 Ill. 367.

If the note provides for 30 per cent interest after maturity it is liquidated damages for nonpayment against which equity will not relieve. *Bane v. Gridley*, 67 Ill. 388; *Walker v. Abt*, 83 Ill. 226.

A provision that upon default in payments when they become due the payee may declare the whole debt due when it shall bear a higher rate of interest is not in the nature of a penalty

to enable him to sell his cattle in the fall of 1880, he asked that three months longer might be given to him for that purpose, so that with the proceeds of the sale of his cattle then to be made, he would more surely be able to pay the money; that the interest on \$1,125 at 6 per cent per annum for two years and three months, to wit, from July 1, 1878, to October 1, 1880, was then calculated and found to be \$151.87, which added to \$1,125 made \$1,276.87; but to make the bond for even money, the sum of \$1.87 was dropped, and the bond drawn for \$1,275; that the rate of interest agreed to be paid was 6 per cent per annum only; and that, it being understood and agreed that the bond should be paid at maturity, it was further agreed, by way of penalty only, in order to secure its prompt payment, at maturity, that after maturity it should bear 8 per cent. It was denied in the answer that any payments had been made, except \$35.15, paid on a tax ticket on November 29, 1883, and credited on December 13, 1883, on the bond for \$975, and the sum of \$100, paid December 5, 1889, and credited on the bond for \$1,275. The bond itself, the deeds of trust made to secure it, and which have been already referred to, and the answer of F. R. Cornett and E. Mallissee Cornett, constitute the entire evidence bearing on the controversy.

It was stated by the complainants in the bill that they had no means of proving the alleged usury except by a discovery from the defendants, and calling for the discovery they made it evidence upon the matter in issue. The answer wholly denies the usury. It was directly responsive to the special interrogations of the bill and the whole of it is to be taken as evidence for the defendants. *Morrison v. Grubb*, 23 Gratt. 342; *Fant v. Miller*, 17 Gratt. 187; *Corbin v. Mills*, 19 Gratt. 438, 466; *Shurtz v. Johnson*, 28 Gratt. 657; *Bell v. Moon*, 79 Va. 341; *Thompson v. Clark*, 81 Va. 422; 4 Minor, Inst. pt. 2, p. 1191; Story, Eq. Jur. § 1528; and 3 Greenl. Ev. § 289.

It was claimed by the counsel for the appellants that the bond on its face disclosed

the usury; and they therefore argued that, upon the principle that parol evidence cannot be received to vary a written contract, no averment to contradict the bond could be received or considered; and furthermore, that all the statements of the answer in regard to the bond, after its production, constituted new and affirmative matter, and could not operate as evidence without being proved as any other fact. Whether the rule of evidence thus invoked is applicable to a contract of this kind (*Browne*, Parol Ev. § 36; *Thompson v. Clark*, 81 Va. 422; *Campbell v. Shields*, 6 Leigh, 517; 3 Parsons, Contr. 110; *Beete v. Bidgood*, 7 Barn. & C. 453; 7 Wait, Act. & Def. § 5, p. 611; Wharton, Ev. § 1044; and Tyler, Usury, 108, 109) need not be decided, for it is to be observed that the bond on its face does not bear interest for two years and three months from its date. It is only after it matures that any interest is provided for. The answer then, in disclosing the facts of the transaction in its inception, and stating the consideration of the bond, and that only legal interest entered into it, in no wise contradicts the terms of the bond. And all the statements of the answer respecting the loan and execution of the bond being directly responsive to the interrogations of the bill, they are to be treated as evidence in the cause; and, being so treated, under the rule of law, in the absence of other evidence to overcome the answer, which is the case here, the charge of usury is wholly refuted. The deed of trust by which the bond was originally secured authorizes an immediate sale of the land, if the debt is not paid when it falls due. It is evidence that prompt payment of the debt at maturity was contemplated by the parties. This fact, taken in connection with the unusual and peculiar character of the bond in not stipulating for any interest until it fell due at a fixed period in the future of considerable duration, and in providing for a greater than legal rate of interest after its maturity, shows that this illegal rate of interest was affixed as a penalty to insure the

against which equity will relieve. *Scottish American Mortg. Co. v. Wilson*, 24 Fed. Rep. 310.

If money is loaned on mortgage at 5 per cent, with a covenant to pay 6 per cent if default is made for a space of sixty days after the time of payment, the agreement will not be relieved against in equity as a penalty. *Halifax v. Higgens*, 2 Vern. 134.

Where the mortgage provided that if the interest was not promptly paid when due the mortgagor should answer at a higher rate, it was held that this was a penalty to enforce prompt payment, against which equity would relieve. There the *Halifax Case* was cited as being one where the interest reserved was at the higher rate with a reduction if promptly paid, but it is not so stated by the reporter. *Holles v. Wyse*, 2 Vern. 289.

But the penalty for nonpayment after maturity will not be enforced if there was usury in the note at its inception. *Armour v. Moore*, 5 Ill. App. 433.

Other decisions.

A note is not void for providing for payment
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of more than the statutory rate of interest after maturity. *Green v. Brown*, 22 Misc. 279.

A person is not liable to indictment for taking the extra amount allowed under a contract by which one undertakes to pay a certain amount at a certain time, and if he fails to do so to pay a certain amount extra. *Sumner v. People*, 29 N. Y. 337.

In case of a note reserving an unlawful rate of interest after maturity, the court said there is no agreement for forbearance after maturity. The promise is not strictly an agreement to receive interest at the unlawful rate after due, for the creditor was not bound to forbear a day after maturity. The most that can be said is that it is a contingent agreement, which if not usurious might be enforced upon the happening of the contingency, but still is not at its making such an absolute contract as is necessary to incur a forfeiture, and therefore it should not be regarded as subjecting the person to forfeiture in that respect. But the court refused to enforce the contract on the ground that it was unlawful. *First Nat. Bank v. Davis*, 108 Ill. 633.

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prompt payment of the debt, and is not usury. And this bond is to be so construed and treated. A debt, to be usurious, must be so in the beginning. It cannot be made so by subsequent events. A usurious agreement is one to pay originally a greater rate of interest than the law allows. If the obligor had paid the debt when the bond became due, he would not have incurred, even under the literal terms of the bond, any liability to pay the illegal interest stipulated for after its maturity. Where the debtor by a punctual payment of the debt, may thus relieve himself and avoid the payment of the illegal interest stipulated for, it is not usury. 2 Minor, Inst. 4th ed. 438; *Pollard v. Baylor*, 6 Munf. 433; *Groves v. Graves*, 1 Wash. (Va.) 1; *Lloyd v. Scott*, 4 Pet. 205, 7 L. ed. 333; *Lawrence v. Coules*, 13 Ill. 577-579; *Goucer v. Carter*, 3 Iowa, 244, 66 Am. Dec. 71; *Tyler. Usury*, 96, 213-215, 217; *Parsons, Contr.* 117, and note 8.

It was further argued that in the deed of trust of October 25, 1880, which was made to secure the debt of \$975, and also to secure further the debt of \$1,275, an extension of time from October 1, 1880, to December 1, 1886, was given, and the debt in question, including the illegal interest stipulated for after its maturity, provided for. But the provisions of the deed do not sustain this view. The 8 per cent interest provided for in the bond being a penalty, the bond, if not paid at maturity, would only bear legal interest until paid; and this, we have no doubt, is the purport of the deed of trust.

It was provided as to both debts that the grantor should "remain in quiet and peaceful possession of the land until the 1st day of December, 1886, after which time, if default be made in the payment of the debt of \$975, with interest thereon as aforesaid, and also of the other debt herein further secured, with interest from the 1st day of October, 1880, thereon," the trustee, if requested, should sell the land. The proper interpretation of this language, as it does not specify any rate of interest, must be that both bonds are to bear only legal interest. In the last clause of the deed, where it is directed how

the proceeds of sale, in the event of a sale, shall be applied, the language is that after paying the debt of \$975, "with legal interest thereon, as aforesaid," the balance, if any, is to be applied to the payment of the "principal and interest on the other debt, herein further secured as aforesaid." The insertion of the word "legal" with respect to the interest to be paid on the one debt, and its omission as to the interest to be paid on the other debt, was relied on in argument as proof of a discrimination in the rate of interest on the two debts, and of an intention to provide for 8 per cent interest on the debt for \$1,275. We do not think that this is a legitimate construction of the language used. The insertion of the word "legal" in the one case, and its omission in the other, was not intended to make any distinction in the rate of interest to be paid, and does not have such effect. Only legal interest in the case of each debt was provided for. Where interest is stipulated for, and no particular rate is reserved, it must be construed to mean legal interest only. A court would not be justified in inserting in a writing by construction an illegal rate of interest, such as 8 per cent in this case, where no particular rate of interest was stipulated for, but only interest generally, where its effect would be to make a debt usurious, and thereby invalidate it. This could not be done except in a case of irresistible implication. Evidence such as the above falls far short of the degree of proof required to establish usury. Usury is a quasi-penal offense, and must be strictly proved. The evidence must establish it beyond a reasonable doubt. *Brockenbrough v. Spindle*, 17 Gratt. 21; 7 Wait, Act. & Def. 637; *Barton, Law Pr.* 549.

The evidence relied on in this case to prove usury, exclusive of the answer, fails to do so; and, when the answer is considered as evidence for the defendants, which we are bound to do, the charge of usury is completely refuted.

The decree of the Circuit Court must be affirmed.

Buchanan, J., did not sit.

KENTUCKY COURT OF APPEALS.

TECUMSEH MILLS, *Appt.*,
v.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY.

(.....Ky.....)

**The prohibition against contracts by
common carriers for relief against**

their common-law liability, which is contained in Ky. Const. § 196, does not make it unlawful for a railroad corporation created by the authorities of that state to make a contract in another state limiting its liability for a transportation of goods between points in other states, and which is to be performed entirely outside of the state of Kentucky.

(May 29, 1900.)

NOTE.—As to extraterritorial force of statute forbidding limitation of carrier's liability, see also *Missouri P. R. Co. v. Sherwood, T. & Co.* (Tex.) 17 L. R. A. 643.

For conflict of laws as to right of carrier to limit liability, see also *Forepaugh v. Delaware, L. & W. R. Co.* (Pa.) 5 L. R. A. 508; *Fonseca* 49 L. R. A.

v. Cunard S. S. Co. (Mass.) 12 L. R. A. 340; *Meuer v. Chicago, M. & St. P. R. Co.* (S. D.) 25 L. R. A. 81; and *Illinois C. R. Co. v. Beebe* (Ill.) 43 L. R. A. 210.

For right to limit common-law liability in absence of negligence, see *Little Rock & Ft. S. R. Co. v. Cravens* (Ark.) 18 L. R. A. 527, and

A PPEAL by plaintiff from a judgment of the Circuit Court for Jefferson County in favor of defendant in an action brought to recover damages for failure to deliver certain cotton placed in defendant's possession for transportation. *Affirmed.*

The facts are stated in the opinion.

Messrs. Wilkins G. Anderson, H. S. Barker, and M. S. Barker, for appellant:

Appellee, a Kentucky corporation, must be governed by the laws of Kentucky; and its liabilities, by the law of Kentucky, were those of a common carrier, and could not by any contract be changed, modified, or restricted.

Pennsylvania R. Co. v. Miller, 132 U. S. 75, 33 L. ed. 267, 10 Sup. Ct. Rep. 34.

The constitutional provision prohibiting a common carrier from contracting for relief from its common-law liability must prevail wherever such liability is called in question.

Bank of Augusta v. Earle, 13 Pet. 587, 10 L. ed. 307; *Reife v. Rundle*, 103 U. S. 225, sub nom. *Life Asso. of America v. Rundle*, 26 L. ed. 339; *Canada Southern R. Co. v. Gebhard*, 109 U. S. 537, 27 L. ed. 1024, 3 Sup. Ct. Rep. 363; *Rust v. United Waterworks Co.* 36 U. S. App. 167, 70 Fed. Rep. 129, 17 C. C. A. 22; *Gromie v. Louisville Orphans' Home Soc.* 3 Bush, 365; *Ohio & M. R. Co. v. Tabor*, 98 Ky. 503, 34 L. R. A. 685, 32 S. W. 168, 36 S. W. 18; *Lathrop v. Commercial Bank*, 8 Dana, 114, 33 Am. Dec. 481.

Nowhere in the original charter, or in any of the numerous amendments thereto, is the power given to the appellee, either directly or indirectly, or by implication, to limit by contract its liability as a common carrier.

Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036; *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; *Pearsall v. Great Northern R. Co.* 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714.

A corporation possesses no rights or powers, except such as are given to it by its charter. In construing an act to establish a private corporation it is a rule of law that it must be construed strictly as against the corporation, but liberally in favor of the public.

Maddox v. Graham, 2 Met. (Ky.) 72.

Unless its charter, in express terms or by necessary implication, gives to appellee the right to limit its common-law liability, it is, like all other common carriers, subject to the future general legislation of the state from which it received its existence.

Messrs. Lyttleton Cooke, Edward W. Hines, and Walker D. Hines, for appellee:

Having alleged a general power in the ap-

pellee "to contract and be contracted with," appellant cannot now assail its validity by attempting to interpose by mere argument a provision of the Constitution of Kentucky, in order to evade or have declared invalid certain stipulations contained in said contract made and entered into between the parties in the state of Tennessee.

The legislative authority of every state must spend its force within the territorial limits of the state.

Cooley, Const. Lim. 5th ed. pp. 151 et seq.; 2 Kent, Com. 406.

The right and power to make the contract filed with the appellant's petition in this action was and is, not only one of appellee's necessary and incidental powers, but is expressly conferred upon it by the act incorporating it.

It is not now within the power of the commonwealth of Kentucky, or any other power, to lawfully or justly take from appellee the right to make such contracts.

Louisville & N. R. Co. v. Com. 99 Ky. 132, 33 L. R. A. 209, 35 S. W. 129; *Louisville v. University of Louisville*, 15 B. Mon. 642; *Gregory v. Shelby College*, 2 Met. 589; *Slack v. Maysville & L. R. Co.* 13 B. Mon. 25; *Hamilton v. Keith*, 5 Bush, 461; *Louisville, C. & L. R. Co. v. Com.* 10 Bush, 47; *Covington v. Covington & C. Bridge Co.* 10 Bush, 76; *Stone v. Mississippi*, 101 U. S. 816, 25 L. ed. 1079; *Mississippi & M. R. Co. v. McClure*, 10 Wall. 515, 19 L. ed. 998; *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 17 L. ed. 173; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; *Louisville Gas Co. v. Citizens' Gas Co.* 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. Rep. 265; *St. Tammany Waterworks v. New Orleans Waterworks*, 120 U. S. 64, 30 L. ed. 563, 7 Sup. Ct. Rep. 405; *McGahey v. Virginia*, 135 U. S. 662, 34 L. ed. 304, 10 Sup. Ct. Rep. 972.

The contract must be construed and decided in accordance with the law of Tennessee.

Hutchinson, Car. 2d ed. §§ 140 et seq.; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 480.

As the supreme court of said state has comparatively recently passed upon bills of lading or contracts of affreightment of exactly the same tenor and import as the one in the case at bar, this court will adopt as the law of this case the rule and doctrine laid down and declared by the supreme court of Tennessee.

Lancaster Mills v. Merchants' Cotton-Press & Storage Co. 89 Tenn. 1, 14 S. W. 317; *Deming v. Merchants' Cotton-Press & Storage Co.* 90 Tenn. 306, 13 L. R. A. 518, 17 S. W. 89; 5 Am. & Eng. Enc. Law, 2d ed. pp. 292 et seq.; 3 Am. & Eng. Enc. Law, 1st

note; *St. Joseph & G. I. R. Co. v. Palmer* (Neb.) 22 L. R. A. 335; *Chicago, M. & St. P. R. Co. v. Wallace* (C. C. A. 7th C.) 30 L. R. A. 161; *Kirby v. Western U. Tele. Co.* (S. D.) 30 L. R. A. 612; and *Allam v. Pennsylvania R. Co.* (Pa.) 39 L. R. A. 535.

For power to limit liability in case of negligence, see *Alabama G. S. R. Co. v. Carroll* (Ala.) 18 L. R. A. 433; *Alair v. Northern P. R. Co.* (Minn.) 10 L. R. A. 764; *J. J. Douglass Co. v. Minnesota Transfer R. Co.* (Minn.) 30 L. R. A. 860; *Pierce v. Southern P. Co.* (Cal.) 40 L. R. A. 350; and *Harman & C. v. Norfolk & W. R. Co.* (Va.) 44 L. R. A. 289.

ed. p. 905; *Louisville & N. R. Co. v. Brownlee*, 14 Bush, 590; *Adams Exp. Co. v. Nock*, 2 Duv. 562, 87 Am. Dec. 510; *Harris v. Louisville & N. R. Co.* 9 Ky. L. Rep. 392; *Murrell v. McAllister*, 79 Ky. 315; *York Mfg. Co. v. Illinois C. R. Co.* 3 Wall. 107, 18 L. ed. 170; *New York C. R. Co. v. Lockwood*, 17 Wall. 360, 21 L. ed. 634; *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151.

When the owner of the goods accepts such a bill of lading or receipts he is conclusively presumed, in the absence of fraud and imposition, to have assented to all the terms and conditions contained in it; and this amounts to a contract with the carrier, which, whether called a special or express contract, or a special acceptance, becomes at once binding upon both parties.

Hutchinson, Carr. § 241; *Louisville & N. R. Co. v. Brownlee*, 14 Bush, 590.

Separate argument of *Mr. Lyttleton Cooke*, for appellee:

The laws of other governments have no force beyond their territorial limits.

2 Kent, Com. 11th ed. pp. 406, 517; *Pairpoint Mfg. Co. v. Philadelphia Optical & Watch Co.* 161 Pa. 17, 28 Atl. 1003; *Bank of Louisville v. Young*, 37 Mo. 407; *American Bible Soc. v. Marshall*, 15 Ohio St. 543; *Hitchcock v. Bank of United States*, 7 Ala. 386; *White v. Howard*, 38 Conn. 342; *John Shillito Co. v. Richardson*, 19 Ky. L. Rep. 1020, 42 S. W. 847; *Young v. Bullen*, 19 Ky. L. Rep. 1551, 43 S. W. 687; *Lathrop v. Commercial Bank*, 8 Dana, 114, 33 Am. Dec. 481.

The right and power to make the contract is now a vested right, and it would be absurd to hold that § 196 of the Constitution of Kentucky is a part of appellee's charter, and attends it into all jurisdictions or countries in which it may attempt to do business.

Louisville & N. R. Co. v. Com. 99 Ky. 132, 33 L. R. A. 209, 35 S. W. 120; *Algeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427.

It makes no difference whether the validity of the said contract be determined by the law of Tennessee or the law of Massachusetts, the result must be the same, as the law in each of those two states in respect to the question at issue, i. e., the validity of the shipping contract, is substantially the same.

Lancaster Mills v. Merchants' Cotton-Press & Storage Co. 89 Tenn. 1, 14 S. W. 317; *Deming v. Merchants' Cotton-Press & Storage Co.* 90 Tenn. 306, 13 L. R. A. 518, 17 S. W. 89; *Dillard Bros. v. Louisville & N. R. Co.* 2 Lea, 288; *East Tennessee, V. & G. R. Co. v. Brumley*, 5 Lea, 401; *Buckland v. Adams Exp. Co.* 97 Mass. 131, 93 Am. Dec. 68; *Grace v. Adams*, 100 Mass. 505, 1 Am. Rep. 131.

Guffy, J., delivered the opinion of the court:

The appellant instituted this action in the Jefferson circuit court, law and equity division, against the defendant; seeking to recover judgment against it for \$1,968.96 on account of its failure to deliver to plaintiff 49 L. R. A.

fifty bales of cotton shipped from Brownsville, Tennessee, to Falls River, Massachusetts, and there to deliver same to plaintiff. The petition reads as follows: "The plaintiff, Tecumseh Mills, says that it is a corporation created by and existing under the laws of the state of Massachusetts, with power to contract and be contracted with, and to sue and be sued, in its corporate name; that the defendant, Louisville & Nashville Railroad Company, is a corporation created by and existing under the laws of the state of Kentucky, with power to contract and be contracted with, and to sue and be sued. Plaintiff says that on the 10th day of April, 1894, at Brownsville, Tennessee, it bought fifty bales of cotton, weighing in the aggregate 25,406 pounds, at the price of 7½ cents per pound, amounting to the sum of \$1,968.96. Plaintiff further says that on the said 10th day of April, 1894, the defendant, Louisville & Nashville Railroad Company, was a common carrier having connection with other common carriers for the purpose of transporting goods, property, and freight under one contract, and for one certain, fixed rate, from one point to another. Plaintiff says that on the 10th day of April, 1894, at Brownsville, state of Tennessee, it contracted with said defendant, Louisville & Nashville Railroad Company, for the transportation of said fifty bales of cotton from Brownsville, Tennessee, to Falls River, Massachusetts, for the guaranteed through rate of 71 cents per 100 pounds. Plaintiff says that in pursuance of said contract said fifty bales of cotton, marked 'LADY,' were on said 10th day of April, 1894, delivered to and received by said defendant for transportation as aforesaid, and the said defendant at said time executed and delivered its bill of lading therefor to J. S. Phillips & Co., who were plaintiff's agents, and authorized to ship said cotton for plaintiff. Plaintiff says that by said bill of lading, which is herewith filed as a part hereof, marked 'XNQ,' said defendant acknowledged the receipt of said cotton from said J. B. Phillips & Co. for the purpose of being transported and delivered to this plaintiff at Falls River, Massachusetts. Plaintiff says that said defendant, by its said contract entered into as aforesaid, and for the consideration aforesaid, agreed and undertook with plaintiff to transport said fifty bales of cotton from Brownsville, Tennessee, to Falls River, Massachusetts, and there to deliver the same to this plaintiff. Plaintiff says that without fault on his part all of said cotton was destroyed by fire on April 13, 1894, while in the compress or warehouse of the Brownsville Compress & Storage Company, at Brownsville, Tennessee; said cotton having been placed there by said defendant after the delivery thereof to said defendant, and without the knowledge or consent of this plaintiff, after the delivery of said cotton to defendant as hereinbefore stated. Plaintiff says that said cotton was not, nor was any part of said cotton, ever delivered to this plaintiff, or to anyone for plaintiff. Plaintiff says that all of the fifty bales of cotton were consumed by said fire at the

time aforesaid, and were a total loss. Plaintiff says that, by reason of defendant's failure to deliver said fifty bales of cotton to plaintiff as agreed and contracted for, it has been damaged in the sum of \$1,968.96, with interest thereon at the rate of 6 per cent per annum from April 13, 1894, until paid. Plaintiff says that it has demanded of said defendant the payment of said sum, but said defendant has refused and still refuses to pay said sum or any part thereof, and the whole of said sum is due and unpaid, wherefore plaintiff prays judgment against said defendant for said sum of \$1,968.96, with interest thereon from April 13, 1894, until paid, for its costs herein, and for all other proper relief." It is provided in the contract or bill of lading, among other things, that the defendant should not be liable for damage or loss by fire. It is further provided that defendant should have the privilege of compressing all shipments of cotton at its own expense. A demurrer was sustained to the petition, and, plaintiff failing to amend, the petition was dismissed, and from that judgment this appeal is prosecuted.

The sole question presented for decision is whether or not the contract exempting defendant from liability for loss by fire is valid and sufficient to exempt it from any liability for the loss sustained by the plaintiff. It will be seen from the petition that the cotton was destroyed by fire while in the compress or warehouse of the Brownsville Compress & Storage Company, of Brownsville, Tennessee; the same having been placed there by defendant after the delivery to it, and without the knowledge or consent of plaintiff. Appellant relies upon the provision of § 196 of the present Constitution, the latter part of which reads as follows: "No common carrier shall be permitted to contract for relief from its common-law liability." It is the contention of appellant that the defendant, being a corporation created by the authority of this state, has no power to make any contract anywhere in violation

of the provision of the Constitution aforesaid; hence the exemption from loss by fire, being a contract limiting its common-law liability must be held invalid, and appellant is therefore entitled to recover in this action. Appellant has cited the following authorities: *Pennsylvania R. Co. v. Miller*, 132 U. S. 75, 33 L. ed. 267, 10 Sup. Ct. Rep. 34; *Bank of Augusta v. Earle*, 13 Pet. 587, 10 L. ed. 274; *Tipton County v. Rogers Locomotive & Mach. Works*, 103 U. S. 537, 26 L. ed. 340; *Cromie v. Louisville Orphans' Home Soc.* 3 Bush, 365; *Ohio & M. R. Co. v. Tabor*, 98 Ky. 503, 34 L. R. A. 685, 32 S. W. 168, 36 S. W. 18; *Brown v. Illinois C. R. Co.* 100 Ky. 525, 38 S. W. 862; *Lathrop v. Commercial Bank*, 8 Dana, 114, 33 Am. Dec. 481.

After a careful consideration of the authorities relied on, we fail to see that they sustain the contention of appellant. Numerous authorities are cited by appellee, which we deem it unnecessary to discuss. It will be seen from the petition that the cotton, the subject-matter of the contract, was in the state of Tennessee. The contract was entered into in the same state, and the cotton was to be delivered in the state of Massachusetts. It does not appear that the cotton was expected to even pass through the state of Kentucky. It seems to be conceded that a carrier might, by contract, exempt itself, under the common law, in the states of Tennessee and Massachusetts, from responsibility for loss of goods caused by fire, not the result of its own negligence. It is not claimed that the common law is not in force in the states of Tennessee and Massachusetts. It seems to us that, under the facts as they appear in this action, the provision of the Constitution aforesaid could in no wise affect or control the liability of defendant respecting the contract sued on. The other questions discussed in this case are not decided. All that we do decide is that, under the terms of this contract as shown by the petition and exhibit filed, plaintiff is not entitled to recover in this action.

Judgment affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

John C. F. SLAYTON
v.

Phillip A. BARRY.

(175 Mass. 513.)

An infant is not liable in tort for false representations as to his age, whereby he obtains credit in the purchase of goods.

(March 3, 1900.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Middlesex Coun-

NOTE.—For false representations by infant as to age, see also *Nash v. Jewett* (Vt.) 4 L. R. A. 561, and note; also *Elliot v. Elliot* (Wis.) 15 L. R. A. 259.
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ty directing a verdict for defendant in a proceeding to hold him liable for false representations as to his age for the purpose of inducing plaintiff to sell and deliver goods to him. *Overruled.*

The facts are stated in the opinion.

Messrs. Wiggins & Fernald, for plaintiff:

The defendant is liable in damages upon proof of the plaintiff's allegations.

It is universally recognized law that an infant is liable for his torts.

Shaw v. Coffin, 58 Me. 254, 4 Am. Rep. 290; *Elwell v. Martin*, 32 Vt. 217.

False and fraudulent representations made with the intention to defraud, and relied upon by the party to whom they are made, con-

stitute a tort for which the party making them is liable in damages.

Fisher v. Mellen, 103 Mass. 503; *Fitts v. Hall*, 9 N. H. 441; *Rice v. Boyer*, 108 Ind. 472, 50 Am. Dec. 54, 9 N. E. 420; *Wallace v. Morss*, 5 Hill, 391; *Neff v. Landis*, 110 Pa. 204, 1 Atl. 177; *Eaton v. Hill*, 50 N. H. 235, 9 Am. Rep. 189; *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209; *Wheeler & W. Mfg. Co. v. Jacobs*, 2 Misc. 236, 21 N. Y. Supp. 1006.

The courts in this commonwealth have not adopted the rule of allowing the plea of infancy where the infant got possession of property by means of a contract.

Homer v. Thwing, 3 Pick. 492; *Baker v. Stone*, 136 Mass. 405.

The defendant is liable for the conversion of the goods. He obtained the goods under a contract which was voidable by the plaintiff by reason of the defendant's fraud, and by the defendant by reason of his infancy. The contract, when avoided, became void *ab initio*, and the defendant, having sold the goods, became liable for this conversion.

Walker v. Davis, 1 Gray, 506.

The fraudulent assertion of the defendant that he was of age, upon which the plaintiff relied, was sufficient to avoid the contract.

Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105.

The infant cannot set up his contract as a justification for taking the plaintiff's goods and selling them, while he is repudiating the contract and his obligations under it.

McCarthy v. Henderson, 138 Mass. 310; *Vent v. Osgood*, 19 Pick. 572.

Mr. W. Frederic Kimball, for defendant:

The common law in England holds that the infant is not liable in this case. He is only liable in cases where the form of the action does not suppose that a contract existed.

Johnson v. Pie, 1 Lev. 169, 1 Sid. 258, 1 Keble, 905; *Stikeman v. Dawson*, 1 De G. & S. 113; *Grove v. Nevill*, 1 Keble, 778; *Price v. Hewitt*, 8 Exch. 146; *Liverpool Adelphi Loan Asso. v. Fairhurst*, 9 Exch. 422; *Wright v. Leonard*, 11 C. B. N. S. 258; *Bartlett v. Wells*, 1 Best & S. 836; *De Roo v. Foster*, 12 C. B. N. S. 272; *Cooley, Torts*, 2d ed. p. 126.

Under the old form of pleadings there was an option to sue for contract or tort. In such a case an infant could not be liable by framing in tort what was in truth a breach of contract.

Jennings v. Rundall, 8 T. R. 335.

The weight of the American cases is with the English cases.

Gilson v. Spear, 38 Vt. 311, 88 Am. Dec. 659; *Ferguson v. Bobo*, 54 Miss. 121; 2 Kent, Com. 241; *Brown v. Dunham*, 1 Root, 272; *Geer v. Hovy*, 1 Root, 179; *Wilt v. Welsh*, 6 Watts, 9; *Curtin v. Patton*, 11 Serg. & R. 309; *Stoolfoos v. Jenkins*, 12 Serg. & R. 403; *Livingston v. Coz*, 6 Pa. 360; *Keen v. Coleman*, 39 Pa. 299, 80 Am. Dec. 524; *Brown v. McCune*, 5 Sandf. 224; *Carpenter v. Carpenter*, 45 Ind. 142; *Burns v. Hill*, 19 Ga. 22; *Kilgore v. Jordan*, 17 Tex. 341; *Tucker* 49 L. R. A.

v. Moreland, 10 Pet. 59, 9 L. ed. 346; *Nash v. Jewett*, 61 Vt. 501, 4 L. R. A. 561, 18 Atl. 47; *Schouler*, Dom. Rel. § 625.

An infant is liable in an action *ex delicto* for an actual and wilful fraud, only in cases in which the form of action does not suppose that a contract has existed.

Gilson v. Spear, 38 Vt. 311, 88 Am. Dec. 659; *Nash v. Jewett*, 61 Vt. 501, 4 L. R. A. 561, 18 Atl. 47.

Morton, J., delivered the opinion of the court:

The declaration in this case is in two counts. The first count alleges, in substance, that the defendant, intending to defraud the plaintiff, deceitfully and fraudulently represented to him that he was of full age, and thereby induced the plaintiff to sell and deliver to him the goods described, and, though often requested, had refused to pay for or return the goods, but had delivered them to persons unknown to the plaintiff. The second count is in tort for the conversion of the goods described in the first count. The case is here on exceptions to the refusal of the presiding judge to give certain instructions requested by the plaintiff, and to his ruling ordering a verdict for the defendant. The question is whether the plaintiff can maintain his action. He could not bring an action of contract, and so has brought an action of tort. The precise question presented has never been passed upon by this court. *Merriam v. Cunningham*, 11 Cush. 40, 43. In other jurisdictions it has been decided differently by different courts. We think that the weight of authority is against the right to maintain the action. *Johnson v. Pie*, 1 Lev. 169, 1 Sid. 258, 1 Keble, 905; *Grove v. Nevill*, 1 Keble, 778; *Jennings v. Rundall*, 8 T. R. 335; *Green v. Greenbank*, 2 Marsh. 485; *Price v. Hewett*, 8 Exch. 146; *Wright v. Leonard*, 11 C. B. N. S. 258; *De Roo v. Foster*, 12 C. B. N. S. 272; *Gilson v. Spear*, 38 Vt. 311, 88 Am. Dec. 659; *Nash v. Jewett*, 61 Vt. 501, 4 L. R. A. 561, 18 Atl. 47; *Ferguson v. Bobo*, 54 Miss. 121; *Brown v. Dunham*, 1 Root, 272; *Geer v. Hovy*, 1 Root, 179; *Wilt v. Welsh*, 6 Watts, 9; *Burns v. Hill*, 19 Ga. 22; *Kilgore v. Jordan*, 17 Tex. 341; *Benjamin, Sales*, 6th ed. 23; *Cooley, Torts*, 2d ed. 126; 2 Addison, *Torts*, § 1314. See, *contra*, *Fitts v. Hall*, 9 N. H. 441; *Eaton v. Hill*, 50 N. H. 235, 9 Am. Rep. 189; *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209; *Rice v. Boyer*, 108 Ind. 472, 58 Am. Rep. 53, 9 N. E. 420; *Wallace v. Morss*, 5 Hill, 391.

The general rule is, of course, that infants are liable for their torts. *Sikes v. Johnson*, 16 Mass. 389; *Homer v. Thwing*, 3 Pick. 492; *Shaw v. Coffin*, 58 Me. 254, 4 Am. Rep. 290; *Vasse v. Smith*, 6 Cranch, 226, 3 L. ed. 207. But the rule is not an unlimited one. It is to be applied with due regard to the other equally well-settled rule, that, with certain exceptions, they are not liable on their contracts; and the dominant consideration is not that of liability for their torts, but of protection from their contracts. The true rule seems to us to be as stated in *Liverpool*

Adelphi Loan Asso. v. Fairhurst, 9 Exch. 422, 429, where it was sought to hold a married woman for a fraudulent misrepresentation, namely: If the fraud "is directly connected with the contract, . . . and is the means of effecting it, and parcel of the same transaction," then the infant will not be liable in tort. The rule is stated in 2 Kent, Com. 8th ed. § 241, as follows: "The fraudulent act, to charge him [the infant], must be wholly tortious; and a matter arising *ex contractu*, though infected with fraud, cannot be changed into a tort in order to charge the infant in trover or case by a change in the form of the action."

In the present case it seems to us that the fraud on which the plaintiff relies was part and parcel of the contract, and directly connected with it. The plaintiff cannot maintain his action without showing that there was a contract, which he was induced to enter into by the defendant's fraudulent representations in regard to his capacity to contract, and that pursuant to that contract there was a sale and delivery of the goods in question. Whether, as an original proposition, it would be better if the rule were as laid down in *Fitts v. Hall*, 9 N. H. 441, and *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209, in New Hampshire, and *Rice v. Boyer*, 108 Ind. 472, 58 Am. Rep. 53, 9 N. E. 420, in Indiana, we need not consider. The plaintiff relies on *Homer v. Thwing*, 3 Pick. 492; *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; and *Walker v. Davis*, 1 Gray, 506. In *Walker v. Davis*, 1 Gray, 506, there was no completed contract, and the title did not pass. The sale of the cow by the defendant operated, therefore, clearly, as a conversion. *Badger v. Phinney*, 15 Mass. 359, was an action of replevin; and it was held that the property had not passed, or, if it had, that it had reverted in the plaintiff in consequence of the defendant's fraud. The plaintiff maintained his action independently of the contract. In *Homer v. Thwing*, 3 Pick. 492, the tort was only incidentally connected with the contract of hiring.

We think that the exceptions should be overruled.

So ordered.

Henry S. ANGUS et al.

v.

John T. SCULLY.

(.....Mass.....)

Recovery may be had for the value of the work done under a contract to move a building for a specified price, if the performance of the contract becomes impossible by reason of the destruction of the building without the contractor's fault.

(June 20, 1900.)

NOTE.—For nonperformance of contract excused by intervening impossibility, see *Stewart v. Stone* (N. Y.) 14 L. R. A. 215, and *note*; *Parker v. Macomber* (R. I.) 16 L. R. A. 858; *Anderson v. L. L. May & Co.* (Minn.) 17 L. R. A. 49 L. R. A.

EXCEPTIONS by defendant to rulings of the Superior Court for Middlesex County made during the trial of an action brought to recover for services rendered in moving a building which resulted in a judgment in plaintiffs' favor. *Overruled.*

The facts are stated in the opinion.

Mr. John H. Hurley, for defendant:

Where a contract is open and unrescinded a *quantum meruit* cannot be maintained. *Indebitatus assumpsit* may sometimes be supported where there is a special contract, but that is where the contract has been fulfilled.

Ellis v. Hamlen, 3 Taunt. 52; *Jennings v. Camp*, 13 Johns. 94, 7 Am. Dec. 673; *Clark v. Smith*, 14 Johns. 326; *Champlin v. Butler*, 18 Johns. 169; 1 Selwyn, N. P. 86; *Faxon v. Mansfield*, 2 Mass. 147; *Whiting v. Sullivan*, 7 Mass. 107; *Stark v. Parker*, 2 Pick. 267, 13 Am. Dec. 425; *Taft v. Montague*, 14 Mass. 282, 7 Am. Dec. 215; 2 Phill. Ev. 83, Boston ed. note a; *Hulle v. Heightman*, 2 East, 145; *Damer v. Langton*, 1 Car. & P. 168.

The case at bar is distinguishable from *Hayward v. Leonard*, 7 Pick. 180, 19 Am. Dec. 269, for in that case the defendant received a benefit, but in this case not only did the defendant not benefit by the plaintiffs' work, but he suffered a loss on the failure to perform.

If one agrees to build a house for another at a stipulated price, and the building is destroyed by fire before its completion, from some cause unknown, no recovery can be had for either the labor or the materials destroyed.

Adams v. Nichols, 19 Pick. 279, 31 Am. Dec. 137; *Boyle v. Agawam Canal Co.* 22 Pick. 381, 33 Am. Dec. 749.

So, on the covenant to keep the premises in repair, and at the expiration of the lease to surrender them in as good condition as when leased, the lessee is bound to rebuild in case of the destruction of the premises by fire.

Phillips v. Stevens, 16 Mass. 238; *Kramer v. Cook*, 7 Gray, 550; *Tilden v. Tilden*, 13 Gray, 103.

Not only is the defendant not liable to the plaintiffs in this action, but the plaintiffs would be liable to the defendant for failure to perform in not putting the building on the place stipulated in the contract.

Gates v. Ryan, 115 Mass. 596.

Where a contract consists of mutual dependent stipulations, and the acts of performance by each party are to be concurrent, if both parties remain inactive there is no breach by either; if either cannot charge the other upon it, he must put him in default.

Gardiner v. Corson, 15 Mass. 500; *Dana v. King*, 2 Pick. 155; *Hunt v. Livermore*, 5 Pick. 395; *Kane v. Hood*, 13 Pick. 281; *Tinney v. Ashley*, 15 Pick. 546, 26 Am. Dec.

A. 555; *Remy v. Olds* (Cal.) 21 L. R. A. 645; *Pengra v. Wheeler* (Or.) 21 L. R. A. 726; *Fisher v. Walsh* (Wis.) 43 L. R. A. 810; and *Smith v. North America Transp. & Trading Co.* (Wash.) 44 L. R. A. 557.

620; *Perkins v. Perkins*, 8 Cush. 318; *Cook v. Doggett*, 2 Allen, 439; *Smith v. Boston & M. R. Co.* 6 Allen, 262; *Hapgood v. Shaw*, 105 Mass. 276.

Plaintiffs, to recover, must show that performance was prevented by inevitable accident or by the act of God, or was made unlawful by statute.

Willington v. West Boylston, 4 Pick. 101; *Fuller v. Brown*, 11 Met. 440; *Barnard v. Fisher*, 7 Mass. 73; *Badlam v. Tucker*, 1 Pick. 284.

The duty of the plaintiffs in this case was not created by law, but by their own agreement; consequently they are not excused from performing.

Proprietors of Mill Dam Foundry v. Hovey, 21 Pick. 441; *Taft v. Montague*, 14 Mass. 282, 7 Am. Dec. 215.

Plaintiffs here were bailees, and as such should have exercised over the property which was the subject of the bailment a degree of care not less than that which men usually exercise over their own property under the same circumstances.

Maynard v. Buck, 100 Mass. 40; *Smith v. Smith*, 2 Pick. 622, 13 Am. Dec. 464.

Plaintiffs, having an insurable interest, could have avoided the loss.

3 Kent, Com. 6th ed. 276; *Howard F. Ins. Co. v. Chase*, 5 Wall. 517, 18 L. ed. 527; *Eastern R. Co. v. Relief F. Ins. Co.* 98 Mass. 420.

Messrs. Edwin B. Hale and F. E. Dickerman, for plaintiffs:

The agreement on both sides was upon the implied condition that the buildings which were to be moved should continue in existence.

While nothing is expressly said about it, the parties contemplated the continued existence of that to which the contract relates.

Butterfield v. Byron, 153 Mass. 517, 12 L. R. A. 571, 27 N. E. 667; *Wells v. Calnan*, 107 Mass. 514, 9 Am. Rep. 65; *Marvel v. Phillips*, 162 Mass. 399, 26 L. R. A. 416, 38 N. E. 1117; *Gilbert & B. Mfg. Co. v. Butler*, 146 Mass. 82, 15 N. E. 76.

The plaintiffs can recover the value of the services performed down to the time that the event happened which rendered the completion of the contract impossible.

Butterfield v. Byron, 153 Mass. 517, 12 L. R. A. 571, 27 N. E. 667; *Cleary v. Sohler*, 120 Mass. 210; *Lord v. Wheeler*, 1 Gray, 282; *Gilbert & B. Mfg. Co. v. Builer*, 146 Mass. 82, 15 N. E. 76; *Cook v. McCabe*, 53 Wis. 250, 10 N. W. 507; *Clark v. Franklin*, 7 Leigh, 1; *Hollis v. Chapman*, 36 Tex. 1; *Schwartz v. Saunders*, 46 Ill. 18; *Rawson v. Clark*, 70 Ill. 656; *Clark v. Busse*, 82 Ill. 515; *Hargrave v. Conroy*, 19 N. J. Eq. 281; *Dolan v. Rodgers*, 149 N. Y. 489, 44 N. E. 167; *Haynes v. Second Baptist Church*, 88 Mo. 285, 57 Am. Rep. 413; *Weis v. Devlin*, 67 Tex. 507, 3 S. W. 726.

The right of a plaintiff to recover does not depend upon acceptance by the defendant, or upon whether he was benefited by the services.

Stowe v. Buttrick, 125 Mass. 449.
49 L. R. A.

Hammond, J., delivered the opinion of the court:

The contract was that the plaintiffs should move a large building belonging to the defendants from a lot on Third street to a lot on First street, and also change the location of two other buildings, of which one was on the First street lot, and one on the Third street lot; and the defendant was to pay them \$840. In accordance with the agreement, the plaintiffs began the work. "They first moved the house on the Third street lot, and then began to move the large building from the Third street lot across certain open lots towards the lot on First street. When said last-named building had been moved about half the distance to said lot on First street it was entirely consumed by fire at some time during the night, and thereupon, with the assent of the defendant, no further work was done in moving either of the other buildings." In this action the plaintiffs seek to recover the fair value of the services rendered by them in the work done down to the time of the fire. The court refused to rule as requested by the defendant, that the plaintiffs could not recover, and submitted the case to the jury upon instructions which would authorize them to find for the plaintiffs if they were satisfied that the fire was not attributable to any negligence of the plaintiff. We see no error in the rulings under which the case thus went to the jury. Clearly, one of the implied conditions of the contract was that the building should continue to exist. Upon the destruction of the building, the work could not be completed according to the contract. Authorities differ as to the rights of the parties in such a case, but so far as respects this commonwealth the rule is well settled. As stated by Knowlton, J., in *Butterfield v. Byron*, 153 Mass. 517, 523, 12 L. R. A. 573, 27 N. E. 669: "The principle seems to be that when, under an implied condition of the contract, the parties are to be excused from performance if a certain event happens, and by reason of the happening of the event it becomes impossible to do that which was contemplated by the contract, there is an implied assumpsit for what has properly been done by either of them; the law dealing with it as done at the request of the other, and creating a liability to pay for it its value, to be determined by the price stipulated in the contract, or in some other way if the contract price cannot be made applicable." Stated more narrowly, and with particular reference to the circumstances of this case, the rule may be said to be that where one is to make repairs or do any other work on the house of another under a special contract, and his contract becomes impossible of performance on account of the destruction of the house without any fault on his part, then he may recover for what he has done. This case comes clearly within this rule. *Lord v. Wheeler*, 1 Gray, 282; *Butterfield v. Byron*, 153 Mass. 517, 523, 12 L. R. A. 573, 27 N. E. 669, and cases therein cited.

Exceptions overruled.

OPINION OF JUSTICES as to Gratuitous
Payment to Representatives of Office Hold-
ers.

(175 Mass. 599.)

The legislature has the right to appropriate public money to pay to the widow, heirs, or legal representatives of a person who died while holding an office, the salary for any period of time after such decease to which he would have been entitled if living and continuing to hold such office, where the public good will be served by the grant of such a reward, but not where the only public advantage is such as may be incident to the relief of a private citizen; and it may delegate such power to counties, cities, or towns.

(June 5, 1900.)

THE State Senate adopted the following order on May 22, 1900, which was transmitted to the justices for their action thereon:

"Ordered, that the opinion of the justices of the supreme judicial court be required by the senate upon the following important questions of law:

"(1) Has the general court the right to appropriate money to pay to the widow, heirs, or legal representatives of a person who died while holding an office the salary of which is payable from the treasury of the commonwealth, or from the treasury of a county, city, or town, the salary, for any period of time after such decease, to which such person would have been entitled if living and continuing to hold such office?

"(2) Has the general court the right to authorize a county, city, or town to appropriate money to pay to the widow, heirs, or legal representatives of a person who died while holding an office the salary of which is payable from the treasury of such county, city, or town, the salary, for any period of time after such decease, to which such person would have been entitled if living, and continuing to hold such office?

To the Honorable the Senate of the Commonwealth of Massachusetts:

The undersigned justices of the supreme judicial court, having considered the questions proposed by the honorable senate, by its order of May 22, 1900, a copy of which is annexed, respectfully submit the following opinion:

The questions, as we understand them, both assume that there was no provision of law in existence before the death of the officer by which the money in question would be payable as supposed. If such a provision should be enacted with regard to the widow, heirs, or legal representatives of a living officer, it naturally would be regarded as placing the faith of the state to the officer

himself, and thus as constituting part of the consideration for his future service. We understand the questions to refer to payments which technically are pure gratuities. We also understand them to refer to payments of money raised by taxation in the ordinary way.

In general, the power to pay gratuities to individuals is denied to the legislature by the Constitution. Ordinarily, a gift of money to an individual would be an appropriation of public funds to private uses, which could not be justified by law. *Mead v. Acton*, 139 Mass. 341, 1 N. E. 413; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Freeland v. Hastings*, 10 Allen. 570; *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *Parkersburg v. Brown*, 106 U. S. 487, 500, 501, 27 L. ed. 238, 1 Sup. Ct. Rep. 442; *Cole v. La Grange*, 113 U. S. 1, 28 L. ed. 896, 5 Sup. Ct. Rep. 416, and cases cited there and in *Kingman v. Brockton*, 153 Mass. 255, 259, 11 L. R. A. 123, 26 N. E. 998; *Cooley, Const. Lim.* 6th ed. 601, 602. We deem this proposition so plain that we do not delay to enforce it, but it is not a proposition which disposes of the questions before us; for it is hardly less clear that, when a public purpose can be carried out or helped by spending public money, the power of the legislature is not curtailed or destroyed by the fact that the money is paid to private persons who had no previous claim to it of any kind.

We need not illustrate by cases where the payment is made on the footing that there would have been an obligation had not one party been the sovereign power, and there the public advantage is in the manifestation that the sovereign power is just. We will take a case which is in the strictest sense a gift. A conspicuous example which occurs to every one is the granting of military pensions after a war. The soldiers have been paid all to which they are entitled, yet the state may grant them a partial or total support for disabilities contracted in service. Such a gift may be intended primarily for an object which is no more private than is a memorial hall. *Kingman v. Brockton*, 153 Mass. 255, 256, 11 L. R. A. 123, 26 N. E. 998. It may be meant to bring home to all minds by visible facts that now, as of old, the courage of the battlefield is honored, and that, if a man will risk his life for his country, his country afterwards will not necessarily hold him to the letter of his generous bond, and deem him fully paid at \$13 a month.

In the language of the Supreme Court of the United States, the "power to grant pensions is not controverted, nor can it well be, as it was exercised by the states and by the continental congress during the war of the Revolution; and the exercise of the power is coeval with the organization of the government under the present Constitution, and

NOTE.—As to purposes for which public money may be used, see *Daggett v. Colgan* (Cal.) 14 L. R. A. 474.

As to gifts within meaning of constitutional prohibition thereof, see also *Bourn v. Hart* (Cal.) 15 L. R. A. 431; *Patty v. Colgan* (Cal.) 49 L. R. A.

18 L. R. A. 744; *Conlin v. San Francisco City & County Supers.* (Cal.) 21 L. R. A. 474; *Ingram v. Colgan* (Cal.) 28 L. R. A. 187; and *Conlin v. San Francisco City & County Supers.* (Cal.) 33 L. R. A. 752.

has been continued without interruption or question to the present time." *United States v. Hall*, 98 U. S. 343, 346, 25 L. ed. 180. See *Frisbie v. United States*, 157 U. S. 160, 166, 39 L. ed. 657, 15 Sup. Ct. Rep. 586; *Kellogg v. Waite*, 12 Allen, 529, 530.

If the power of Congress is unquestioned, that of the state legislatures under their broader authority is still less questionable, subject to some inquiry as to what would be legitimate occasions for exercising it, for which we need not stop. On January 16, 1781, it was resolved that there be allowed and paid to the noncommissioned officers and soldiers "who were engaged to serve during the war on or before the 2d day of December last the sum of \$24 in silver or gold equivalent thereto as a gratuity, . . . as a testimony of the sense this commonwealth entertains of their faithful services." Resolves, 1780, Jan. Sess. chap. 9. See *Id.* chaps. 39, 240. There were many special resolves of the same kind. So far as we have seen expressions of opinion by the courts of other states, they agree with what we have quoted from the Supreme Court of the United States, and with what is to be inferred from the practice of our own legislature within four months of the time when the Constitution had come into force. *Booth v. Woodbury*, 32 Conn. 118, 128; *Spicer v. Blairsville School Directors*, 50 Pa. 150, 162; *Durack's Appeal*, 62 Pa. 491, 494; *Brodhead v. Milwaukee*, 13 Wis. 624, 652, 88 Am. Dec. 711. See also Cooley, *Tax'n*, 2d ed. 111; 1 Hare, *Const. Law*, 387.

If further justification for the power to grant military pensions be needed, article 6 of the Bill of Rights recognizes that advantages distinct from those of the community may be conferred upon the consideration of services rendered to the public. And although in *Brown v. Russell*, 166 Mass. 14, 22, 23, 32 L. R. A. 253, 43 N. E. 1005, it was intimated as the prevailing view of the court that, so far as these words were applicable to the filling of public offices, they must be taken to refer to services to be rendered, that conclusion was drawn from the dependence of the advantages upon the office, not from a general construction of the words. That the words include past as well as future services is shown by the authorities and facts to which we have referred, and perhaps is indicated by the mention of rewards and immunities in chapter 5, § 2, of the second part of the Constitution.

The power to give rewards after the event for conspicuous public service, if it exists at all, cannot be limited to military service. If a man has deserved greatly of the commonwealth by civil services, the public advan-

tage of recognizing his merit may stand on ground as strong as that for rewarding a general. We cannot foresee the possibilities of genius or distinguished worth, and settle in advance the tariff at which its action shall be paid.

It will be plain from what we have said that, in our opinion, the public welfare alone must be the ground, as it is the only legal justification, for this kind of payment. And it follows that our answer to the first of the two questions before us is that the general court has the right to appropriate money for the purposes supposed in a case where it fairly can be thought that the public good will be served by the grant of such an unstipulated reward, but that it has not that right where the only public advantage is such as may be incident and collateral to the relief of a private citizen. To a great extent the distinction must be left to the conscience of the legislature. Whether a judicial remedy could be found if a clear case should arise of an unconstitutional appropriation, it happily is unnecessary to inquire.

We make no different answer to the second question, and have not found it necessary to consider distinctions between what the legislature can do, as representing the sovereign power, and what it can authorize counties, cities, or towns to do. We assume that, if the general court should confer such a power in any case, it would so far specify the object and occasion as to adjudicate that they were sufficient to warrant an expenditure for the public good. The ground of decision in *Mead v. Acton*, 139 Mass. 341, 1 N. E. 413,—which certainly went very far,—was not a distinction between the direct and indirect action of the legislature, but was that, because the war had been over so long, it was manifest that the public welfare could not be promoted by the payment of the proposed bounties, and therefore a statute attempting to authorize such a payment by anyone attempted to divert public funds to private uses, and was void. Possibly other reasons could have been invoked. Some of the language used in that case and in *Kingman v. Brockton*, 153 Mass. 255, 11 L. R. A. 123, 26 N. E. 998, may need qualification. It goes beyond the point which the court was called upon to decide.

[Signed] OLIVER WENDELL HOLMES.

MARCUS P. KNOWLTON.

JAMES M. MORTON.

JOHN LATHROP.

JAMES M. PARKER.

JOHN W. HAMMOND.

WILLIAM CALEB LORING.

OHIO SUPREME COURT.

CINCINNATI, LEBANON, & NORTHERN
RAILWAY COMPANY, *Plff. in Err.*,

v.

City of CINCINNATI *et al.*

(62 Ohio St. 465.)

*1. Section 19, art. 1, of the Constitution is a limitation upon § 6, art. 13, as to the power of assessments.

2. Compensation paid to a landowner for lands taken by appropriation proceedings to open a street cannot be assessed back upon the lands of the owner remaining after such taking. Neither can the costs and expenses incurred in such proceeding be so assessed. *Cleveland v. Wick*, 18 Ohio St. 303, overruled.

(Minshall and Williams, JJ., dissent.)

(April 24, 1900.)

ERROR to the Circuit Court for Hamilton County to review a judgment reversing a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to enjoin defendants from enforcing an assessment upon plaintiff's property for the expense of opening a street. *Reversed.*

Statement by **Burket, J.:**

On the 10th day of February, 1892, the Cincinnati, Lebanon, & Northern Railway Company filed the following petition in the court of common pleas against the city of Cincinnati and Daniel W. Brown, city auditor:

"Plaintiff says that it is a corporation organized under the laws of Ohio, and is operating a railroad between Cincinnati and Lebanon, in said state; that the city of Cincinnati is a municipal corporation of the first grade of the first class; and that Daniel W. Brown is auditor of said city. Plaintiff, for cause of action, says that on the 17th day of February, 1889, an ordinance was passed by the common council of said city (two thirds of all the members elected to the board of councilmen and the board of aldermen concurring therein, and declaring the same to be necessary) to condemn property in said city for the purpose of extending Fern street eastwardly to Lane street, a copy of which ordinance is hereto attached, marked 'Exhibit A,' and is made part hereof. Plaintiff further says: That in compliance with said ordinance the city solicitor of said city did on the — day of May, 1889, file

an application on behalf of said city to assess compensation for the property by said ordinance ordered to be appropriated against this plaintiff and others, in case No. 83,904 of this court; the property desired to be appropriated, belonging to this plaintiff, being described in said petition, as follows: 'Lot No. 4. The right to cross the tracks of the Cincinnati, Lebanon, & Northern Railway at the place where the north and south lines of Lincoln avenue produced west would cross the same; the same being the property of the Cincinnati, Lebanon, & Northern Railway Company.' That thereafter a jury was duly impaneled and sworn, and compensation was awarded to the several owners of the property, and among others to this plaintiff, in the following words and figures, to wit: 'To the owner or owners of lot No. 4, the Cincinnati, Lebanon, & Northern Railway, for the right to cross their tracks, the sum of \$1.' Plaintiff says that its roadbed and tracks, as then and now situated, are from 20 to 30 feet below the grades of Lane street and Fern street, and that it would be impracticable to cross the tracks of plaintiff, except by the erection of a bridge, and that the construction and erection of a bridge over the tracks of this plaintiff were intended at the time of the passage of said ordinance. Plaintiff says that no improvement has as yet been made or commenced, and that said plaintiff has derived no benefit to its property; that when the said improvement is made the tracks of this company can only be crossed by a bridge; and that no part of plaintiff's premises will abut upon said improvement, when made, but, on the contrary, access from plaintiff's premises to such improvement will be entirely cut off. Plaintiff says that on the 12th day of February, 1890, the board of public affairs passed an ordinance (No. A310) to assess a special tax on real estate bounding and abutting on Fern street extended from the west line of Spring street, as platted, to the west line of Lane street, a copy of which ordinance is hereto attached, marked 'Exhibit B,' and is made part hereof. Plaintiff says that its property or roadbed, across which said right of way was condemned at said point, is 30 feet in width. A plat of the survey for the extension of Fern street is hereto attached, marked 'Exhibit C,' and is made part hereof. Plaintiff says that Daniel W. Brown, city auditor, in compliance with said assessing ordinance, has assessed and charged upon the books in his office against this plaintiff and its property

*Headnotes by the Court.

NOTE.—As to necessity of special benefit to sustain assessments for local improvements, see *Re Bonds of Madera Irrig. Dist.* (Cal.) 14 L. R. A. 755, and note; *Raleigh v. Peace* (N. C.) 17 L. R. A. 330; *Violet v. Alexandria* (Va.) 31 L. R. A. 382; *Asberry v. Roanoke* (N. C.) 42 L. R. A. 636, and note; *Detroit v. Chapin* (Mich.) 42 L. R. A. 638; *Hutcheson v. Storrie* (Tex.) 45 L. R. A. 289.

As to liability of railroad right of way to 49 L. R. A.

assessments, see *Chicago, M. & St. P. R. Co. v. Milwaukee* (Wis.) 28 L. R. A. 249, and note; also *Detroit, G. H. & M. R. Co. v. Grand Rapids* (Mich.) 28 L. R. A. 793; *Lake Shore & M. S. R. Co. v. Grand Rapids* (Mich.) 29 L. R. A. 195; *Stewart v. Wheeling & L. E. R. Co.* (Ohio) 29 L. R. A. 438; and *Philadelphia use of McCann v. Philadelphia & E. R. Co.* (Pa.) 34 L. R. A. 564.

for 80 feet frontage abutting upon said Fern street, notwithstanding that the property of plaintiff has a frontage thereon of but 60 feet, or 30 feet on either side, and that said assessment, as charged against it, is as follows: [The amounts of the assessments per front foot from 1891 to 1900, inclusive, are omitted, as not material to an understanding of the case.] Plaintiff says that said assessment so made against its said property is illegal and void: First, for the reason that said assessment is simply to reimburse the city for the cost of the property taken from these plaintiffs, and, if enforced against plaintiff, it will be deprived of its said property without compensation and due process of law, in violation of its rights as the owner of said property, and in violation of article 1, § 19, of the Constitution of the state of Ohio, and in violation of the 14th Amendment of the Constitution of the United States of America; second, because only a right of way was condemned over the tracks of plaintiff, and only a nominal compensation was awarded it for such right of way; third, that plaintiff will not have any lots abutting upon said improvement when the same is completed; fourth, because the assessment is in excess of 25 per cent of the value of its property, with the usual depth of lots in that vicinity. Plaintiff says that it has not paid said assessment levied for said purpose, nor any part thereof; that the assessment for the year 1891 amounts to \$91.02, together with 10 per cent penalty thereon; and that the said Daniel W. Brown, city auditor, threatens to certify the said assessment for the year 1891, and the other said assessments as they may become due, to the auditor of Hamilton county, Ohio, to be placed upon the tax duplicate of Hamilton county, Ohio, as a charge and lien upon the property of plaintiff in said county, and unless restrained by this court a cloud will be placed upon its title, and it will suffer great and irreparable loss and injury, for which it has no adequate remedy at law. Wherefore plaintiff prays that the said Daniel W. Brown, city auditor, may be restrained from certifying said assessment for the year 1891 to the auditor of Hamilton county, Ohio, and upon the final hearing thereof the said city of Cincinnati and Daniel W. Brown, the city auditor, or his successors or successor, may be perpetually enjoined from the collection of said assessment so charged and levied against this plaintiff and its said property for said Fern street improvement, and for all other and further relief to which in law or equity it may be entitled."

The answer is as follows: "Now come the defendants, and for answer say that they admit that the defendant city is a corporation organized under the laws of Ohio, and is of the first grade and of the first class; that Daniel W. Brown is auditor of said city, and that the plaintiff is a corporation under the laws of Ohio, and operates a railroad between Cincinnati and Lebanon, in said state, and that on the 17th of February, 1889, an ordinance was passed by the common council of said city, and that the board

of aldermen concurring therein, and declaring it necessary to condemn property for the purpose of extending Fern street eastwardly to Lane street, and that under the said ordinance proceedings were had in case No. 83,904, common pleas court; that compensation was assessed and paid, and that the money to pay the said compensation was raised by levying an assessment upon the abutting property, as alleged in the petition, and that all necessary steps were taken to make the said assessment a charge upon the abutting property; and that the plaintiff's property was assessed in the amounts and in the manner described and alleged in the petition. And defendant denies each and every other allegation in plaintiff's petition contained, not herein expressly admitted. Wherefore defendants pray that the injunction asked for may be denied, and for all other relief to which in equity they are entitled."

The following supplemental petition was filed March 19, 1895: "Now comes the plaintiff, and by leave of court files this, its supplemental petition, and says that, since the levying of the assessment upon the property described in the original petition, the legislature of the state of Ohio passed an act, on May 21, 1894, whereby it was provided that the county commissioners of Hamilton county should levy a tax for the purpose of building a bridge over the tracks of this plaintiff, so as to connect Fern street on the west with Lane street and Lincoln avenue on the east; that by reason of the passage of said act (volume 91, p. 826) the improvement of said property can only be made by the construction of a bridge over the premises, abutting property, and right of way condemned in the proceedings, as alleged in the petition herein. This plaintiff says that, while it may have abutting property upon the right of way, by reason of the passage of the act hereinbefore mentioned it will have no frontage whatever upon the improvement. Wherefore this plaintiff prays that the injunction herein issued may be made perpetual."

The court of common pleas found in favor of the railway company, and enjoined the collection of the assessment. Upon appeal the circuit court made the following finding of facts, and rendered the following judgment: "This cause, coming on to be heard upon the pleadings and evidence, was argued by counsel and submitted to the court, upon consideration whereof the court find the facts to be as follows: In condemning and appropriating the land described in the petition, it was the intention of the city of Cincinnati to construct over and above it a bridge at a considerable distance from the surface, and in accordance with that plan there has been built since the commencement of this action a bridge over said real estate, about 22 feet above the surface; said bridge having iron railings on either side. The real estate of the plaintiff assessed for the expense of said appropriation being a strip of land 30 feet wide on either side of said bridge, the land on either side of said strips of land being owned by private parties, and

that the plat attached to the petition correctly shows the property of the plaintiff and the surrounding property. The court also find that the plaintiff's said land is used as part of its right of way for the running of trains. The court further find that the value of said property after the improvement, and at the date of the appropriation, was \$12 per front foot. The court further find, as their conclusions of law, that said property abuts upon said improvement, under the statutes of Ohio, and is liable to assessment for said improvement, but only to the extent of 25 per cent of the value of said land as here found, to wit, \$3 per front foot. It is therefore considered by the court that the defendants be restrained from endeavoring to collect said assessment in excess of \$3 per front foot on the 60 feet of the plaintiff's land described in the petition." And thereupon the plaintiff, by its counsel, excepted to so much of the decree as found that the plaintiff's property was liable to assessment for any amount. The railway company filed its petition in error in this court, seeking to reverse the judgment of the circuit court.

Messrs. Ramsey, Maxwell, & Ramsey for plaintiff in error.

Messrs. Ellis G. Kinkead, Wade H. Ellis, and H. K. Rogers, for defendants in error:

The right of a railroad company is subject to assessment for the cost of street improvements, in the same manner and to the same extent exactly as is other real property.

Northern Indiana R. Co. v. Connelly, 10 Ohio St. 164.

What constitutes abutting property subject to assessment is determined by the situation at the time of the passage of the ordinance directing the improvement, and is not affected by changes occurring after such ordinance has been passed, but before the passage of the assessing ordinance.

Douglass v. Cincinnati, 29 Ohio St. 165.

The extending of a street is an improvement within the meaning of the statutes.

Krumberg v. Cincinnati, 29 Ohio St. 69;

Caldwell v. Carthage, 49 Ohio St. 334, 31 N. E. 602.

Burket, J., delivered the opinion of the court:

While the petition in error asks relief upon several grounds, we shall consider only one of them,—that which invokes § 19 of article 1 of the Constitution of this state. That section is as follows: "Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure, or for the purpose of making or repairing roads, which shall be open to the public without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner." Section 6 of

article 13 of the Constitution is as follows: "The general assembly shall provide for the organization of cities, and incorporated villages, by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power." In *Zanesville v. Richards*, 5 Ohio St. 589, this court held that § 2 of article 12 of the Constitution is a limitation upon the power of taxation which the general assembly can grant to a municipality under this section, and that general revenue is required to be raised by a uniform levy on all taxable property alike, without exemption. Later decisions have held that general revenue may also be raised by fees in certain cases. In *Hill v. Higdon*, 5 Ohio St. 243, 67 Am. Dec. 289, and also in *Cleveland v. Wick*, 18 Ohio St. 303, this court held that § 19 of the Bill of Rights and said § 6 of article 13 are independent of each other, and that said § 19 is not a limitation on said § 6. Upon the correctness of that holding depends the determination of this case. In *Hill v. Higdon*, 5 Ohio St. 243, it is held that the Constitution must be so construed as to be consistent throughout, and it was concluded that that could only be done by holding these two sections independent of each other; and the same theory obtained in *Cleveland v. Wick*, 18 Ohio St. 303. If they are independent of each other, then the one does not affect, limit, or control the other. If they are independent, the guaranty in § 19 that private property shall ever be held inviolate may be, in effect, abrogated and nullified under the guise of an assessment. If they are independent, then, after private property has been taken for public use and paid for, § 19 has exhausted itself, and § 6 may then step in with its powers of assessment, and begin, not where § 19 left off, but back of that point, and may again take up the question of benefits conferred by the taking of the property for public use, and compel the owner, from whom the property was taken, to pay back into the treasury all that he has received, and the costs and expenses in addition thereto. If they are independent, the power of assessment, unlike the power of taxation, is unlimited and unrestricted, except by the will of the general assembly, and the general assembly need not look for benefits upon which to found an assessment, but may assess as it pleases, whether there are benefits or not. It may supply its treasury with funds with which to make improvements by assessment upon any property it pleases, and exempt any property it pleases. A mere statement of the consequences of holding the two sections to be independent is sufficient to show that they are not so, and that § 19 is a limitation on said § 6.

But we are not without authority upon this question. That the constitutional guaranty of the inviolability of private property is a limitation upon the power of taxation and assessment has been held by the Supreme Court of the United States and by this court. The Supreme Court of the United States so held in construing the 14th Amendment to

the Constitution in *Davidson v. New Orleans*, 96 U. S. at page 107, 24 L. ed. 620, and in the *Kentucky Railroad Tax Cases*, 115 U. S. 321, *sub nom. Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep. 67. And this court, in *Chamberlain v. Cleveland*, 34 Ohio St. 551, held that § 19 of the Bill of Rights is a limitation upon the power of assessment, and held that "if a sum is exacted, in any instance, in excess of the value of the special benefits conferred, it is, as to such excess, in that instance, private property unjustly taken for public use without compensation to the owner." In considering the question as to whether the power of assessment is unlimited and in the sole discretion of the general assembly, the court says: "If such a discretionary power is vested in the general assembly, it is very clear that it may be used to subvert § 19 of the Bill of Rights, and private property will not be inviolate, but at the mercy of a discretion, under which it may be taken from the owner without compensation, and be gratuitously given to the public." It is therefore clear that said § 19 is a limitation upon the power of assessment in § 6 of article 13 of the Constitution. Being such limitation, all that is found in said § 19 bearing upon the power of assessment must also be construed as a limitation upon that power; that is, the power of assessment in said § 6 must be so used and administered as not to conflict with said § 19, but must be subservient and subordinate thereto. The limitation is not only as to the amount of the assessment, which cannot exceed benefits, but it is also as to the purpose for which an assessment can be made. No assessment can be made to raise general revenue, because that must be raised by taxation under other provisions of the Constitution, as has often been held by this court. And, as assessments cannot be made to raise general revenue, no assessment can be made to replenish the general revenue in the treasury, or reimburse the treasury for general revenue which has been paid out. When payments have been made out of the general revenue fund, the treasury can only be replenished or reimbursed by taxation or fees, and not by assessments. The two sections deal with the same general subject-matter,—that of taking value from a private individual and appropriating it to public use, whether that value consists of real estate for a roadbed, or money to pay for improving a roadbed; and both should be construed together, as being *in pari materia*, and by so doing the Constitution is consistent throughout, without any independent conflicting sections. Said § 19 provides that "private property shall ever be held inviolate, but subservient to the public welfare. When taken . . . for the purpose of making or repairing roads, which shall be open to the public without charge, a compensation shall be made to the owner in money, . . . and such compensation shall be assessed by a jury without deduction for benefits to any property of the owner." The property is held subservient to the public welfare, and may be taken for the purpose of

making or repairing roads which shall be open to the public; so that it is only the public that is granted the power to take private property, and the public can only take such property for public use. As the public takes the property for public use, it follows that the public must pay for the property which it takes and uses. If the state takes the property, the state must pay for it; if a county takes the property, the county must pay for it; if a township or school district takes the property, payment must be made by the taker; and, if a city takes the property, the city must pay for it. In all such cases the state or the subdivision of the state which takes the property is in that particular case the public. In practice the compensation is awarded by a jury, and the court confirms the verdict and renders the proper judgment, and thereupon payment is made out of its treasury by that subdivision of the state which instituted the proceedings. That subdivision which institutes the proceedings and is in that particular case the public, is thus constituted a taxing district, by said § 19, to pay for the property which it takes, and payment is made by that taxing district out of its treasury; and the property cannot be awarded to it until it pays for it, or deposits the money to secure its payment. The money to pay for property so appropriated must be raised by a levy upon the general tax list, or by the sale of bonds issued upon the public faith and credit; and, whichever method may be adopted, it invokes the power of taxation, which must be an equal levy upon the general tax list, and not the power of assessment, which is a levy upon a prescribed district according to benefits. It is therefore clear that payment for property so appropriated must be by taxation, and not by assessment, and that § 19 of article 1 is in this regard a limitation upon the power of assessment in § 6 of article 13.

Coming now to the power of assessment particularly in question in this case: A municipality having, by proceedings in appropriation, taken private property for street purposes, and paid for it out of its treasury, can it create and constitute the lands of the owner left after the appropriation a special taxing district for the purpose of reimbursing its treasury by assessing back upon his said remaining lands the full amount of the compensation paid him, together with all the costs and expenses? We think not. Section 19 of article 1 being a limitation on the power of assessment in § 6 of article 13, as held in the later cases, there is nothing to base such an assessment upon. The taking of private property for public use is an injury to the owner, for which, under said § 19, he must be awarded full payment; and when such a payment is made he has received only that which the Constitution guaranteed him, and he can be under no obligation to the municipality for receiving that to which he had a legal and constitutional right. He parted with as much value as he received. The public injured him and paid for the injury, and then to make the injury and payment a basis for

recovering back from him all he received, and more, would be to take his property for nothing, and mulct him in costs and expenses besides; and this would be in direct conflict with said § 19 of article 1 of the Constitution. But it is said that, after the owner has received payment of his compensation for the lands taken from him, he stands on an equality with the rest of the community, and may be assessed the same as they for any special benefit which accrues to him by the improvement; that is, by the taking of his lands for street purposes. This is true as to the surface improvement made after the street is opened, but as to the compensation paid him for the land it is not true, and is a taking back from him, without consideration, of that which is guaranteed to him by the Constitution, and which has been paid to him upon a judgment rendered in his favor by a court of competent jurisdiction. In such a case there can be no going back of the judgment rendered in the appropriation proceedings to seek for benefits conferred by the taking of the property. If he is to be assessed for such benefits, that should have been taken into consideration in the appropriation proceedings, so that the judgment might be final as to the rights and liabilities of the parties as to the lands taken. But it is answered that that could not be done, because the compensation must be without deduction for benefits. True, and it is because the Constitution so guarantees,—that no benefits can enter into the case, and form the basis for making an assessment against him. To make an injury to his lands, for which the Constitution guarantees full payment, without benefits; the basis for an assessment against his lands for benefits conferred, is illogical and absurd. If such a thing can be sustained by a course of reasoning in equity,—and it cannot,—it certainly cannot be sustained under our Constitution; and it is the Constitution, and not equity, by which we are bound, when the two come in conflict. There is much force in what is said by the circuit court on this question in *Rhoades v. Toledo*, 6 Ohio C. C. 9.

The case of *Cleveland v. Wick*, 18 Ohio St. 303, is relied upon to sustain the assessing back upon the property of the owner of the compensation paid him for lands appropriated, with the costs and expenses added. That case is reasoned out by means of two false premises, which vitiate the whole case, and render it unsound. The case is based, in the first place, upon the premise that § 19 of the Bill of Rights and § 6 of article 13 are entirely independent of each other. That this premise is false, and does not exist, has since been clearly shown in the well-considered case of *Chamberlain v. Cleveland*, 34 Ohio St. 551. The case is based, in the second place, upon the false premise that there can be no power of assessment for surface improvements of a street, unless the power of assessment to pay for the land taken also exists; that is, that the power of assessment to pay for the land taken and the power of assessment to pay for the cost and expenses of the surface improvement are one and the

same, and inseparably connected. That this is not legally true is shown by the subsequent case of *Krumberg v. Cincinnati*, 29 Ohio St. 69, in which this court held in the fourth syllabus, as well as in the opinion, that "the power to levy special assessments to pay for land taken to widen or extend a street is separate and independent of the power to levy such assessments to pay for grading and paving the street, and the validity of assessments made for these purposes does not depend upon whether the powers were exercised at the same or at different times." Said § 19 being a limitation upon the power of assessment as to the taxing district, by which compensation and costs must be paid, as above shown, it follows that such compensation and costs cannot be involved in, or as part of, the street improvement; and with that out, and the assessment made for the surface improvement against the lots and lands of all the bounding and abutting owners, including the one from whom the lands were taken to open the street, according to benefits, the inequalities pointed out in that case cannot arise. It is only by insisting upon the false premise that the compensation paid and the cost and expenses of making the surface improvement are inseparably connected, and that an assessment for all or none must be made against the owner from whom lands were taken to open the street, that the inequalities pointed out in that case can arise. With the compensation left out of the assessment, there can be no double payment to the owner, as argued at the close of the opinion; and, in like manner, if the compensation is left out of the assessment, and the assessment made for the cost and expense of the surface improvement only, the example given in that case, of A and B owning 1 acre each on the street, loses its force. In fact, with that left out, the whole opinion loses its force. The whole case is founded upon and reasoned out—and well reasoned—upon the false premises that the two sections of the Constitution above cited are independent of each other, and that the compensation must be included as a part of the amount for which the assessment must be made, and that, if no assessment can be made for the compensation, none can be made for the surface improvement. This case is, therefore, not sound, and is overruled; and the statute, in so far as it undertakes to assess the compensation paid to the owner of the land taken, back upon his remaining lands, together with the costs of the taking, is unconstitutional and void, and so is any ordinance passed thereunder.

In the case at bar there was paid to the railway company out of the general revenue fund raised by taxation the sum of \$1 for the right of way for a street across the track of the railway company, and there was assessed back upon the track of the railway company, as property abutting on such right of way of said street, over \$500, not to pay for the right of way, because that had already been paid for out of the treasury, nor to pay for the bridge across the railway tracks, because that was paid out of a fund

raised under a special act for that purpose, but to reimburse the general revenue fund of the treasury for the \$1 paid to the company, and the costs and expenses paid out of the general revenue fund in the appropriation proceedings. The statute is broad enough to cover such a case, but is the statute warranted by the Constitution? When such robbery is perpetrated under, and is attempted to be justified by, the Constitution, it is high time to carefully examine that instrument, and former decisions of this court construing it, to see whether such extortions are warranted, and, if former decisions seem to cover such cases, to see whether there is not some mistake in the construction, false premise in argument, or fallacy in reasoning, that leads to such unjust and burdensome results. We think that the construction heretofore placed upon the power of assessment is unwarranted; that the reasoning in former cases on that subject, as above shown, is founded upon false premises, and is not sound; that the power of assessment does not extend to raising general revenue, nor to reimbursing the treasury for general revenue paid out in appropriating rights of way for street purposes; that the judgment of the circuit court is erroneous; and that the plaintiff in error is entitled to final judgment in its favor upon the record in this case. The case of *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 159, was a case of making an assessment by the foot front on abutting property for the cost of a surface improvement of a street, and nothing was included in the assessment for the value of lands appropriated for a street. That case is, therefore, not affected by this one; but, in so far as it holds that lots and lands which are not benefited by the improvement of a street may be assessed to pay for the same, it is in conflict with *Chamberlain v. Cleveland*, 34 Ohio St. 551, and with *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187. The case of *Schroeder v. Overman*, 61 Ohio St. 1, 47 L. R. A. 156, 55 N. E. 158, also involved a surface improvement of a street, and not an assessment for the value of lands taken for the right of way to open a new street, and that case is not affected by the case at bar. The case of *Krumberg v. Cincinnati*, 29 Ohio St. 69, relied upon *Cleveland v. Wick*, 18 Ohio St. 303, to sustain the assessment of the compensation paid for the land taken, back upon the remaining lands, but did not consider the constitutionality of the statute then in force, but assumed it to be sustained by the *Wick Case*. In that case it was conceded that the assessment for the value of the land taken was to reimburse the city treasury for money paid for the lands, but the question as to whether assessments could be made for that purpose was not argued by counsel or considered by the court. The case of *Caldwell v. Carthage*, 49 Ohio St. 334, 31 N. E. 602, construed the statutes then in force, but did not pass upon the question of their constitutionality. The same is true of the case of *Cincinnati v. Batsche*, 52 Ohio St. 324, 27 L. R. A. 336, 40 N. E. 21.

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It has been urged that the *Wick Case* has been sustained by the Supreme Court of the United States in *Norwood v. Baker*, 172 U. S. 288, 43 L. ed. 451, 19 Sup. Ct. Rep. 194. That is a mistake. That court said: "It is said that the judgment below is not in accord with the decision of the supreme court of Ohio in *Cleveland v. Wick*, 18 Ohio St. 303, 310. But that is a mistake. That case only decided that the owner whose property was taken for a public improvement could not have his abutting property exempt from its due proportion of an assessment made to cover the expense incurred in making such improvement; that his liability in that regard was not affected by the fact that he was entitled to receive compensation for his property actually taken for the improvement, without deduction on account of benefits to his other property. That the decision covered no other point is shown by the following extract from the opinion of the court." Then follows an extract from the opinion. In the above the Supreme Court of the United States gave only its construction of the *Wick Case*, but further along, on page 296, 172 U. S., page 197, 19 Sup. Ct. Rep., and page 454, 43 L. ed., the court says: "We have considered the question presented for our determination with reference only to the provisions of the national Constitution. But we are also of opinion that, under any view of that question different from the one taken in this opinion, the requirement of the Constitution of Ohio that compensation be made for private property taken for public use, and such compensation must be assessed 'without deduction for benefits to any property of the owner,' would be of little practical value if, upon the opening of a public street through private property, the abutting property of the owner whose land was taken for the street can, under legislative authority, be assessed, not only for such amount as will be equal to the benefits received, but for such additional amount as will meet the excess of expense over benefits." We have considered the case at bar only in view of the Constitution of this state, so as to more clearly define the rights of the owners of private property when taken for public use for making streets, and the limitation upon the power of assessment in such cases, but it would seem that the judgment of the circuit court is also erroneous under the case of *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, because the assessment is far in excess of the benefits; but under that case a new assessment might be made to equal the benefits, if any, while under the Constitution of Ohio no assessment whatever can be made, back upon the property of the railway company, for the compensation paid and costs and expenses incurred in the appropriation proceedings. Sometimes a municipality desires to open a new street, or straighten or widen an old one, in the line of general improvements, and for the general benefit and appearance of the municipality, and not for the special benefit of the lots and lands in a particular district. In such cases the compensation, costs, and expenses for lands

taken should be paid by the municipality out of its general revenue fund raised for such purposes. Sometimes the people in the vicinity desire to have a new street opened, or an old one straightened or widened, as a special benefit to their lots and lands, and when the same would not be of sufficient benefit to the municipality to warrant the payment of the compensation, costs, and expenses out of the treasury. In such cases the municipality may refuse to act in the matter until the parties to be specially benefited supply the funds to pay the compensation, costs, and expenses, or such portion thereof as the municipality regards fair and just, the same as is now authorized by § 4651, Rev. Stat., as to public roads. By acting upon this principle the burden can be placed where it belongs, without forcing people to contribute by assessments where they are not benefited, and where they are opposed to the opening, straightening, or widening of the street; and, more than all else, their constitutional rights will be protected. If the present statutes are not broad enough, they can be amended.

Judgment reversed, and judgment for plaintiff in error.

Williams, J., dissents from the judgment.

Minshall, J., dissenting:

I concur in the reversal, but not in the grounds on which it is placed. They admitted facts show that it is physically impossible for the property of the railway company to be benefited by the construction of the overhead bridge, as property "abutting" on the improvement. It cannot be used by the company as an abutting owner, nor can any one using it have access to the company's

road. It may be that its construction is a benefit to the company, in that its construction may relieve the company from the dangers incident to a grade crossing. But such benefits are merely incidental to the improvement, and are not of a kind with those for which an assessment may be made for the cost of an improvement. Such benefits must be common to all abutting property owners. Such as are not common cannot afford a basis for the apportionment of costs and expenses among property owners. It is the benefits that arise from the use to be made of the improvement that can be regarded in making an assessment, and none others. I fail to see any necessity in this case for overruling any of the former decisions of this court, and it will be quite time enough to consider whether any of them should be overruled when the necessity arises. The opinion in *Cleveland v. Wick* was prepared by a judge distinguished for his ability and accuracy of reasoning, and its supposed fallacies have withstood all criticism for a third of a century, and it has been followed and approved time and again; and only recently the case of *Henkel v. Cincinnati*, 58 Ohio St. 726, 51 N. E. 1098, was disposed of on its authority alone. It is further to be observed that in *Norwood v. Baker* the Supreme Court of the United States does not question its accuracy. The majority regarded it as quite distinguishable from the case before the court, and it was fully approved by the minority. The proposition that the value of lands condemned for a street must be paid for from the general fund of the municipality, or from a fund raised by general taxation, virtually destroys the power of assessment, is contrary to the practice that has prevailed under the present Constitution, and is unsupported by any reported case.

NEW JERSEY COURT OF ERRORS AND APPEALS.

MIDDLESEX WATER COMPANY
v.
KNAPPMANN WHITING COMPANY,
Plff. in Err.

(.....N. J.....)

A water company is liable to a consumer for the loss of property by fire, if this is due to the failure to supply water sufficient for fire purposes, although the failure is due to a breaking of the pipes, without any fault of the water company, when it had expressly contracted with him to supply water for fire purposes.

(March 5, 1900.)

ERROR to the Supreme Court to review a judgment in favor of plaintiff in an ac-

NOTE.—As to liability for loss by fire due to the lack of adequate water supply, see also *Howson v. Trenton Water Co.* (Mo.) 23 L. R. A. 146, and *note*; *Springfield F. & M. Ins. Co. v. Keeseville* (N. Y.) 30 L. R. A. 660; and *Gorell v. Greensboro Water Supply Co.* (N. C.) 46 L. R. A. 518.
49 L. R. A.

tion to recover the amount alleged to be due under a contract for water supply in which defendant sought to set off damages which it alleged to have been caused by plaintiffs' failure to furnish water as required by the contract. *Reversed.*

Statement by **Depue, J.**:

The Middlesex Water Company, the defendant in error, brought an action in the supreme court to recover the amount due for water supplied to the defendant, a manufacturing company, whose factory and place of business were in the township of Woodbridge, and for furnishing and setting up a meter and connecting the defendant's premises with the mains of the plaintiff, in pursuance of an agreement between the parties set out in the plaintiff's declaration and in the bill of particulars. The dispute in the case was not upon the claim of the plaintiff for the services set out in its bill of particulars. The controversy was with respect to the defendant's claim for damages sustained by reason of nonperformance of the contract by the plaintiff. This claim was

made by way of recoupment, pursuant to § 129 of the practice act (2 Gen. Stat. p. 2555), as amended by the act of 1896 (Pub. Laws 1896, p. 185). The plaintiff was incorporated as a water company. The defendant sent to the company a proposition in writing, as follows:

To the Middlesex Water Company:

In consideration of \$1 paid by you to the subscriber, the receipt whereof is hereby acknowledged, we do hereby agree that if you will within the present year, 1897, construct your waterworks in the township of Woodbridge, N. J., and lay a water main in the public highway adjoining or near our premises at "Star Landing," so-called, the point of delivery by the company to be near the branch of the Central R. R. of New Jersey and our factory, about 1500 feet from the main 12-inch line in the Woodbridge road, and furnish pure and wholesome water therein suitable for drinking purposes and other domestic uses, and suitable for use in steam boilers, and with a pressure sufficient for fire purposes, we will take water from said main at said point, for a supply to our factory and for fire purposes, for the period of five years from the date when you are ready to turn the water on, and pay for the same the sum of six hundred dollars (\$600) per annum, in quarterly payments, on the second days of January, April, July, and October, which shall entitle us to draw in each quarter an amount not exceeding at the rate of one million five hundred and fifty thousand gallons; and, in case we take in any quarter more than said amount, we are to pay for such excess at the rate of \$1 per thousand cubic feet. The expense of connecting premises with the main and of setting and maintaining a meter to be paid by the consumer at cost, we to have the right at all reasonable times to inspect and read said meter with the agent of the water company. This agreement shall, at our option, be null and void unless the construction of the waterworks system is begun within four months from date and in good faith prosecuted to completion as above provided.

Dated at New York, April 26th, 1897.

[Signed] Knappmann Whiting Co.

By Charles H. Smith, Treasurer.

The statute in relation to recoupment provides that in all actions on contract the defendant may recoup all damages which he may have sustained by reason of any cause of action arising out of the contract set forth in the plaintiff's declaration as the foundation of the plaintiff's demand, and if the defendant shall recoup damages, and the amount of such damages shall be found to exceed the demand of the plaintiff, judgment shall be given in favor of the defendant and against the plaintiff in such action for such excess, with costs. The notice annexed to the plea sets out the defendant's cause of action by way of recoupment in substance as follows: That the defendant sustained damage by reason of the failure of the plaintiff to perform its agreement

to supply the defendant with water with a pressure sufficient for fire purposes for use in the prevention and extinguishment of fires in its factory; that on or about the 17th of May, 1898, the plaintiff, without any notice to the defendant and without any cause therefor given by the defendant, shut off the supply of water to the said factory; that on the 18th day of May the defendant's factory caught fire, and, by reason of the failure and neglect of the plaintiff to perform its agreement to furnish and supply the defendant with water with sufficient pressure for fire purposes, the said factory and its contents were wholly destroyed by fire, causing loss and damage to the defendant to the extent of \$20,000,—concluding with averments in compliance with the statute concerning recoupment.

Mr. Edward S. Savage for plaintiff in error.

Mr. Frank Bergen, for defendant in error:

Contracts such as that in question are to be construed by the light of experience.

Proprietors of Mill Dam Foundry v. Hovey, 21 Pick. 417; *Dexter v. Norton*, 47 N.Y. 62, 7 Am. Rep. 415; *Chicago, M. & St. P. R. Co. v. Hoyt*, 149 U. S. 1, 37 L. ed. 625, 13 Sup. Ct. Rep. 779; *Hadley v. Baxendale*, 9 Exch. 353.

The absence of water under pressure, if it was absent, was not the proximate cause of the loss of the building. The proximate cause was the fire, caused, probably, by friction of a shaft in a journal.

Squire v. Western U. Teleg. Co. 98 Mass. 237, 93 Am. Dec. 157; *Memphis & C. R. Co. v. Reeves*, 10 Wall. 176, 19 L. ed. 909; *Denny v. New York C. R. Co.* 13 Gray, 481, 74 Am. Dec. 645; *State v. Ward*, 9 Heisk. 100; *Dubuque Wood & Coal Asso. v. Dubuque*, 30 Iowa, 176; *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695; *Ashe v. De Rossett*, 50 N. C. (5 Jones, L.) 299, 72 Am. Dec. 552; *Walker v. Tucker*, 70 Ill. 527; *Walton v. Hollis* (Misc.) 16 So. 260; *Robinson v. Davison*, L. R. 6 Exch. 269; *Dickey v. Linscott*, 20 Me. 453, 37 Am. Dec. 66; *Murdock v. Boston & A. R. Co.* 133 Mass. 15, 43 Am. Rep. 480; *Witherbee v. Meyer*, 155 N. Y. 446, 50 N. E. 58; *Jones v. Gilmore*, 91 Pa. 310; *Macy v. Peach*, 2 Kan. App. 575, 44 Pac. 687; *Browne v. United States*, 30 Ct. Cl. 124; *Patch v. Covington*, 17 B. Mon. 722, 66 Am. Dec. 186; *King v. Miles City Irrig. Ditch Co.* 16 Mont. 463, 41 Pac. 431.

Depue, J., delivered the opinion of the court:

The application in writing of the manufacturing company for water was accepted by the water company, and became a contract of the parties, respectively. The water company in its declaration sets out the contract as expressing the terms of its agreement, as well as the agreement on the part of the defendant. The bill of particulars shows that the water company's claim against the defendant was founded on this agreement. The water company in this suit

sued for and recovered payments for water under the contract which became due July 1, 1898 (\$150), and October 1, 1898 (\$150), as the fire in question took place in May, 1898. The litigation, therefore, must be decided upon the terms and legal effect of this paper as the agreement *inter partes*. The facts, briefly, are these: The water company, having accepted the proposition of the defendant, connected defendant's works with its mains, in accordance with the contract, and in November, 1897, purchased and set up a meter, and began to supply the defendant with water. The plant of the water company, with its pumping station, is located at South Plainfield, and its principal main extends in an easterly direction from South Plainfield, through the villages of Metuchen, Woodbridge, and Seawaren, to the village of Cartaret on Staten Island, a distance of about 15 miles. Between Woodbridge and Cartaret the main crosses a stream in which the tide ebbs and flows. The main at that point was laid at the bottom of the stream, and was often submerged several feet below the tide. On the night of the 18th of May, 1898, a connection of the blow-off in the principal main of the water company gave way at a point where it crosses the stream, whereby water was discharged, and the usual pressure was removed. The water company was notified of the absence of pressure about 11 o'clock in the evening of the 18th, and immediately the superintendent and others set out to find the cause. It was a difficult leak to find, owing to the fact that the opening was under the waters of the creek. The men found it about 4 o'clock in the morning of the 19th. By that time the tide was so high that it was impossible to repair it, and it was necessary to wait until low tide, which occurred about noon of the 19th, and the superintendent began to open the gate just west of the creek at 2 o'clock, taking about twenty minutes to do so. On the day following the break in the pipe the defendant's factory caught fire, and with its contents was burned and destroyed, with a loss to the defendant of \$16,889, after deducting insurance and salvage. No notice of the break in the pipe was given to the defendant. There is some conflict in the evidence as to whether the pressure was on the main at the defendant's works at the time the fire broke out. In view of the judge's instruction, it must be assumed that the pressure was not on, or that question must have gone to the jury. It must also, for the present purposes, be assumed that the burning of the building was the result, proximately, of the failure of plaintiff to furnish water with a pressure sufficient for fire purposes. If any question of the causal connection between the failure to supply water and the fire was involved, that, also, would have been a question for the jury.

As already observed, this contract was an agreement *inter partes*. Cases, such as *Nickerson v. Bridgeport Hydraulic Co.* 46 Conn. 25, 33 Am. Rep. 1; *Beck v. Kittanning Water Co.* (Pa.) 9 Cent. Rep. 536, 11 49 L. R. A.

Atl. 300, and *Boston Safe-Deposit & T. Co. v. Salem Water Co.* 94 Fed. Rep. 238, which hold that, where the contract of the water company is with the city, no privity of contract exists between the water company and an inhabitant of the city whose property was destroyed by fire, to lay the foundation of an action against the company, do not apply to this case. The water company by this agreement in express terms contracted with the defendant to furnish to it water suitable for drinking purposes and other domestic uses, and for use in steam boilers, and with a pressure sufficient for fire purposes; the manufacturing company stipulating in the same connection that it would take water for a supply of its factory and for fire purposes for the period of five years, and pay for it the stipulated price. The construction of the agreement is free from doubt. The premises to which the contract related were a factory with its contents. The enumeration in the contract of the purposes for which the water was contracted for comprehends the supply of water appropriate to and adequate for all the enumerated purpose. The construction of this agreement by the learned judge at the trial presents the merits of this controversy. His instruction was as follows: "Under this agreement there is no express contract by the water company that it will furnish water uninterruptedly for five years to the defendant. There is no agreement that an unavoidable accident will not happen, causing temporary stoppage of the water supply; but the agreement on the part of the defendant to take water and pay for it imposed on the water company the duty of exercising reasonable care in the construction and maintenance of the waterworks in such a way as to give a proper supply of water to the defendant during the term of five years. If, therefore, the water company was guilty of any negligence in these respects, it is liable for such damages as proximately resulted from such negligence." On this construction of the agreement the judge directed a verdict for the plaintiff. To this ruling the defendant excepted. The agreement contained an express contract to furnish water for fire purposes, without condition or qualification. The learned judge, by his construction, introduced into the agreement a qualification that would exempt the water company from performing its agreement in cases where, without negligence on its part, the supply of water was cut off. To sustain this construction counsel rely mainly on *Proprietors of Mill Dam Foundry Co. v. Hovey*, 21 Pick. 417. In that case the Mill Dam Foundry Company were proprietors of a foundry. They entered into an agreement with Hovey to manufacture iron, steel, etc., on hand. The foundry company, although they were lessees of the works under the Boston Waterpower Company, were, as between the parties to the suit, under an obligation for the continuance of the water power. They made a contract with Hovey for the manufacture for them of certain iron, steel, etc., on hand into

plate iron for the market; the foundry company binding themselves to furnish all the iron, steel, and other materials used in and about said manufacture. One of the mill-dams was broken by a high tide. At that time the defendant had on hand a large quantity of materials in different states of manufacture. The dam was repaired with due diligence, and the waters restored. In a suit by the foundry company against the defendant for the nonperformance of his agreement to manufacture, the defendant treated the covenant to repair as a condition which authorized him to repudiate the entire contract. The defense was disallowed. The case turned on the distinction between a condition and a covenant. The court held that, if the breaking of the dam was not a substantial suspension and destruction of the water power for manufacturing purposes, but only a temporary diminution, subjecting the defendant to some loss and inconvenience, it was not a breach of a condition precedent which would absolve him from further performance of his contract, although he might have remedy by an action for damages. The result in that case is analogous to the decisions of this court with respect to covenants which are not conditions precedent. *Blackburn v. Reilly*, 47 N. J. L. 290-308, 1 Atl. 27; *Gerli v. Poidebard Silk Mfg. Co.* 57 N. J. L. 432, 30 L. R. A. 61, 31 Atl. 401.

The actual decision of the Massachusetts court is upon an issue not in this case, and the principle adopted by the court, so far as it is applicable to this litigation, is adverse to the claim of the water company. Chief Justice Shaw, in delivering the opinion of the court, on page 441, 21 Pick., says: "The distinction is now well settled between an obligation or duty imposed by law and that created by covenant or act of the party. When the law creates a duty, and the party is disabled from performing it without any default of his own, the law will excuse him, as in waste to a tenement, if the same be destroyed by tempest or enemies, the lessee is excused. But when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. . . . The good sense of the rule seems to be this: that in a case where, if an event happen it must inevitably cause loss and damage to one or the other of the contracting parties, the party who has contracted that such an event shall not happen, although he cannot specifically perform that contract, because the event may happen through the act of God or inevitable necessity, yet he shall stand to that risk, and make good all the loss which shall occur in consequence of the happening of the event contemplated. The party thus contracting takes the consequences." The defense made in that case was overruled on the ground that the contract between the parties did not create a condition which would justify rescission,—that the plaintiffs' remedy was in an action on the covenant for 49 L. R. A.

damages. The portions of the chief justice's opinion which are pressed upon the consideration of this court are his observations with respect to the construction of such a contract when expressed in general terms, and implied qualifications and exceptions are obviously necessary to carry into effect the intentions of the parties collected from the whole contract,—qualifications which are founded on the presumption that the parties who enter into a contract with reference to a business are presumed to understand how that business is usually carried on, and to have reference to such known circumstances in making their contracts. The illustrations given are contracts for the supply of water power, in which it must be presumed that the parties know that such power may and must necessarily be occasionally interrupted; that on a few very cold days in winter the ice will clog the wheel; that it may take several hours to clear it; that a freshet may carry away a gate, and that it will take a few days to replace it; that the covenants, though in general terms, are to be taken with these necessary and implied exceptions. These remarks apply to interruptions occasioning temporary inconveniences, where the damage is inconsiderable, and are limited to cases in which the contract is expressed in general terms. These observations of the chief justice, if they are not limited to the particular defense then before the court, as is made probable by his remarks on page 444, do not apply to the situation of the parties in this suit. The agreement between the parties is not expressed in general terms. The contract is specific and precise,—to furnish "water with a pressure sufficient for fire purposes." The subject-matter of the contract concerned the supply of water for use for fire purposes. The parties, in making this agreement, contemplated the protection of the defendant's premises from a loss by fire, which might happen at any time, and occasion, not merely a temporary inconvenience, but an entire destruction of property. The covenant to pay rent, which at common law bound the tenant to pay although the premises were destroyed by accident, is never more explicit than the plaintiff's agreement in this case. The decision of the court in *Chicago, M. & St. P. R. Co. v. Hoyt* is more pertinent to the issue in this suit. There the action was on an agreement by the railroad company that the total amount of grain received at Hoyt's elevator should be at least 5,000,000 bushels on an average each year, with an agreement to pay one cent per bushel for the amount of such deficiency. It was held, upon the terms of this agreement, that the railroad company was bound to pay the one cent per bushel on the amount of such deficiency, and that such construction met the real object and purpose which the parties had in view in entering into the contract. 149 U. S. 1-12, 37 L. ed. 625-629, 13 Sup. Ct. Rep. 779.

The general rule of law applicable to such agreements is that, "where there is a posi-

tive contract to do a thing not in itself unlawful, the contractor must perform it, or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome, or even impossible." Pollock, Contr. 362. The exceptions to the generality of this rule of law are few, and will be stated presently. The leading case on that subject is *Paradine v. Jane*, Aleyn, 26. The decision in that case is stated in the opinion of Mr. Justice Whelpley in *Public Schools v. Bennett*, with an extensive citation of cases to the same effect. In his opinion the learned justice says: "No rule of law is more firmly established by a long train of decisions than this: that, where a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; therefore, if a lessee covenant to repair a house, though it be burned by lightning or thrown down by enemies, yet he is bound to repair it. . . . No matter how harsh and apparently unjust in its operation the rule may occasionally be, it cannot be denied that it has its foundations in good sense and inflexible honesty. He that agrees to do an act should do it, unless absolutely impossible. He should provide against contingencies in his contract. Where one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it, or, rather, the law leaves it where the agreement of the parties has put it, the law will not insert, for the benefit of one of the parties, by construction, an exception which the parties have not, either by design or neglect, inserted in their engagement." 27 N. J. L. 513. In that case it was decided, among other things, that the damage occasioned by the destruction of the building by a gale of wind must be borne by the contractor, who entered into a contract to build and erect the building. In a similar case (*Dermott v. Jones*) Mr. Justice Swayne, in delivering the opinion of the court, referred to *Public Schools v. Bennett* and other cases, and said: "The principle which controlled the decision of the cases referred to rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires parties to do what they have agreed to do. If unexpected impediments lie in the way, and a loss must ensue, it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated." 2 Wall. 1, *sub nom. Ingle v. Jones*, 17 L. ed. 762. In *Jones v. United States*, 98 U. S. 24, 24 L. ed. 644, under an executory contract for the manufacture and delivery of goods at a specified time, it was held that the failure to comply with the terms of the contract with respect to the time of delivery was not excused by the fact that the mill in which the cloths

were manufactured was destroyed by fire, and that consequently the party failed to make deliveries of the cloths as the contract required. In the English courts the rule laid down in *Paradine v. Jane* has been adhered to with great tenacity. In *Atkinson v. Ritchie* the master agreed with the freighter that he would proceed to St. Petersburg, and there load for the freighter a complete cargo, and deliver the same at London. It was held in that case that the master, after taking in at St. Petersburg about half a cargo, and sailing away upon a general rumor of a hostile embargo being laid on British ships by the Russian government, was liable in damages for the short delivery of the cargo, though the jury found that he acted bona fide and under reasonable and well-grounded apprehension at the time. Lord Ellenborough, Ch. J., delivering the opinion of the court, said: "No exception which is not contained in the contract itself can be ingrafted upon it by implication as an excuse for its nonperformance. The rule laid down in the case of *Paradine v. Jane*, Aleyn, 27, has often been recognized in courts of law as a sound one; i. e. that, 'when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.'" 10 East, 530-533. The English and American cases are stated in 1 English Ruling Cases, pp. 338-351, and in 6 English Ruling Cases, pp. 597-617, and also in 1 Am. & Eng. Enc. Law, 2d ed. pp. 588-590.

The principle underlying all these cases is that where the contract is express, as it is in this case,—to furnish water with a pressure sufficient for fire purposes,—to do a thing not unlawful, the contractor must perform it; and if, by some unforeseen accident, the performance is prevented, he must pay damages for not doing it. No distinction is made between accidents that could be foreseen when the contract was entered into and those that could not have been foreseen. Where, from the result of such an accident, one of two innocent persons must sustain a loss, the law, as was said by Mr. Justice Whelpley, casts it upon him who has agreed to sustain it, or, rather, leaves it where the agreement of the parties has put it, and will not insert, for the benefit of one of the parties, by construction, an exception which the parties have, either by design or neglect, omitted to insert in their agreement. To this general rule there are three exceptions. I know of no other. They are stated in the English notes (6 English Ruling Cases, 611) as follows: First, where the subsequent impossibility is imposed by law; secondly, where the continued existence of something essential to the performance is an implied condition of the contract; thirdly, in contracts for personal services, in which there is generally the implied condition that the person who is to render the service is alive and not incapacitated by illness. The first of these exceptions exists where there is a declaration of

war between two countries, of which the parties severally were inhabitants, which made the performance of the contract illegal. *Esposito v. Bouden*, 7 El. & Bl. 763; *Hillyard v. Mutual Ben. L. Ins. Co.* 35 N. J. L. 415-422, 37 N. J. L. 444, 18 Am. Rep. 741. The second exception is illustrated in the case of *Taylor v. Caldwell*. The defendant in that case agreed to let certain gardens and a music hall to the plaintiffs for four specified days to come for the purpose of giving a series of concerts. After the agreement was entered into, and before the day arrived for the first concert, the music hall was accidentally destroyed by fire. It was held that, as the existence of the hall was necessary for the performance of the contract, the defendants were excused from liability in respect to its performance, and that no action would lie against them. In that case the agreement was wholly executory, and the result is placed by Mr. Justice Blackburn on the principle that "where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done." 3 Best & S. 826, 6 English Ruling Cases, 603. This doctrine was applied in the supreme court of New York to an executory contract for the sale and delivery of specified articles of personal property which were accidentally destroyed by fire before the time for delivery. *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415. In a subsequent case in the same court, in an opinion delivered by the same judge, it was held that, under a contract to deliver a certain manufactured article within a specified time, the destruction by fire of the defendant's rolling mill, which prevented the defendant from completing its contract by the time fixed in the agreement, did not excuse the defendant's failure to perform the contract, even though the accident prevented performance. *Booth v. Spuyten Duyvil Rolling Mill Co.* 60 N. Y. 487. The third class comprises contracts for purely personal services, where the life or health of the contracting party is essential to the execution of the contract. *Robinson v. Davison*, L. R. 6 Exch. 289. Cases in the first and third classes have no relevancy to this litigation. Cases in the second class, of which *Taylor v. Caldwell* is the leading case, were decided upon executory contracts, and proceed on the ground that the existence of the subject-matter of the contract at the time of performance was a condition upon which the contract itself took effect. In *Taylor v. Caldwell* the music hall was destroyed by a cause *ab extra* before the time for the performance of the

contract, and, performance having become impossible, the contract was entirely put at an end as to both parties. In this case the interruption of the delivery of water by the breaking of the pipe was a temporary interference with the performance of the plaintiff's contract. The failure to deliver water for the period required to repair the break did not justify either party in rescinding the contract as for a breach of condition. The case cited from the Massachusetts courts establishes that fact conclusively. *Proprietors of Mill Dam Foundry Co. v. Hovey*, 21 Pick. 417. The defendant's factory was at the time of the breach of this contract standing in a condition to receive and use water. Its destruction is alleged to have been due to the failure of the plaintiff to supply water. It was not due to any antecedent cause *ab extra*, and the plaintiff cannot set up the destruction of the premises, imputable to its own breach of contract, to discharge it from the consequences of its failure to perform one of its terms. If the plaintiff's waterworks had been accidentally destroyed, in an action by the defendant for not continuing to supply water under the contract, or in a suit against the defendant for the payments reserved for the use of water after the destruction of its factory, under the ruling in *Taylor v. Caldwell*, a different question might have arisen. Decisions in this aspect cannot be permitted to have application to the circumstances of this case, unless *Paradine v. Jane*, *Public Schools v. Bennett*, and the long line of cases, English and American, holding the principles adjudged in those cases, are set aside.

Applying the rules of law adjudged in the cases, and especially in *Public Schools v. Bennett*, we have here this condition of affairs: The water company expressly contracted to supply water for fire purposes. The company failed to do so, and the premises of the defendant took fire, occasioning a considerable loss. Assuming that this result was due to the breaking of the pipes, without any fault on the part of the water company, we have a loss to be borne by one party or the other. In such a condition of affairs, to adopt the language of Mr. Justice Whelpley, "where one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it, or, rather, the law leaves it where the agreement of the parties has put it. . . . Between accidents by the fault of the contractor and those where he is without fault, they all rest upon the simple principle—such is the agreement, clear and unqualified, and it must be performed, no matter what the cost, if performance be not absolutely impossible."

The construction by the trial court of the agreement was erroneous, and the judgment should be reversed.

Albert F. BEHRING *et al.*
v.
Alonzo SOMERVILLE, *Plff. in Err.*
(.....N. J.....)

- *1. S. held an assignment, as collateral security of a mortgage against B., from K., the holder of it, who had previously assigned it to another by an assignment which was recorded at the time K. assigned it to S., but the mortgage was left in the hands of K., and by him delivered to S. B., in the presence of K., paid S. the sum due him from K., and paid K. the balance due on the mortgage, which was delivered up and canceled. B., having been compelled to pay the mortgage to the first assignee, sued S. for the money paid by her to him. *Held*, that as the money was paid by B. to S. on a mistake of fact, of which both were ignorant, and there being no fraud, the money could not be recovered back by B.
2. Where the fact is equally unknown to both parties, and where each has equal means of information, money paid upon a mistake of fact cannot, in the absence of fraud, be recovered back, the money being due to the payee.
3. As S. had surrendered his assignment, and lost his legal hold upon the mortgage, B. could not call upon him to refund the money paid to him, without restoring him to his lost position.
4. In dealing with a special verdict, in strict practice, the court draws conclusions of law from facts found, but does not draw conclusions of fact from evidence. The material fact relied upon should be expressly found.

(November 21, 1899.)

ERROR to the Supreme Court to review a judgment in favor of plaintiff in an action brought to recover money alleged to have been paid to defendant under mistake. *Reversed.*

The facts are stated in the opinion.

Mr. Philemon Woodruff, for plaintiff in error:

This action cannot be sustained because there is no privity of contract between the parties.

Sergeant v. Stryker, 16 N. J. L. 464, 32 Am. Dec. 404; *Nolan v. Manton*, 46 N. J. L. 231, 50 Am. Rep. 403; *Cory v. Somerset County Freeholders*, 47 N. J. L. 187; *First Baptist Church v. Syms*, 51 N. J. Eq. 363, 28 Atl. 461; *Westcott v. Sharp*, 50 N. J. L. 392, 13 Atl. 243.

The action is not one which can be maintained because the plaintiff in error parted with King's promissory note at the time the same was paid by Mrs. Behring and King.

The Behrings' legal position in this cause is no better than Somerville's because they had the same opportunity to examine the records of the county with respect to assignments of mortgages that the defendant had.

Mott v. Newark German Hospital, 55 N.

*Headnotes by VAN SICKEL, J.

J. Eq. 722, 37 Atl. 757; *Palmer v. Merrill*, 6 Cush. 282, 52 Am. Dec. 782; *Chase v. Breed*, 5 Gray, 440; *Falk v. James*, 40 N. J. Eq. 484, 23 Atl. 813; *Baldwin v. Johnson*, 1 N. J. Eq. 441; *Rose v. Kimball*, 16 N. J. Eq. 185; *Kamena v. Huelbig*, 23 N. J. Eq. 78; *Dirigo Tool Co. v. Woodruff*, 41 N. J. Eq. 336, 7 Atl. 125; 1 Schouler, Pers. Prop. pp. 513, 514.

Bonds and mortgages being assignable in equity without a written instrument (*Kinna v. Smith*, 3 N. J. Eq. 14; *Allen v. Pancost*, 20 N. J. L. 68; *Kamena v. Huelbig*, 23 N. J. Eq. 78), the defendant was justified, even if actual notice of an assignment as a pledge had been given him two years before, in assuming that the purpose of the pledge had been answered, and that the papers had been voluntarily returned to the pledgee by the pledgee.

Messrs. Collie & Swayze, for defendants in error:

Somerville was not the owner of the mortgage.

Somerville can be in no better position, and acquire no better title, than his assignor, King, had at the time of the assignment.

Atwater v. Underhill, 22 N. J. Eq. 600; *Magie v. Reynolds*, 51 N. J. Eq. 113, 26 Atl. 150; *Fisher v. Bull*, 52 N. J. Eq. 298, 29 Atl. 440.

Somerville could acquire no greater right than King had at the time.

Kamena v. Huelbig, 23 N. J. Eq. 78; *Fisher v. Bull*, 52 N. J. Eq. 298, 29 Atl. 440; *Woodruff v. Morristown Inst. for Savings*, 34 N. J. Eq. 174; *Ryall v. Rowles*, 1 Ves. Sr. 348, 2 White & T. Lead. Cas. in Eq. 1579. *794.

The record of the assignment from King to Mott was constructive notice to Somerville of Mott's rights.

Rose v. Kimball, 16 N. J. Eq. 185; *Stein v. Sullivan*, 31 N. J. Eq. 409; *Mellick v. Mellick*, 47 N. J. Eq. 86, 19 Atl. 870.

Mott is not estopped to assert his right to the mortgage as against Somerville.

Harrison v. New Jersey R. & Transp. Co. 19 N. J. Eq. 488; *Heyder v. Excelsior Bldg. Loan Asso.* No. 2, 42 N. J. Eq. 403, 8 Atl. 310; *Lawson v. Carson*, 50 N. J. Eq. 370, 25 Atl. 191, *Reversed* in 52 N. J. Eq. 821, 31 Atl. 336.

The money paid to Somerville was paid under mistake of fact, and can be recovered.

Milnes v. Duncan, 6 Barn. & C. 671; *Kelly v. Solari*, 9 Mees. & W. 54; *Bell v. Gardiner*, 4 Mann. & G. 11; *Townsend v. Croudy*, 8 C. B. N. S. 477; *Durrant v. Ecclesiastical Comrs.* L. R. 6 Q. B. Div. 234; *Brownlie v. Campbell*, L. R. 5 App. Cas. 925; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Appleton Bank v. McGilvray*, 4 Gray, 518, 64 Am. Dec. 92; *Marriot v. Hampton*, 7 T. R. 269, 2 Smith, Lead. Cas. Hare & W.'s Notes, 400, *393.

NOTE.—As to assumption for money paid by mistake, see *State ex rel. McCarty v. Nelson* (Minn.) 4 L. R. A. 300, and *note*; *Craft v. South Boston R. Co.* (Mass.) 5 L. R. A. 641; *Mansfield v. Lynch* (Conn.) 12 L. R. A. 285; 40 L. R. A.

Langevin v. St. Paul (Minn.) 15 L. R. A. 766; *Alton v. First Nat. Bank* (Mass.) 18 L. R. A. 144; *Soderberg v. King County* (Wash.) 83 L. R. A. 670.

Van Syckel, J., delivered the opinion of the court:

This case was tried below before Mr. Justice Depue, by consent of parties, without a jury. The said justice found the following facts: On the 5th of February, 1885, Mrs. Behring executed a mortgage for \$500 to William King. William King's executors, on the 23d of October, 1886, assigned said mortgage to Isaac W. King, which assignment was recorded November 22, 1886. Isaac W. King assigned this mortgage, and also a mortgage against one Hartman for \$700, to one Mott, April 29, 1890, to secure a note for \$1,000. This assignment was recorded in February, 1892. Judgment was obtained by Mott against Isaac W. King on this note in May, 1895, for \$1,200.66. King is insolvent, and resides out of this state. King retained possession of the Behring bond and mortgage after he assigned it to Mott, and on the 25th of March, 1893, assigned it to the said Somerville to secure the sum of \$325, which assignment was recorded November 3, 1893. Somerville had the records searched before he took said assignment, and the prior assignment to Mott was overlooked. On the 11th of October, 1893, Mrs. Behring, at King's request, went with him to Somerville's office, and there paid the principal sum due on the mortgage; the interest being abated by an arrangement between King and Mrs. Behring. Mrs. Behring gave Somerville \$325, and paid the balance to King. The mortgage was produced by Somerville, and a receipt directing the county clerk to cancel it was signed by King and Somerville, and then King went with Mrs. Behring to the clerk's office, and took the receipt and mortgage, and had the mortgage canceled of record. The receipt was as follows:

County Clerk of Essex County:

The within mtg. being fully paid and satisfied, please cancel the same of record.

Isaac W. King.

A. Somerville.

Neither Mrs. Behring nor Somerville had actual notice of the assignment to Mott. This suit was brought by Mrs. Behring to recover from Somerville the money which she paid him on account of the mortgage. By agreement of the respective parties it was submitted to the supreme court, upon the facts found as aforesaid, whether Mrs. Behring was entitled to recover of Somerville the said sum of \$325, and that the said special case might be turned into a special verdict. Thereupon the supreme court, being of opinion that Mrs. Behring was entitled to recover at the request of the attorney of Somerville, ordered that said special case be treated as if a special verdict had been rendered by a jury of the above-stated facts as found by said justice of the supreme court, and, upon motion of the attorney of Mrs. Behring, entered judgment upon said verdict in favor of Mrs. Behring and against Somerville for the sum of \$430.50. The writ of error in 49 L. R. A.

this case is prosecuted to review the judgment of the supreme court.

It appears by the facts found that neither Mrs. Behring nor Somerville had actual notice of the assignment to Mott, and there is no evidence whatever to charge Somerville with fraud or want of good faith in this transaction. The statute authorizing the recording of assignments of mortgage provides that such record shall be notice of such assignment to all persons concerned from the time the assignment is left for record. Both Mrs. Behring and Somerville are therefore chargeable with constructive notice of the previous assignment to Mott, but, neither having actual notice, the mistake of fact upon which they acted was mutual, each believing that Somerville had a valid assignment of the mortgage, subject to no paramount equities, and each having equal and adequate means of ascertaining the real situation by reference to the record. In *Deare v. Carr*, 3 N. J. Eq. 513, the chancellor said: "There are a great variety of cases in which relief will be afforded; so many, indeed, as to have given rise to the general rule that an act done, or a contract made, under a mistake or ignorance of a material fact, is voidable and relievable in equity. The rule has a number of important qualifications or exceptions, and these are often as important as the rule itself." After discussing the authorities, Chancellor Vroom classified the case in hand with the exceptions to the general rule, for the reason that the party seeking relief on the ground of a mistake of fact could have ascertained the true situation by reference to the record of mortgages. As applicable to that case, where a purchase was made at sheriff's sale, the parties acting in like ignorance of the record, he lays down the rule that where the fact is equally unknown to both parties, or where each has equal and adequate means of information, and both have acted in good faith, the court will not interfere.

The right of a debtor to recover from his creditor money paid by mutual mistake, in excess of what is due and owing, is not questioned, because there the position of the creditor is in no wise injuriously affected by requiring him to restore the overpayment. But in the case *sub judice*, both parties having acted in ignorance of a material fact, neither can claim a right to relief superior to the other. They must be left in the position in which they placed themselves. Somerville had in fact good title to the mortgage, subject to the right of Mott, the prior assignee. He had a right to receive payment of his note, and surrender his claim upon the mortgage he held as collateral. He did that in the presence of Mrs. Behring, the mortgagor, who paid him the amount due him, and also in the presence of King, who had assigned and delivered the bond and mortgage to him. Somerville was under no legal obligation to ascertain whether any equities prior to his own existed, and give such information to Mrs. Behring. Somerville in this transaction surrendered his as-

signment, and lost his legal hold upon the bond and mortgage, as security for his claim against King, and Mrs. Behring cannot call upon him to return the money paid by her without restoring him to his position. That was recognized as the correct legal rule in *Shand v. Grant*, 15 C. B. N. S. 324, where the court refused to allow a recovery of money paid under a mistake of fact as against persons who had changed their position in good faith, believing the payment to have been rightly made.

The judgment of the Supreme Court should therefore be reversed.

No question being stated as to the form

of the special verdict, the case has been disposed of as if the special verdict had found that the payment was made to Somerville upon a mistake of fact. The special verdict contains evidence that Mrs. Behring paid under a belief that the defendant owned the bond and mortgage, and that he received the money under a like belief. Facts are stated from which such a conclusion may be drawn, but there is not an express finding that the money was paid under a mistake of fact. In dealing with a special verdict, in strict practice, the court draws conclusions of law from facts found, but does not draw conclusions of fact from evidence.

NEW YORK COURT OF APPEALS.

John GRAY, *Resp't.*,

v.

KAUFMAN DAIRY & ICE CREAM COMPANY, *Appt.*

(162 N. Y. 388.)

Statements in letters written by a landlord to his tenant after the latter has abandoned the premises, to the effect that the premises will be leased at the tenant's risk, which are not replied to, will not avoid the rule that a surrender is effected by the reletting with the consent of the former tenant, on the ground that by his silence the tenant acquiesced in the landlord's proposition.

(*London, J., dissents.*)

(April 6, 1900.)

A PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Trial Term for Kings County in plaintiff's favor in an action brought to recover rent alleged to be due and unpaid. *Reversed.*

Statement by **Werner, J.:**

This action was brought to recover two months' rent of the premises known as "No. 787 Eighth Avenue," in the city of New York. In July, 1893, the plaintiff let the said premises to the defendant for ten years from August 1, 1893, at the yearly rental of \$2,400, payable monthly in advance, and also the extra water rent charged against the defendant for its business. The defendant took possession about July, 1893, and paid rent to November 1, 1893, but refused to pay for the months of November and December of that year, the rent of which became due and payable on the 1st days of those months respectively. The answer, in effect, admits the making of the lease, but denies any in-

debtedness under it, and sets up the eviction of the defendant, a surrender and rescission of the lease, and claims credit for the rent received from the undertenant. On or about the 28th or 29th of October, 1893, the plaintiff had a conversation with Mr. Kaufman, the president of the defendant, upon the demised premises. The plaintiff's version of this conversation is as follows: "They were pulling up the store and the things, and were going to move out. They had not said anything to me about moving out prior to that time. I asked Mr. Kaufman what he was doing,—pulling up the store. He said he was going to move out, and I asked him why, and he said because he couldn't make any money; and I told him that he had a lease on it, and that I would hold him responsible for the rent if he went out. 'Well,' he says, 'I am moving out. I don't want to stay where I don't make my rent.'" The defendant moved out, and sent the keys of the store to the plaintiff by mail. Plaintiff received them about the 2d of November, 1893. On the 3d of November, 1893, plaintiff served upon the defendant a notice, of which the following is a copy:

New York, November 3rd, 1893.

To the Kaufman Dairy & Ice-Cream Co.:

Yesterday I received the keys of 787 Eighth Avenue by mail. I hereby notify you that I do not accept a surrender of the premises, and that I intend to hold you responsible for the rent under the lease. I shall let the premises on your account, and hold you for any loss which may be sustained.

Yours, etc.,

John Gray.

The defendant made no answer to this notice. On the 17th of November, 1893, the plaintiff went to Kingston and saw Mr. Kaufman, the president of the defendant, Mr. Spore, the secretary, and a Mr. Bruin. The plaintiff asked Mr. Kaufman for the November rent, and the latter replied that no rent was due; that he had not made a lease; that there was nothing due, and he would not pay; that he had given up the store, and plaintiff could do what he liked with it.

NOTE.—On the question, What constitutes a surrender and acceptance of leased premises: see also *Kneeland v. Schmidt* (Wis.) 11 L. R. A. 498, and note; *Alsop v. Banks* (Miss.) 13 L. R. A. 598; and *Bonetti v. Treat* (Cal.) 14 L. R. A. 151.
49 L. R. A.

Thereupon the plaintiff started for home. The president and secretary of the defendant went to the railway station, and there had a conversation with the plaintiff about compromising the matter by taking the cellar of said premises for \$50 a month for the term of the lease if the plaintiff would cancel the same as to the rest of the premises. The plaintiff said he would think over the matter, and see what he could do with the remainder of the property, and let them know. The plaintiff testifies that thereafter, and on the 27th of November, 1893, he wrote to the defendant as follows:

Kaufman Dairy & Ice-Cream Co.
Gentlemen:

I have an offer for the store you leased from me, 787 Eighth Ave. The parties will pay \$1,500 to the first of May, and \$1,600 for three years from May. I think this is about as good an offer as can be expected, considering the times. Please let me know if you will keep the cellar, and pay the difference between the \$1,500 and \$2,400 to May, and \$1,600—\$2,400 after. An early reply will much oblige.

Yours respect.,
J. Gray,

323 Washington Ave.

The plaintiff further testifies that he inclosed this letter in an envelope directed to the defendant at Kingston, New York, deposited it prepaid in the postoffice at Brooklyn, and received no reply thereto. The defendant had tenants in the cellar when it left the premises. These tenants attorned to the plaintiff. On or about the 1st of December, 1893, plaintiff let the premises which had been previously demised to the defendant to one Mary Ann Keogh for the term of three years and five months at an annual rental of \$1,500 per year for the first five months, and \$1,600 per year for the remaining three years, to be paid in equal monthly instalments in advance. The defendant pleaded eviction, but gave no evidence upon that subject, and upon the trial admitted that it had no excuse for leaving the premises. Kaufman admitted having a conversation with the plaintiff before the defendant left the premises, in which the plaintiff stated that he would hold the defendant for the rent, but denied that he (Kaufman) had stated that the defendant would not stay where it did not make any money. Kaufman also admitted the receipt of the letter dated November 3, but both he and Spore denied receiving the one dated November 27. Both admitted the conversation testified to by the plaintiff as having taken place at Kingston, and Spore testified that on that occasion Kaufman stated distinctly that the defendant did not owe any rent; that it had given up and surrendered the premises; that there was some talk at the railroad station about renting the cellar from the plaintiff at \$50 per month during the term of the lease, but there was nothing said in that conversation about plaintiff's reletting the premises on defendant's account. Abraham 49 L. R. A.

L. Gray, a son of the plaintiff, testified on the latter's behalf that he went to Kingston with his father to see Kaufman, and was present at the conversation at the railroad station. He testified that Mr. Spore offered the plaintiff \$50 a month for the basement if he would let the defendant off on the store, and the plaintiff replied that he would think it over and let them know. The lease to the defendant contained no provision against subletting, except for "any saloon or liquor business," and contained no provision for a reletting of the premises by the plaintiff in case the defendant vacated the same during the term of the lease. After the evidence was all in, the parties waived the jury, and submitted the facts to the court for decision. The defendant admitted its liability for the November rent, but claimed that it was released as to the December rent by the reletting of the premises to said Mary Ann Keogh on the 1st of December. Upon these facts the court found that the plaintiff was entitled to recover rent for the months of November and December, less the amount received from the undertenants; that the plaintiff refused to accept a surrender of the premises; that the premises were at no time surrendered to the plaintiff; and that the reletting of the premises was done with the assent of the defendant.

Mr. David B. Hill, with Mr. M. Linn Bruce, for appellant:

The reletting of the store by the landlord in the absence of an agreement, express or implied, that he might do so as agent for the tenant, constituted an acceptance of surrender.

Lewis v. Angermiller, 89 Hun, 66, 35 N. Y. Supp. 69; *Coe v. Hobby*, 72 N. Y. 145, 28 Am. Rep. 120; *Gray v. Kaufman Dairy & Ice Cream Co.* 9 App. Div. 115, 41 N. Y. Supp. 73; *Bedford v. Terhune*, 30 N. Y. 462, 86 Am. Dec. 394; *Smith v. Kerr*, 108 N. Y. 36, 15 N. E. 70; *Vandekar v. Reeves*, 40 Hun, 430; *Ballou v. Baxter*, 28 N. Y. S. R. 431, 8 N. Y. Supp. 15; *Hurley v. Schring*, 43 N. Y. S. R. 240, 17 N. Y. Supp. 7; *Beall v. White*, 94 U. S. 389, 24 L. ed. 175; *Amory v. Kannoffsky*, 117 Mass. 351; *Thomas v. Cook*, 2 Barn. & Ald. 119; *Nickells v. Atherstone*, 10 Q. B. 944; *Lyon v. Reed*, 13 Mees. & W. 300; *Underhill v. Collins*, 132 N. Y. 271, 30 N. E. 576.

The plaintiff accepted the surrender by taking the subtenant as his own tenant, and collecting the rent from him direct.

Amory v. Kannoffsky, 117 Mass. 351; *Thomas v. Cook*, 2 Barn. & Ald. 119; *McAdam, Land. & T.* 2d ed. 475; *Burhans v. Monier*, 38 App. Div. 467, 56 N. Y. Supp. 632.

There was no written agreement in the lease or otherwise, authorizing the landlord to relet for account of the tenant.

McAdam, Land. & T. 2d ed. Supp. 1892, p. 142; *Hawthorne v. Coursen*, 18 Misc. 448, 41 N. Y. Supp. 995.

Entire silence on defendant's part did not

give assent to the written proposal sent by mail.

Fairlie v. Denton, 3 Car. & P. 103; *Com. v. Eastman*, 1 Cush. 205, 48 Am. Dec. 596; *Learned v. Tillotson*, 97 N. Y. 12, 49 Am. Rep. 508; *Thompson v. Simpson*, 128 N. Y. 289, 28 N. E. 627; *Thomas v. Gage*, 141 N. Y. 510, 36 N. E. 385; *Vassar v. Camp*, 11 N. Y. 450; *People's Bank v. St. Anthony's Roman Catholic Church*, 109 N. Y. 523, 17 N. E. 408; *Marvin v. Wilber*, 52 N. Y. 270.

Since the reletting to Keogh by plaintiff was for a term exceeding one year, the authority to make such a lease on defendant's behalf could not be implied.

McAdam, Land. & T. 2d ed. § 150; *Underhill v. Collins*, 132 N. Y. 272, 30 N. E. 576; *Gray v. Kaufman Dairy & Ice Cream Co.* 9 App. Div. 119, 41 N. Y. Supp. 73.

An agreement authorizing the plaintiff to act as agent in creating or granting the Keogh lease for a term exceeding one year cannot be implied, as such authority under the statute must be expressed in writing.

Chase v. Second Ave. R. Co. 97 N. Y. 388, 49 Am. Rep. 531.

The law will not make that valid without a writing which the law requires should be in writing.

Chase v. Second Ave. R. Co. 97 N. Y. 388, 49 Am. Rep. 531.

There being no agreement in writing authorizing plaintiff to relet, for defendant's account, the Keogh lease for a term exceeding one year, it must be held to be in law, as it is in form, plaintiff's own case, since, as defendant's lease, it would be void under the statute of frauds for all purposes.

Coudert v. Cohn, 118 N. Y. 310, 7 L. R. A. 69, 23 N. E. 298; *Dung v. Parker*, 52 N. Y. 496.

By making the Keogh lease in his own name, under seal, and without referring to his alleged authority to relet on defendant's account, plaintiff is estopped from denying that such lease is his own.

Denike v. De Graaf, 87 Hun, 62, 33 N. Y. Supp. 1015; *Briggs v. Partridge*, 64 N. Y. 361, 21 Am. Rep. 617; *Schaefer v. Henkel*, 75 N. Y. 381.

There is no privity of contract or estate between the new tenant and the defendant.

Henricus v. Englert, 137 N. Y. 494, 33 N. E. 550; *Kiersted v. Orange & A. R. Co.* 69 N. Y. 345.

Though void, as between Keogh and the defendant, the lease is perfectly valid between the parties to it; for the latter is plainly estopped from denying the validity of the instrument executed by him in his own name, and under his own hand and seal; and is not permitted to show that he acted as agent for defendant.

Schaefer v. Henkel, 75 N. Y. 381; *Briggs v. Partridge*, 64 N. Y. 361, 21 Am. Rep. 617; *Henricus v. Englert*, 137 N. Y. 494, 33 N. E. 550; *Denike v. De Graaf*, 87 Hun, 62, 33 N. Y. Supp. 1015.

Plaintiff was under no duty to relet the premises on defendant's behalf in order to reduce the damages.

Underhill v. Collins, 132 N. Y. 271, 30 N. 49 L. R. A.

E. 570; Re Ludeke, 33 App. Div. 399, 54 N. Y. Supp. 121; *Clendinning v. Lindner*, 9 Misc. 682, 30 N. Y. Supp. 543; *Re Heecker*, 144 N. Y. 271, 39 N. E. 393; *Gray v. Kaufman Dairy & Ice Cream Co.* 9 App. Div. 115, 41 N. Y. Supp. 73.

Mr. Jacob F. Miller, for respondent:

The case at bar is the case of *Underhill v. Collins*, 132 N. Y. 269, 30 N. E. 576, so far as it recognizes the right to relet, and charges the difference in rent to the tenant.

People ex rel. Loughran v. New York K. Comrs. 158 N. Y. 430, 53 N. E. 163; *Amherst College v. Ritch*, 151 N. Y. 320, 37 L. R. A. 305, 45 N. E. 876; *People v. Helmer*, 154 N. Y. 599, 49 N. E. 249; *Marden v. Dorothy*, 160 N. Y. 39, 46 L. R. A. 694, 54 N. E. 726; *Reed v. McCord*, 160 N. Y. 330, 54 N. E. 737.

When the defendant left the premises without excuse, the plaintiff, if he did not accept a surrender, was in duty bound to let the premises on behalf of defendant, or at least was at liberty to do so in order that the amount of damages might be made as small as possible.

Hamilton v. McPherson, 28 N. Y. 77, 84 Am. Dec. 330; *Miller v. Mariner's Church*, 7 Me. 51, 20 Am. Dec. 341; *Shannon v. Comstock*, 21 Wend. 461, 34 Am. Dec. 262; *Heckscher v. McCrea*, 24 Wend. 309; *Clark v. Marsiglia*, 1 Denio, 317, 43 Am. Dec. 670; *Spencer v. Halstead*, 1 Denio, 606; *Loker v. Damon*, 17 Pick. 284.

It was the right of the plaintiff to relet them on defendant's account, and hold it responsible for the difference between the rent agreed upon and the rent received.

Morgan v. Smith, 70 N. Y. 537; *McAdam, Land. & T.* 205, 210, 467, 475; *Johnson v. Meeker*, 96 N. Y. 96, 48 Am. Rep. 609; *Bloomer v. Merrill*, 29 How. Pr. 259, 1 Daly, 485; *Townsend v. Albers*, 3 E. D. Smith, 560; *Thomas v. Nelson*, 69 N. Y. 118; *McKenzie v. Farrell*, 4 Bosw. 192; *Underhill v. Collins*, 132 N. Y. 270, 30 N. E. 576.

Defendant is responsible for the difference between the rent agreed upon and the rent received.

Morgan v. Smith, 70 N. Y. 537.

For the purpose of such letting the plaintiff was the agent for the defendant.

Pollen v. Le Roy, 30 N. Y. 556; *Dustan v. McAndrew*, 44 N. Y. 72; *Van Brocklen v. Smeallie*, 140 N. Y. 70, 35 N. E. 415; *Johnson v. Meeker*, 96 N. Y. 96, 48 Am. Rep. 609; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Dillon v. Anderson*, 43 N. Y. 231; *Hamilton v. McPherson*, 28 N. Y. 72, 84 Am. Dec. 330; *Clark v. Marsiglia*, 1 Denio, 317, 43 Am. Dec. 670.

After the defendant had left the premises the plaintiff might relet the premises on its account, and after the plaintiff had changed his position by reletting it was too late for the defendant to retract its renunciation of the lease so made, and reclaim the premises.

Windmuller v. Pope, 107 N. Y. 675, 14 N. E. 436; *Bernstein v. Meech*, 130 N. Y. 358, 29 N. E. 255.

The defendant had a tenant in the premises when it left. That tenant remained till long after the time for which the plaintiff

demands rent. The possession by the under-tenant was the possession of the tenant.

Harding v. Orcthorn, 1 Esp. 57; *McAdam*, Land. & T. p. 146.

The tenant could pay to his superior landlord in protection of his own lease. Such payment, therefore, would not amount to acceptance of premises.

Peck v. Ingersoll, 7 N. Y. 528.

When the defendant notified plaintiff that it would leave the premises, and the plaintiff said he would hold the defendant responsible for the rent, and after it had gone out, and before a new lease was made, the plaintiff notified the defendant that he would let the premises on its account, it was the duty of the defendant then to protest against such reletting, if it did not want it done.

Herman, Estoppel, §§ 917, 932, 952, 954, 965, 978; *Packard v. Sears*, 6 Ad. & El. 474; *McClure v. Lockard*, 121 N. Y. 312, 24 N. E. 463; *Danley v. Rector*, 10 Ark. 211, 50 Am. Dec. 245; *Thompson v. Sandborn*, 11 N. H. 201, 35 Am. Dec. 490; *Frost v. Saratoga Mut. Ins. Co.* 5 Denio, 154, 49 Am. Dec. 234; *Hall v. Fisher*, 9 Barb. 31; *Viele v. Judson*, 82 N. Y. 40; *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344; *Doe v. Oliver*, 2 Smith, Lead. Cas. Hare & W.'s Notes, 737-740.

The defendant's objection that the lease was made in the name of the plaintiff, and that therefore he must be held to have intended to let the premises on his own account, has no foundation. This was merely a method of reletting.

Thurston v. Cornell, 38 N. Y. 287; *Tracy v. McManus*, 58 N. Y. 257; *Bayliss v. Cockcroft*, 81 N. Y. 371; *Bedell v. Chase*, 34 N. Y. 388; *McKoen v. Hunter*, 30 N. Y. 628.

The question of intent is of no consequence now as the defendant consented to the reletting.

Porter v. Ruckman, 38 N. Y. 210.

Werner, J., delivered the opinion of the court:

This controversy arises out of the conventional relation of landlord and tenant, under circumstances governed by fixed principles of law. The first and most important question in the case is whether the plaintiff's reletting of the premises described in the lease after the defendants' attempted surrender of the same, changed or affected the legal status of the parties under the original lease. It is so well settled as to be almost axiomatic that a surrender of premises is created by operation of law when the parties to a lease do some act so inconsistent with the subsisting relation of landlord and tenant as to imply that they have both agreed to consider the surrender as made. It has been held in this state that "a surrender is implied, and so effected by operation of law within the statute, when another estate is created by the reversioner or remainderman, with the assent of the terminor, incompatible with the existing estate or term." *Coe v. Hobby*, 72 N. Y. 145, 28 Am. Rep. 120. The existence of this rule has been recognized in this state in *Bedford v. Terhune*, 30 N. Y. 463, 36 Am. Dec. 394; *Smith v. 49 L. R. A.*

Kerr, 108 N. Y. 36, 15 N. E. 70; *Underhill v. Collins*, 132 N. Y. 271, 30 N. E. 576,—and in other jurisdictions in *Beall v. White*, 94 U. S. 389, 24 L. ed. 176; *Amory v. Kannoffsky*, 117 Mass. 351, 19 Am. Rep. 416; *Thomas v. Cook*, 2 Barn. & Ald. 119; *Nickells v. Atherstone*, 10 Q. B. 944; *Lyon v. Reed*, 13 Mees. & W. 306; and 1 Washb. Real Prop. pp. 477, 478. It is conceded that defendant's offer of surrender was declined by the plaintiff, and that after the defendant's abandonment of the premises the plaintiff relet the same in his own name to one Mary Ann Keogh for a term of three years and five months. Such a situation, unqualified by other conditions, would create a surrender by operation of law. We must therefore ascertain whether the conduct of the parties takes this case out of the operation of this rule.

It is urged by the learned counsel for the plaintiff that the reletting was done with the consent of the defendant, under circumstances which bring the case directly within the rule laid down by Judge Haught in *Underhill v. Collins*. 132 N. Y. 270, 30 N. E. 576. In that case the landlord and tenant had a conversation a few days before the latter vacated the premises. The tenant asked the landlord to take the same off his hands. This the landlord declined to do; insisting that he would hold the tenant for the rent, and would lease the premises for his benefit. In the case at bar there was also a conversation before the premises were vacated, but in this conversation there was nothing said about a reletting. The plaintiff simply said that he would hold the defendant for the rent. On the 2d of November, 1893, a day or two after defendant's removal, the plaintiff received the keep of the premises. He returned them with a note stating that he would relet on defendant's account, and hold it responsible for any loss that might be sustained. To this note the defendant made no reply. On the 17th of November, 1893, the plaintiff and his son went to Kingston, and saw Kaufman and Spore. In the conversation which took place between them and the plaintiff there was no suggestion of reletting. The plaintiff made a demand for the rent which was unpaid, and the defendant made an offer of compromise, under which it agreed to take the cellar of said premises at \$50 per month if the plaintiff would cancel the lease as to the store. This offer the plaintiff agreed to consider. On the 27th of November, 1893, the plaintiff wrote to the defendant that he had an offer for the store of \$1,500 per year to the 1st of the next ensuing May, and \$1,600 per year for three years thereafter. He requested the defendant to let him know if it would keep the cellar, and pay the difference between the rent fixed by the lease and the amount offered by the intending tenant. To this letter the defendant made no reply. It will be observed from this brief résumé of the facts that there are several distinct features in which this case differs from the *Underhill Case*. In the latter case there was a personal interview before the tenant had va-

cated, in which the subject of reletting the premises was discussed. Here the subject of reletting was not mentioned until after the tenant went out, and then the suggestion came in a letter to which the defendant made no reply. Obviously, the only theory upon which defendant can be held to have assented to the reletting of the premises is that by its silence it acquiesced in the act of the plaintiff. We may assume, although we do not decide, that if the communications upon the subject of reletting had been made verbally in the course of conversation between the parties, even after the tenant had vacated the premises, the rule as to agreements by implication laid down in the *Underhill Case* might be held to apply. But here, as we have seen, the landlord's proposal to relet was in the form of two letters. In the first of these, dated November 3, he makes the unequivocal assertion that he will let the premises on defendant's account, and will hold it for any loss that may be sustained. Defendant's failure to reply to this letter is followed by a personal interview on the 17th of November, in which there is no reference to a reletting of the premises, and in which defendant's president, after denying any liability for rent, tells the plaintiff to do what he likes with the premises. Then follows the letter of November 27, informing the defendant of the offer which the plaintiff had received from an intending tenant, and asking defendant if it would pay the difference between the amount offered and the rent reserved in the original lease. It will be observed that, even if we were to give these written communications the same force and effect as verbal statements made in personal interviews between the parties, the facts here are easily differentiated from those in the *Underhill Case*. There the tenant vacated the premises upon the offer of the landlord to relet for his benefit, and under such circumstances as to permit the inference that he accepted the offer. Here the landlord's statement to that effect, made after the tenant's abandonment of the premises, is followed by negotiations in which the tenant expresses a willingness to keep the cellar at \$50 per month if the landlord will cancel the lease as to the rest of the premises. These steps are succeeded by a communication from the landlord, in which he requests the tenant to decide whether it will keep the cellar, and pay the deficit which will arise by an acceptance of the offer which the former then had under consideration. It may well be doubted whether verbal declarations made in personal interviews between the parties, under the circumstances above narrated, would support the plaintiff's theory of this action. To create a contract by implication, there must be an unequivocal and unqualified assertion of a right by one of the parties, and such silence by the other as to support the legal inference of his acquiescence. But it is clear, both upon principle and authority, that we have no right to indulge in the assumption that the letters above referred to have the force and effect of

verbal statements made in the presence of the defendant's officers. The rule is precisely to the contrary. It is well expressed in *Learncd v. Tillotson*, 97 N. Y. 12, 49 Am. Rep. 508, as follows: "We think that a distinction exists between the effect to be given to oral declarations made by one party to another, which are in answer to, or contradictory of, some statement made by the other party, and a written statement in a letter written by such party to another. It may well be that under most circumstances what is said to a man to his face, which conveys the idea of an obligation upon his part to the person addressing him, or on whose behalf the statement is made, he is at least in some measure called upon to contradict or explain; but a failure to answer a letter is entirely different, and there is no rule of law which requires a person to enter into a correspondence with another in reference to a matter in dispute between them, or which holds that silence should be regarded as an admission against the party to whom the letter is addressed. Such a rule would enable one party to obtain an advantage over another, and has no sanction in the law." To the same effect are *Bank of British N. A. v. Delafield*, 126 N. Y. 418, 27 N. E. 797, and *Thomas v. Gage*, 141 N. Y. 506, 36 N. E. 385. It is manifest, therefore, that the act of the plaintiff in reletting said premises under the circumstances referred to operated as an acceptance of the defendant's offer to surrender. The judgment herein can be supported upon no theory that is consistent with the established rules of law. As the views above expressed are decisive of the case, it is unnecessary to discuss the other questions raised by the defendant.

The judgment of the court below should be reversed and a new trial granted, with costs to abide the event.

Parker, Ch. J., and Gray, O'Brien, and Haight, JJ., concur.

Landon, J., dissenting:

The trial court found as facts that: "Plaintiff refused to accept a surrender of the premises, and did not accept it, and the premises were at no time surrendered to the plaintiff. The letting of the premises was done with the assent of the defendant." The order of affirmance by the appellate division does not state that it was unanimous, but that is not important here, for the record contains evidence tending to support the findings. The evidence tends to show that the defendant intended by its conduct to threaten the plaintiff with the loss of his rent, and thus to coerce him to relet the premises, and then deny its assent, notwithstanding, after its receipt of the plaintiff's first letter, it told the plaintiff he could do as he liked with the premises. The defendant thus replied to the plaintiff's letter,—at least, so the trial court, in view of all the circumstances, might find, and did find.

Cullen, J., not sitting.

NORTH CAROLINA SUPREME COURT.

STATE of North Carolina, *Appt.*,
v.

A. SAVERY.

(.....N. C.....)

An appeal by the state in a criminal case from a general verdict of not guilty, which was entered upon motion of defendant because the warrant was issued without any affidavit, will not be granted upon the theory that the verdict is equivalent to quashing the indictment, so that the state can appeal under Code, § 1237, where no motion to quash was made, and the court refused to withdraw a juror and dismiss the action.

(Montgomery and Clark, JJ., dissent.)

(April 1, 1900.)

APPEAL by the state from a judgment of the Superior Court for Forsyth County in favor of defendant in a criminal proceeding. *Dismissed.*

The facts are stated in the opinion.

Messrs. Glenn & Manly and J. M. Terrell, Attorney General, for appellant.

Messrs. Jones & Patterson for appellee.

Douglas, J., delivered the opinion of the court:

This is a criminal action brought here on the appeal of the state from a judgment discharging the defendant after a general verdict of not guilty. The material facts are as follows: The cause came on to be heard before the superior court on a warrant issued by the mayor of the city of Winston against the defendant. There was no defect appearing on the face of the warrant, though no affidavit was attached. The defendant pleaded, "Not guilty," and the jury was impaneled. The state introduced a witness who swore that the warrant was issued without any affidavit, he being the witness referred to in the warrant as having made the affidavit. Upon its appearing that no affidavit was made, defendant contended that he was entitled to a verdict of not guilty. The state first contended that, the warrant being regular, the absence of an affidavit made no difference, and that the most the court could do, in case it refused to hear the cause, was to withdraw a juror and dismiss the warrant. The court, in exercise of its discretion, refused to withdraw a juror or dismiss the action, and directed the clerk to enter a verdict of not guilty, which was done, and the defendant discharged. Upon the state of fact, the state and the city of Winston moved the court to strike out the verdict of not guilty, as the defendant had never been in jeopardy, and to reinstate the case for trial, or, at most, to treat the entry of not guilty

as a dismissal of the action, to the end that the state might proceed as it thought best. The court denied the motion, and the state and the city of Winston appeal.

No motion was made to quash. On the contrary, the defendant pleaded to the indictment. The state insisted that the most the court could do was to withdraw a juror. It does not appear that the state made any such motion, but, on the contrary, it does appear that the state insisted that the case should be heard on its merits. No one asked that the indictment be quashed, and no one moved that a juror be withdrawn. The court below announced that, "in the exercise of its discretion, it refused to withdraw a juror or dismiss the action, but directed the clerk to enter a verdict of not guilty, which was done, and the defendant discharged." We are thus brought face to face with a general verdict of not guilty, which we are asked to set aside on the appeal of the state. Look at it as we may, there it stands, and we can proceed no further unless we set it aside. We may reverse as many supposed judgments as we please, quashing the indictment, but that of itself will not do away with the verdict. We cannot reverse the verdict, and hence, if we entertain the appeal, we are forced to establish for the first time in this state the dangerous precedent of granting the state a new trial in a criminal action. We borrow the words of an eminent lawyer, and say that in our opinion such action would be "not simply error, but a misarrangement of the whole idea of jurisprudence." Where is there any element of quashing? His honor did not quash, and did not intend to quash, the indictment. We do not understand the state as maintaining that that would have been the proper action. At best, it seems to us to say that his honor should have permitted the case to proceed, but that, if he was determined to end it erroneously, he should have committed the error of quashing the bill, because then we could have reversed him on appeal. It is true, his honor may have committed error, but would that justify us in exercising a quasi equitable jurisdiction in criminal matters? But it is urged that, unless we adopt some such construction, the defendant may go unwhipped of justice. How does that concern us at present? What right have we to find him guilty, or to assume his guilt, for the purpose of invoking a strained construction upon a pure question of law? We are well answered in the case of *Re Spier*, 12 N. C. (1 Dev. L.) 491, 493, where this court says: "In this case the guilt or innocence of the prisoner is as little the subject of inquiry as the merits of any case can be, when it is brought before this court on a collateral question of law. Although the prisoner, if unfortunately guilty, may escape punishment in consequence of the decision this day made in his favor, yet it should be remembered that the same decision may be a bulwark of safety to those

NOTE.—For appeal by state in criminal case, see also *People ex rel. Hodson v. Miner* (Ill.) 19 L. R. A. 342.
49 L. R. A.

who, more innocent, may become the subjects of persecution, and whose conviction, if not procured on one trial, might be secured on a second or third, whether they were guilty or not." The opinion of the court, delivered by Judge Hall, and the concurring opinion of Chief Justice Taylor, are both exceedingly interesting and instructive. It should be noted that this case does not decide that the doctrine "once in jeopardy" applies only to capital felonies, although that may be inferred from its reasoning, if the phrase is taken in its strictest sense. But there is certainly not the slightest intimation that a general verdict of not guilty can ever be set aside, and that is the question now before us. That opinion quotes Lord Coke as saying that "the life of a man shall not be twice put in jeopardy upon the same charge, for a capital offense;" but it also quotes Lord Coke as laying down the rule in still broader terms, and so as to render the discharge of the jury in treason, felony, or larceny illegal, even with the consent of the prisoner. 3 Coke, Inst. 110. We do not understand the distinction between felony and larceny, but so great a judge must have had something in his mind. The doctrine of "once in jeopardy" goes far beyond that of former acquittal, and applies where the jury have never rendered any verdict. Thus, it is held that, where a jury has once been impaneled in a capital case, they cannot be discharged before verdict, except for causes beyond human control. A conscientious inability to agree after every reasonable effort, is now deemed a cause beyond control, even in capital cases, but it should clearly appear that there is no reasonable possibility of agreement.

Let us briefly review the history of appeals by the state, as shown in our Reports. The cases of *State v. McLelland*, 1 N. C. (Conference) 52a, in the superior court, and *State v. Haddock*, 3 N. C. (2 Hayw.) 162, decided by the old court of conference, recognize the right of the state to appeal from the county court to the superior court on a verdict of acquittal; the court, however, in the latter case, doubting the principle. In fact, the opinion distinctly says that, if it were *res integra*, their opinion would be to the contrary. These cases were overruled by *State v. Jones*, 5 N. C. (1 Murph.) 257, and we can find no subsequent case in our Reports where the state has ever claimed the right of appeal from a general verdict of acquittal. In the last-named case the headnote says, "The state is not entitled to an appeal in a criminal prosecution," while the case is briefly disposed of by a *per curiam* opinion, as follows: "The state, in a criminal prosecution, is not entitled to an appeal, under any of the provisions of the act of assembly regulating appeals: this appeal must therefore be dismissed." In *State v. Taylor*, 8 N. C. (1 Hawks) 462, this court says: "It would be to no purpose for this court to decide whether the paper writings offered in evidence were properly rejected by the circuit judge or not; for, upon the supposition that

they were not, we could not grant a new trial after the acquittal of the defendant." This case, so clearly enunciating the principle, and so repeatedly affirmed, has apparently never been questioned. In *State v. Martin*, 10 N. C. (3 Hawks) 381, the entire case is as follows: "The defendant was indicted below for an assault and battery, and, being acquitted, was discharged, whereupon the state appealed. On the reading of the record in this court, Mr. Attorney General gave up the cause, on the authority of *State v. Taylor*, 8 N. C. (1 Hawks) 462." This example appears to have been faithfully followed for forty-eight years, as the state does not appear even to have attempted an appeal until 1869, in *State v. Credle*, 63 N. C. 506. *Taylor's Case* was promptly and emphatically re-affirmed, whereupon the state again subsided. In 1872 the estate again tried it, but with no better result. *State v. Phillips*, 66 N. C. 646; *State v. Freeman*, 66 N. C. 647; *State v. West*, 71 N. C. 263; *State v. Armstrong*, 72 N. C. 193; *State v. Lane*, 78 N. C. 547; *State v. Sweepson*, 82 N. C. 541; *State v. Moore*, 84 N. C. 724; *State v. Tyler*, 85 N. C. 569, 572; *State v. Powell*, 86 N. C. 640; *State v. Western N. C. R. Co.* 89 N. C. 584; *State v. Ostwalt*, 118 N. C. 1208, 32 L. R. A. 396, 24 S. E. 660; *State v. Ballard*, 122 N. C. 1024, 29 S. E. 899; *State v. Hinson*, 123 N. C. 755, 31 S. E. 854; *State v. Davidson*, 124 N. C. 839, 32 S. E. 957; *State v. Southern R. Co.* (two cases; at this term) 35 S. E. 619, 1039. In this case the court says "The case at bar comes within none of these classes [those mentioned in § 1237 of the Code]. . . . Hence we must dismiss the appeal. This action on our part is not an affirmation in any degree, express or implied, of the judgment of the court below. As we cannot entertain the appeal, the principles therein decided are not before us; and therefore we are powerless to correct any error in the judgment, if error there be, no matter how serious or patent it may appear to us." In the celebrated case of *State v. Sweepson*, 79 N. C. 632, this court, while stating in unequivocal terms that the verdict was obtained by fraud, declined to entertain the appeal of the state.

It is equally interesting to note the origin and growth of the right of the state to appeal under any circumstances. This right, even in its most limited form, is purely the offspring of judicial construction. Apparently the first allusion to it in our Reports, since we have had a supreme court, is in *State v. Credle*, 63 N. C. 506, where this court, dismissing the appeal of the state on a verdict of not guilty (citing *Taylor's Case*, 8 N. C. (1 Hawks) 462, briefly says: "While the humanity of our law gives the right of appeal to the accused in all cases, the class of cases in which the state has that right is very small." What they are, is not stated. In *State v. Lane*, 78 N. C. 547, this court, in dismissing the appeal, says: "Until lately no case could be found in the English Reports where a writ of error was allowed on behalf of the Crown in a criminal prosecution, and it has not yet been decided that

such a writ may lawfully issue, as, in the cases in which it did issue, the question was not made. No reference is found to it in the older books on criminal law. . . . It will be seen that in many of the states it is held that the state has no appeal in a criminal case under any circumstances. In all, or nearly all, it seems to be held that, where the right of appeal exists, it is given by statute, and that, if it exists at all independently of a statute, it is confined to two cases only,—one where the inferior court has given judgment for the defendant upon a special verdict, and the other where it has given a like judgment upon a demurrer to an indictment or upon a motion to quash, which is considered as substantially similar. In this state it has been recognized as existing in those two cases, but I am not aware that it has been in any others." In *State v. Moore*, 84 N. C. 724, this court says: "The state has no right of appeal in a case like this. Its right of appeal in a criminal action is not derived from the common law or any statute of this state, but has obtained under the sanction of the courts by a long practice, and has been recognized in but four cases, to wit, where judgment has been given for the defendant upon a special verdict, upon a demurrer, a motion to quash, and arrest of judgment." By this time it became apparent that the courts, acting upon the *quo minus* and *eo etiam* principle, had enlarged their jurisdiction of state appeals to the verge of public safety; and hence § 1237 of the Code was passed, not as an enabling, but as a restrictive, statute. This section provides that "an appeal to the supreme court may be taken by the state in the following cases, and no other: Where judgment has been given for the defendant (1) upon a special verdict, (2) upon a demurrer, (3) upon a motion to quash, (4) upon arrest of judgment." The statute is emphatic and unequivocal, and yet are we not asked to add another case; that is, where, in our opinion, a general verdict of not guilty is equivalent to quashing? If we can do this in one case, why can we not do so in all cases where the erroneous instructions upon the trial appear to us equivalent to any one of the above cases? Can we not thus reach every erroneous instruction upon a question of law? In the recent cases of *State v. Southern R. Co.* the facts were practically undisputed. There was a verdict of guilty in the criminal court, and the judgment of the superior court was equivalent to sustaining a plea to the jurisdiction. Were we wrong in refusing to entertain the state's appeal? If this court was right then, it seems to us we must dismiss the present appeal.

In conclusion we can do no better than quote the concluding words of Justice Ashe in delivering the opinion of a unanimous court in *State v. McGimsey*, 80 N. C. 377, 383, 30 Am. Rep. 90, as follows: "We think the ancient rule of the common law has been sufficiently relaxed by our predecessors, and we are unwilling to move a step further in the direction of discretion. . . . In coming to this conclusion, we are aware that its

effect may possibly be to turn loose a bad man upon society, but it is better, in the administration of the law, there should be an occasional instance of violence, even to the sense of public justice, than that a principle should be established which, in times of civil commotion that may occur in the history of every country, would serve as an engine of oppression in the hands of corrupt time-servers and irresponsible judges, to crush the liberties of the citizen."

Under our view of the law, the appeal must be dismissed.

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Montgomery, J., dissenting:

The term "appeal," as it is understood to mean the removal of a cause for final judgment from an inferior to a superior court, to be tried *de novo* upon its merits, is of civil-law origin, and was unknown to the common law. A writ of error upon matter of law was the remedy in criminal as well as in civil cases at the common law, but the writ was not allowable to the prosecution in criminal cases. In modern practice, appeals cannot be had by the state in criminal cases, except as provided by statute. The decisions in our court upon this subject are interesting. In *State v. Jones*, 5 N. C. (1 Murph.) 257, it was held that in a criminal prosecution the state was not entitled to an appeal under any of the provisions of the act of assembly regulating appeals. In *State v. Credle*, 63 N. C. 506, it is said: "The class of cases in which the state has that right [appeal] is very small." In *State v. Lane*, 78 N. C. 547, it was held that the state could appeal upon a special verdict, upon a demurrer, and upon a motion to quash. In *State v. Moore*, 84 N. C. 724, it was said: "Its [the state's] right of appeal in a criminal action is not derived from the common law or any statute of this state, but has obtained under the sanction of the courts by a long practice, and has been recognized in but four cases, to wit: Where judgment has been given for defendant upon a special verdict, upon a demurrer, a motion to quash, and arrest of judgment." After the decision in the last-mentioned case, § 1237 of the Code was enacted, and embraces the four cases mentioned in that decision, in which the state can appeal. In the case before us the defendant was tried in the court of the mayor of Winston, was convicted and fined, and appealed to the superior court. In that court the defendant was tried on the warrant which was issued by the mayor, and upon which there was no apparent defect, though in fact no affidavit of a complainant was attached. A witness (the person upon whose alleged affidavit the warrant was issued) testified that it was issued without affidavit. The subsequent proceedings, material for the purposes of this appeal, were, in the language of the "case on appeal," as follows: "It appearing that no affidavit was made, the defendant contended he was entitled to a verdict of not guilty. The state contended that, the warrant being regular on its face, the absence of an affidavit made no difference, and that the case should be heard or

its merits, and that the most that the court could do, in case it refused to hear the case, was to withdraw a juror and dismiss the warrant. The court announced that, in the exercise of its discretion, it refused to withdraw a juror or dismiss the action, but directed the clerk to enter a verdict of not guilty, which was done, and the defendant discharged." The case before us is here on the appeal of the state, and, if the appeal can be sustained, it must be on the ground that the course of his honor in instructing the jury to return a verdict of not guilty was in legal effect the quashing of the bill of indictment (the justice's warrant). I am of the opinion that the action of his honor was equivalent to a quashing of the indictment, from which the state had the right to appeal. I know it is said in *State v. Powell*, 86 N. E. 640, that when a party charged with any offense before a tribunal of competent jurisdiction has been tried and acquitted, the result is final and conclusive, and no appeal is allowed the state to correct any error committed by the court." But I feel satisfied that in this case the verdict of the jury returned by direction of his honor was not such an acquittal as is contemplated in *State v. Powell*, 86 N. C. 640. An acquittal, to be final and conclusive, as is contemplated in the last-mentioned case, must be had upon a trial upon the merits of the case. The ruling of his honor in this case was in legal effect exactly as if he had quashed the bill of indictment for defect in substance. The state was anxious to have the case proceeded with on its merits, and insisted on such a trial; but his honor, upon discovering that the warrant was issued without an affidavit, stopped the trial, and, because of that defect (the issuing of the warrant without affidavit), directed the jury to return a verdict of acquittal. It is true that the third subdivision of § 1237 of the Code is in the words "upon a motion to quash," and it is also true that in the regular course of procedure the motion to quash should be made before the defendant pleads to the indictment; but, in point of legal effect, his honor, without a motion on the part of the defendant, made before or after pleading, after the defendant had pleaded and the jury had been impaneled, quashed the indictment because the warrant was not issued on affidavit. He did not enter a formal judgment that the indictment (warrant) be quashed, but what he did was in legal effect just as if he had done so. The defendant was not tried for the offense with which he was charged,—the warrant itself being sufficient in substance, and regular in form,—but he was discharged by an order to the jury to acquit him of the charge because the warrant was not issued on affidavit. The doctrine of "once in jeopardy" applies only to trials where the indictment is for a capital felony. Wharton, *Crim. Law*, p. 577; *Re Spier*, 12 N. C. (1 Dev. L.) 491.

Clark, J. dissenting:

I concur in the dissenting opinion.
49 L. R. A.

STATE of North Carolina, *Appl.*,

v.

W. E. HAY.

(.....N. C.....)

1. Authorizing county and municipal authorities to require compulsory vaccination is within the power of the legislature unless forbidden by the Constitution.
2. A statute permitting authorities of any city or town to make such regulations "for the vaccination of its inhabitants under the direction of" the local board of health does not require the board of health to act in conjunction with the aldermen in passing the ordinance.
3. An ordinance requiring compulsory vaccination is not violated by failure to except from its operation persons whose health is such that it would be unsafe for them to submit to vaccination.
4. Failure to comply with an ordinance requiring compulsory vaccination is not justified by one's own opinion, or that of his personal physician, that it would be dangerous for him to be vaccinated, or that he is sufficiently protected by former vaccination.
5. The burden of showing facts which justified noncompliance with an ordinance requiring vaccination is upon the one refusing to comply.

(March 20, 1900.)

APPEAL by the state from a judgment of the Superior Court for Alamance County in favor of defendant in a prosecution for refusing to comply with an ordinance requiring vaccination. *Reversed.*

The special verdict by the jury found that defendant refused to be vaccinated upon the ground that he believed and was advised that it was dangerous for him by reason of his physical condition; that a reputable physician had told him he did not need vaccination as he had a scar of a successful vaccination then on his arm; that defendant claimed to have rheumatism so that he could not submit to vaccination; that after the filing of the information he was vaccinated by his family physician and it did not take.

Further facts appear in the opinion.

Mr. Zeb. Vance Walser, Attorney General, for the State.

Clark, J., delivered the opinion of the court:

Chapter 214 of the Laws of 1893 is a well-considered and carefully drawn statute for the preservation of the public health. Section 23 thereof, which is specifically in regard to vaccination, contains, among other provisions, this clause: "The authorities of any city or town, or the board of county commissioners of any county, may make such regulations and provisions for the vaccination of its inhabitants under the direction of the local or county board of health or a committee chosen for the purpose, and impose such penalties, as they deem necessary to protect the public health." There is no provision of the Constitution which forbids the

NOTE.—As to compulsory vaccination, see also *Morris v. Columbus* (Ga.) 42 L. R. A. 175, and note.

legislature so to enact, and it is, indeed, an exercise of that governmental police power to legislate for the public welfare, which is inherent in the general assembly, except when restrained by some express constitutional provision. *Salus populi suprema lex*,—"the public welfare is the highest law,"—is the foundation principle of all civil government. It is the urgent cause why any government is established; for, as Burke says, "any government is a necessary evil." It is, however, a much lesser evil than the intolerable state of things which would exist if there were no government to bridle the absolute right of every man to do "that which seems right in his own eyes," like the Israelites in the days of Micah. The above maxim, quoted from Lord Bacon, is placed appropriately first by Broom in his treatise on "Legal Maxims," with this just observation: "There is an implied assent on the part of every member of society that his own individual welfare shall, in cases of necessity, yield to that of the community; and that his property, liberty, and life shall, under certain circumstances, be placed in jeopardy, or even sacrificed, for the public good." This observation, which is almost a literal translation from Grotius, he fortifies by quotations from Montesquieu, Lord Hale, and many judicial opinions from both sides of the Atlantic. But it needs none, for it is everyday common sense that, if a people can draft or conscript its citizens to defend its borders from invasion, it can protect itself from the deadly pestilence that walketh by noonday by such measures as medical science has found most efficacious for that purpose. We know as an historical fact that prior to the discovery, one hundred and one years ago, of vaccination, by Edward Jenner, smallpox often destroyed a third or more of the population of a country which it attacked, and, so futile was every precaution and the most careful seclusion, that the greatest sovereigns fell victims to this loathsome disease, which Macaulay has styled "the most terrible of all ministers of death." If this was so in days of imperfect communication, the present rapid means of intercourse between most distant points would so spread the disease as to quickly paralyze commerce and all public business if the government could not at once stamp out the disease by compelling all alike, for the public good as much as for their own, to submit to vaccination. Statistics taken by governmental authority show that while 400 out of every 1,000 unvaccinated persons exposed to the contagion are attacked by it, less than 2 in 1,000 take the disease when protected by vaccination within a reasonable period. There are those, notwithstanding these well-ascertained facts, who deny the efficacy of vaccination, as there are always some who will deny any other result of human experience however well established; but the legislature, acting in their best judgment for the public welfare upon the information before them, have deemed vaccination necessary for public protection, and their decision, being within the scope of their func-

tions, must stand until repealed by the same power. The power of the legislature to authorize county and municipal authorities to require compulsory vaccination has been exercised by nearly every state, and has been recently sustained by the highest courts of two of our sister states,—*Morris v. Columbus*, 102 Ga. 792, 42 L. R. A. 175, 30 S. E. 850; *Blue v. Beach* (Ind.) 50 N. E. 89,—and there are no decisions to the contrary. In reply to the argument that such exercise of power by the legislature may in some cases infringe upon individual rights, Cobb, J., in the Georgia case just cited, well says: "No law which infringes any of the natural rights of man can long be enforced. Under our system of government, the remedy of the people in that class of cases where the courts are not authorized to interfere is in the ballot box. Any law which violates reason, and is contrary to the popular conception of right and justice, will not remain in operation for any length of time; but courts have no authority to declare it void merely because it does not measure up to their ideas of abstract justice. The motive which doubtless actuated the legislature in the passage of the act now under consideration was that vaccination was for the public good. In this the general assembly is sustained by the opinion of a great majority of the men of medical science, both in this country and in Europe." But, even if we were of opinion with the small number of medical men who contend that vaccination is dangerous to health, and not a preventive of the disease, the court is not a paternal despotism, gifted with infallible wisdom, whose function is to correct the errors and mistakes of the legislature. *Brodnax v. Groom*, 64 N. C., at page 250. Our people are self-governing, and themselves correct the mistakes of their representatives. The function of the courts is to construe and apply the laws, and they can hold a statute nugatory only when plainly and clearly violative of some provision of the organic law which has restrained the legislative power. *Sutton v. Phillips*, 116 N. C. 502, 21 S. E. 988; *White v. Murray* (N. C.) 35 S. E. 256. Nor does § 23 of the act require that the board of aldermen shall pass such ordinance in conjunction with the board of health (as defendant contends). It merely provides that the execution of the ordinance—i. e. the vaccination—shall be under the direction of the local board of health, or a committee appointed by the aldermen. While the legislature has power to authorize municipal bodies to provide compulsory vaccination, and the defendant did not comply with the ordinance enacted by the town of Burlington, in pursuance of such authority, though afforded opportunity to do so, it is true that there may be some conditions of a person's health when it would be unsafe to submit to vaccination, and which, therefore, would be a sufficient excuse for noncompliance; but it does not vitiate the ordinance that such exception is not provided for and specified therein. It is not a defense that a person bona fide believes that it will be dangerous for him to be

vaccinated, or believes that he is already sufficiently protected by former vaccination; nor would the opinion of his personal physician on either point be conclusive (though it would naturally have weight with the jury), for there may be evidence or circumstances tending to the contrary. Indeed, as to a former vaccination being sufficient protection, the opinion of the official physician supervising the vaccination should be presumptively correct. That which would relieve from a compliance with the ordinance is a matter of defense, the burden of which is upon the defendant, and is a fact to be found by the jury. The special verdict is ambiguous and defective in this particular, and is set aside.

Let there be a new trial.

Douglas, J., concurring:

While I concur in the judgment of the court, I fear that there are some expressions in the opinion that may be misconstrued. What I understand the court to mean is that, while it is in the province of the legislature to provide for the public health by all reasonable means, and incidentally to confer that power upon municipal corporations, yet, whenever the exercise of that power is in derogation of natural right, it must be exercised in a reasonable manner. Compulsory vaccination is not an unreasonable requirement, as experience has shown that it is, in times of epidemic, necessary for the protection of the community, and equally so of the individual. It is ordinarily less harsh than quarantine or isolation, and in the great majority of cases has no injurious effect beyond some slight temporary illness. But there may be cases where vaccination, owing to certain exceptional conditions of health, may be dangerous, or even fatal. We cannot suppose that the legislature intended to enforce the rule under such circumstances, and yet there must be some tribunal competent to determine when such conditions exist. By its very nature this power must ultimately rest in the courts, where all other rights of the citizen are determined and administered. Where legislative authority is given, the board of aldermen can determine within reasonable limits the existence of the general conditions justifying compulsory vaccination, and may make and enforce all reasonable regulations necessary to carry it into effect; but in case of resistance it can enforce it only by an appeal to the criminal jurisdiction of the courts. There the defendant has a right to be heard. It may be that his refusal to comply with a general ordinance might cast upon him the burden of proving whatever facts he might rely upon to exempt him from its operation, but this question is not now before us. I do not think that the election of anyone as superintendent of health, or his employment as vaccinating surgeon, would add anything to the weight of his testimony. It might give him the power to demand the vaccination of the individual, and to prosecute in case of refusal, but it would not carry with it any presumption of professional infallibility. He

must take his chances before the jury, like any other witness. I readily concede that these positions are generally filled by competent men, but we know that they are rarely held by physicians of large practice, because they do not pay enough to justify their acceptance. This is especially so where smallpox is prevalent. No well-established physician could afford to run the risk of contagion which would inevitably cause the loss of his practice. So strong is this feeling that it is sometimes necessary to send to other cities, and even other states, to obtain men willing to undertake the duty. I do not say this in any disparagement to them, but simply in justice to the resident physicians, who are entitled to all the credit due their character and professional standing. I think this construction of the law is clearly in accord with the legislative intent, but, if it were otherwise, I could not come to any other conclusion. The Constitution of this state expressly declares "that we hold it to be self evident that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor and the pursuit of happiness." Article 1, § 1. It does not profess to confer these rights, but recognizes them as pre-existing and inherent in the individual by "right divine." Therefore any unlawful interference with them is in violation of the express letter of the Constitution. When man entered the social compact, he gave up a portion of his natural liberty in exchange for the protection of society, but only so far as was demanded by the general welfare. Even then there must be some limit. Suppose the legislature should pass an act that all persons afflicted with certain diseases should be killed, in order to prevent contagion, would any court permit its enforcement? Therefore, can we suppose that the legislature either would or could enforce vaccination if, under the peculiar conditions of health of the patient, it might reasonably be expected to endanger his life? This discussion, however, is not essential to the determination of the case at bar, as I feel safe in basing my opinion upon a reasonable interpretation of the legislative will without the necessity of resorting to constitutional limitations.

Furches, J., concurs.

M. E. TURNER, Admr., etc., of Josephus Turner, Deceased, et al., Appts..

M. BOGER.

(.....N. C.....)

A provision in a trust deed for attor-

NOTE.—For constitutionality of statutes as to attorney's fees, see *note* to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.) 14 L. R. A. on page 586; also Hocking Valley Coal Co. v. Rosser (Ohio) 29 L. R. A. 386; Vogel v. Pekoc (Ill.) 30 L. R. A. 491; Cameron v. Chicago, M. & St. P. R. Co. (Minn.) 31 L. R. A. 553; and Dell v. Marvin (Fla.) 45 L. R. A. 201.

ney's fees in case the property is sold under the deed is void as contrary to public policy.

(April 3, 1900.)

A PPEAL by plaintiffs from a judgment of the Superior Court for Iredell County in favor of defendant in a suit brought to obtain cancelation of a deed of trust executed to defendant as trustee for the security of a debt. *Reversed.*

The facts are stated in the opinion.

Messrs. Armfield & Turner for appellants.

Clark, J., delivered the opinion of the court:

In 1887 the plaintiffs' intestate executed a deed of trust to the defendant to secure a debt to defendant's wife, in which it is stipulated that, in case sale should be made under the trust, "out of the moneys arising from such sale the said Martin Boger, trustee, or legal representative, shall pay the principal and interest of the indebtedness hereby secured, together with all legal costs and reasonable charges in executing this trust, including an attorney's fee of 5 per cent." After the death of the plaintiffs' intestate an action was begun by plaintiffs for partition of certain land named in the trust deed, in which the trustor had owned a part interest only, and for a sale of all the land embraced in said deed, to make assets to pay debts, including the lien on the debt secured by the trust. This the defendant, who was also defendant in that proceeding, resisted, claiming the right to sell under the deed of trust; and by a consent judgment it was decreed that the defendant should sell the land embraced in the trust deed, and out of the proceeds pay "said debt and interest, and all legal and necessary expenses of said sale." The lands have since been sold by the defendant, and after allowing him all expenses for advertising, traveling, etc., but not including above 5 per cent for attorney's fees, there was a balance due of \$235.74, which the plaintiffs tendered in legal money before the bringing of this action, and paid the same into the clerk's office, to abide the result of this action, and which the defendant has since received without prejudice, to be held as a credit, or as payment in full, according to the decision of the court as to his right to collect the 5 per cent for attorney's fees. This presents the sole question for consideration.

A stipulation in a promissory note "that in case this note is collected by legal process the usual collection fee shall be due and payable" was held contrary to public policy, and invalid, in *Tinsley v. Hoskins*, 111 N. C. 340, 16 S. E. 325. This has since been reaffirmed in *Brisco v. Norris*, 112 N. C. 49 L. R. A.

671, 16 S. E. 850; and in *Williams v. Rich*, 117 N. C. 235, 23 S. E. 257, such reservation was held not only invalid, but evidence of usury. If this stipulation is contrary to public policy in a note which has to be collected by aid of the courts, for a stronger reason the stipulation would be invalid in a mortgage or deed of trust, where the opportunity for oppression is greater. It is true that a stipulation for compensation to the trustee for making sale, in addition to actual expenses, if reasonable, would be sustained, though, if a cloak for usury, it would not be. *Arrington v. Jenkins*, 95 N. C. 462; *Hollowell v. Southern Bldg. & L. Asso.* 120 N. C. 286, 26 S. E. 781. And, if the rate of compensation is not specified, probably, by analogy, the commission allowed for making sale in partition (Code, § 1910; *Ray v. Banks*, 120 N. C. 389, 27 S. E. 28) would be reasonable. But in this trust deed the stipulation is not only for expenses and reasonable charges in executing the trust (i. e. commissions), but that 5 per cent attorney's fees shall be added thereto. The consent judgment eliminated the provision for commissions to the trustee by stipulating that only "legal and necessary expenses" of sale should be charged, and all such expenses claimed by defendant have been paid. The answer avers that the 5 per cent was charged for "services of defendant's attorney, and that they were reasonable and just." Probably they were, but they must be paid by the defendant at whose request they were rendered, and cannot be charged against the debtor, who is only liable for the debt, interest, actual expenses of sale, as advertising and the like, and a reasonable compensation to trustee for his time and trouble in making the sale,—say, not to exceed 2 per cent. Code, § 1910. And by the consent judgment only the expenses were to be charged, omitting compensation to the trustee, who was acting for his wife, and therefore was more like a mortgagee. In *Cannon v. McCape*, 114 N. C. 580, 19 S. E. 703, 20 S. E. 276, the amount of the commission was not discussed, but the right to receive it when a sale was not made, and even on the point decided it has been virtually overruled in *Pass v. Brooks*, 118 N. C. 397, 24 S. E. 736, *Fry v. Graham*, 122 N. C. 773, 30 S. E. 330, and *Whitaker v. Old Dominion Guano Co.* 123 N. C. 368, 31 S. E. 629, thus sustaining the dissenting opinion in *Cannon v. McCape*; and in *Smith v. Frazier*, 119 N. C. 157, 25 S. E. 860, 5 per cent commissions in foreclosure proceedings were held excessive and disallowed.

Upon the facts agreed, judgment should have been rendered in favor of plaintiffs for the surrender and cancelation of the trust deed, and for costs.

Reversed.

MICHIGAN SUPREME COURT.

John H. HEMBEAU, *Plff. in Err.*,
v.
GREAT CAMP OF THE KNIGHTS OF
THE MACCABEES FOR MICHIGAN.

(101 Mich. 161.)

1. An agreement by members of a voluntary benefit association, that the decision of its tribunals rejecting a claim to benefits shall be conclusive, is not against public policy as an attempt to oust courts of jurisdiction.
2. A voluntary benefit association which is by the contract given power to pass on claims is not guilty of fraud in rejecting a death claim on the ground of want of interest in the beneficiary, although at the time the beneficiary was designated the local agent assured the applicant that the beneficiary was a "dependent" within the meaning of the contract, if no oppression or bad faith in the ruling of the association is shown.

(June 16, 1894.)

ERROR to the Circuit Court for Saginaw County to review a judgment in favor of defendant in an action brought to recover the amount alleged to be due on a mutual benefit certificate. *Affirmed.*

The facts are stated in the opinion.

Mr. Rowland Connor, for plaintiff in error:

To prevent any miscarriage of justice, the courts will interfere notwithstanding any agreement that the decision of arbitrators shall be final: (a) If the arbitrators are not impartial; (b) if they are interested in the property or business which is the subject of arbitration; (c) if they are unfit or incompetent; (d) if there is fraud or corruption, or other misconduct on the part of the arbitrators; (e) if the final award is not definite; (f) if the arbitrators do not conform to the agreement of submission; (g) if they omit the consideration of important facts.

Until the occurrences or facts or differences to be arbitrated have actually arisen, and are definitely in sight, no agreement to arbitrate is binding; in other words, an agreement in advance cannot be specifically enforced.

Stephenson v. Piscataqua F. & M. Ins. Co. 54 Me. 55; *Amesbury v. Bowditch Mut. F. Ins. Co.* 6 Gray, 596; *Trott v. City Ins. Co.* 1 Cliff. 439, Fed. Cas. No. 14,189; *White v. Middlesex R. Co.* 135 Mass. 216; *Contee v.*

Dabson, 2 Bland, Ch. 264; *Greason v. Keteltas*, 17 N. Y. 491; *Biddle v. Ramsey*, 52 Mo. 153; *Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 50 N. Y. 250.

Parties cannot by contract oust the ordinary courts of their jurisdiction.

Scott v. Avery, 5 H. L. Cas. 811; *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365; *Doyle v. Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148; *Barron v. Burnside*, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931; *Kistler v. Indianapolis & St. L. R. Co.* 88 Ind. 460; 1 Redf. Railways, p. 454; *Bauer v. Samson Lodge K. of P.* 102 Ind. 262, 1 N. E. 571; *Mentz v. Armenia F. Ins. Co.* 79 Pa. 478, 21 Am. Rep. 80; *Wood v. Humphrey*, 114 Mass. 185; *Stephenson v. Piscataqua F. & M. Ins. Co.* 54 Me. 55; *Gasser v. Sun Fire Office*, 42 Minn. 315, 44 N. W. 252; *Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 50 N. Y. 250; *Seaward v. Rochester*, 109 N. Y. 164, 16 N. E. 348; *Whitney v. National Masonic Acci. Assn.* 52 Minn. 378, 54 N. W. 184, and cases cited.

A statute would be considered and declared unconstitutional if it undertook to deprive the claimant to property of a jury trial.

Edwards v. Symons, 65 Mich. 354, 32 N. W. 796; *Risser v. Hoyt*, 53 Mich. 185, 18 N. W. 611.

Coderre was admitted to the order, and Hembreau was accepted as his dependent and beneficiary by a duly authorized agent of the order, who was fully informed of all the facts, and both Coderre and Hembreau were acting in perfect good faith.

A society, under such circumstances, is bound by the act of its accredited agent, and is estopped from afterwards repudiating the contract so entered into.

Michigan State Ins. Co. v. Lewis, 30 Mich. 41; *Aetna Live Stock Fire & Tornado Ins. Co. v. Olmstead*, 21 Mich. 252; *North American F. Ins. Co. v. Throop*, 22 Mich. 146, 7 Am. Rep. 638; *Kitchen v. Hartford F. Ins. Co.* 57 Mich. 144, 58 Am. Rep. 344, 23 N. W. 613; *Brown v. Metropolitan L. Ins. Co.* 65 Mich. 306, 32 N. W. 610; *Baker v. Ohio Farmers' Ins. Co.* 70 Mich. 199, 38 N. W. 216; *Temmink v. Metropolitan L. Ins. Co.* 72 Mich. 388, 40 N. W. 469; *Copeland v. Dwelling-House Ins. Co.* 77 Mich. 554, 43 N. W. 991; *Crouse v. Hartford F. Ins. Co.* 79 Mich. 249, 44 N. W. 496; *Russell v. Detroit*

NOTE.—The question as to the validity of agreements to abide by decisions of the tribunals of associations or corporations is discussed in subdivision II. c. of the note to *RYAN v. CUDAHY* (III.) *ante*, 353. As there shown, the validity of such agreements has been denied in some of the cases under the influence of the general rule that condemns agreements, in advance of any dispute, to submit all questions that may arise to arbitration, and to abide by the decision of the arbitrators. It will be observed that the law of the order involved in the principal case, to the effect that the decision of the tribunal shall be conclusive, was in force 49 L. R. A.

at the time the deceased became a member. The effect of such a provision upon claims under a certificate issued before its adoption does not seem to have been discussed as a distinct question. That question, of course, cannot legitimately arise in those courts that deny the validity of such a provision, even when in force at the time the certificate is issued, and, if it should arise in a court that takes the other view, its solution would seem to depend upon the same considerations that control when other laws of the order, valid in themselves, are invoked to defeat claims under a certificate issued before their adoption.

G. H. P.

Mut. F. Ins. Co. 80 Mich. 407, 45 N. W. 356; *Michigan Mut. L. Ins. Co. v. Reed*, 84 Mich. 530, 13 L. R. A. 349, 47 N. W. 1106.

If Anderson failed to make full inquiries of Coderre, and assumed to write Hembeau as a dependent on insufficient knowledge, the society cannot now repudiate the contract.

Pudritzky v. Supreme Lodge, K. of H. 76 Mich. 428, 43 N. W. 373; *Dailey v. Preferred Masonic Mut. Acci. Asso.* 102 Mich. 289, 26 L. R. A. 171, 57 N. W. 184; *McArthur v. Home Life Asso.* 73 Iowa, 336, 35 N. W. 430; *Dunbar v. Phenix Ins. Co.* 72 Wis. 492, 40 N. W. 386; *Mutual Ben. L. Ins. Co. v. Robison*, 19 U. S. App. 266, 22 L. R. A. 325, 58 Fed. Rep. 723, 7 C. C. A. 444; *Jacobs v. St. Paul F. & M. Ins. Co.* 86 Iowa, 145, 53 N. W. 101.

Under no circumstances can a society refuse payment when the beneficiary has been designated in good faith.

Sargent v. Supreme Lodge, K. of H. 158 Mass. 557, 33 N. E. 650; *Perine v. Grand Lodge, A. O. U. W.* 51 Minn. 224, 53 N. W. 367, 48 Minn. 82, 50 N. W. 1022; *Lindsey v. Western Mut. Aid Soc.* 84 Iowa, 734, 50 N. W. 29; *Matt v. Roman Catholic Mut. Protective Soc.* 70 Iowa, 455, 30 N. W. 799; *Mutual Ben. Asso. v. Hoyt*, 46 Mich. 477, 9 N. W. 497.

Messrs. Durand & Carton, for defendant in error:

The law of the defendant is a reasonable law and valid, and is not against public policy.

Van Poucke v. Netherland St. Vincent De Paul Soc. 63 Mich. 378, 29 N. W. 863; *Canfield v. Great Camp, K. of M.* 87 Mich. 626, 13 L. R. A. 625, 49 N. W. 875.

Fraud cannot be charged by a mere statement that fraud has been committed, but the facts which it is claimed constitute fraud must be set out in the pleading and proved upon the trial, and when this is done it then becomes a question of fact for the court or jury to determine whether or not fraud has been committed.

Merrill v. Allen, 38 Mich. 487; *Tong v. Marvin*, 15 Mich. 60; *Wilson v. Eggleston*, 27 Mich. 257; *McMahon v. Rooney*, 93 Mich. 390, 53 N. W. 539.

Montgomery, J., delivered the opinion of the court:

The defendant is a fraternal and mutual benefit association, doing business on the assessment plan. It pays beneficiaries of the class to which deceased belonged \$1,000 in case of death. By the laws of the order, beneficiaries are confined to widows, relatives within the first degree of kinship, and to dependents. Alexander Coderre became a member of the order in 1891, and named the present plaintiff as beneficiary, claiming that he was a dependent. Coderre died July 16, 1892. Proofs of death were made by plaintiff. The executive committee of the order which passes on death claims refused to allow the claim of plaintiff, on the ground that plaintiff was not, and never had been, a dependent of Coderre. On appeal to the Great Camp, this action of the executive com-

mittee was sustained. Plaintiff then brought the present suit in the circuit court for the county of Saginaw, and on the trial the circuit judge directed a verdict for the defendant, on the ground that, by his contract, the plaintiff was precluded from maintaining the action. Among the laws of the order at the time that Coderre became a member of the defendant, and also in force at the time of his death, was § 83, which provides: "The executive committee shall have power to pass on all death claims; and if, in their judgment, any such claim is not, on its face, a valid one, they shall notify the beneficiary or beneficiaries of the deceased member thereof, and give them or their attorneys an opportunity to appear before such committee within sixty days thereafter, and present such evidences as they may have to establish the justness of said claim; and the said committee shall try, hear, and decide upon the justness or validity of such claim, and such decision shall be binding on such claimant, unless an appeal is taken to the Great Camp. The notice of the appeal from the decision of the committee must be filed with the great record keeper within sixty days thereafter. The decision of the Great Camp in all such cases shall be final, and no suit in law or equity shall be commenced or maintained by any member or beneficiary against the Great Camp."

We think the ruling of the circuit judge was in accordance with the holdings of this court in *Canfield v. Great Camp, K. of M.* 87 Mich. 626, 13 L. R. A. 625, 49 N. W. 875, and *Van Poucke v. Netherland St. Vincent De Paul Soc.* 63 Mich. 378, 29 N. W. 863. An attempt has been made to distinguish this case, but we do not discover any difference in principle between the *Canfield Case* and the present. That was a death claim, and the plaintiff was wholly defeated. It was sought to try by the suit at law the question of whether the policy was binding at the time of the death of the deceased. The only possible difference between that and the present case is that in the present case the determination of the Great Camp was that the policy never was of binding force. But this is not sufficient to distinguish the cases in principle. The plaintiff contends that this law of the order is invalid as against public policy, for the reason that it attempts to oust the courts of jurisdiction. The same point was made in the *Canfield Case*, and, while it was not much discussed, this court held that the case was controlled by the *Van Poucke Case*. The holding of the courts places contracts of this nature by which one becomes a member of a mutual association, and entitled to benefits in case of disability, or whose heirs are entitled to benefits in case of death, as upon a different footing than ordinary contracts between individuals. As was said in the case of *Rood v. Railway Pass. & Freight Conductors' Mut. Ben. Asso.* 31 Fed. Rep. 63: "This is a purely voluntary association. The members of the association have, by their own organic law, provided a tribunal to hear and determine all claims against it, and I do not think any court can

be invoked to review the action of the board in a matter so completely delegated to them. To attempt to enforce by suit any claim which the board of directors has acted upon, or refused to allow or approve, is equivalent to prosecuting an appeal from this board. It was certainly competent for the members of this association to agree among themselves that the action of their board of directors in reference to any claim presented against the association should be final, and there can be no doubt from the language of the clause from the constitution just quoted that they have so agreed." See also *Woolsey v. Independent Order of O. F. Lodge, No. 23*, 61 Iowa, 492, 16 N. W. 576; *Anacosta Tribe No. 12, I. O. of R. M. v. Murbach*, 13 Md. 91, 71 Am. Dec. 625; *Black & White-Smiths' Soc. v. Vandyke*, 2 Whart. 308, 30 Am. Dec. 263; *Toram v. Howard Beneficial Asso.* 4 Pa. 619; *Lantalum v. Insurance Co.* 22 Nat. Bankr. Reg. 14.

The effect of this agreement would not be to oust the court of jurisdiction in case the Great Camp should determine that the plaintiff was entitled to benefits, but should refuse to proceed to make payment. But such is not the case here. The plaintiff has submitted his claim to the jurisdiction provided by the laws of the order, and has been defeated therein, and now applies to the courts for redress. We think it was competent, under the decisions cited, for the association to provide a law of its order to which all parties should assent, and which should make a finding of liability by the duly-constituted committees of the order a condition precedent to a right to receive benefits. The plaintiff claims that the decision of this court in *Risser v. Hoyt*, 53 Mich. 185, 18 N. W. 611, and other cases in which it has been held that the legislature may not impair the right of trial by jury, are inconsistent with the validity of such an engagement as the one under consideration. We fail to see how the cases have any application to the question before us. This is not a case of an attempted exclusion of remedy by the legislature, but a case where the parties have agreed that only on certain terms and under certain conditions shall a member be entitled to receive any benefits, or the beneficiary named be entitled to receive any sum in case of the death of the member. But it is claimed, further, that the company is guilty of fraud, which takes this case out of the rule laid down in *Canfield v. Great Camp, K. of M.* The declaration alleges that, before coming into court, the plaintiff diligently prosecuted his claim for payment, and has exhausted his remedies, before the tribunals provided by the order; and the plaintiff further alleges that "the defendant, by so refusing, as aforesaid, to pay said sum of money to said plaintiff, is acting in violation of the laws, rules, and regulations of said association, and is wilfully seeking to defraud said plaintiff." The only respect in which any fraud is alleged is that, at the time Coderre became a member, the agent of the company assured Coderre that the plaintiff was a "dependent," within the meaning of the policy.

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There is no averment of any facts tending to show fraud on the part of the executive committee or of the Great Camp. This being so, one of the very questions which they had to determine was the effect of any alleged statements which the plaintiff was able to prove had been made by the agent of the company. Fraud cannot be predicated upon the decision of the tribunal, constituted by the parties themselves, either as to the equity or the law of the case considered, unless, in fact, such committee acted in bad faith and oppressively. No such allegations are contained in the declaration, and the case cannot therefore, on this ground, be distinguished from the *Canfield Case*.

The judgment of the court below will be affirmed, with costs.

Long, J., did not sit. The other Justices concurred.

Eugene Leo HICKEY

v.

Michael O'BRIEN et al., Plffs. in Err.

(.....Mich.....)

A contract by sellers of ice to purchase from another all the ice necessary to carry on their business for a period of five years is not void for uncertainty, and their liability under it cannot be avoided by the transfer of their business within that period, so that they need no more ice under the contract.

(April 3, 1900.)

ERROR to the Circuit Court of Saginaw County to review a judgment in favor of plaintiff in an action brought to recover possession of certain property seized in an attachment suit for alleged breach of contract to purchase ice. *Reversed*.

The facts are stated in the opinion.

Mr. James H. Davitt for plaintiffs in error.

Mr. E. L. Beach, for defendant in error:

The fact that the construction contended for would make the contract unreasonable, and place one of the parties at the mercy of the other, may be taken into consideration.

Beach, Modern Law of Contracts, § 708.

The subsequent acts are admitted to show how the parties understood their contract, and, on a practical construction of it, it makes no difference whether these acts are contemporaneous or subsequent; it is allowable to look to them for assistance in ascertaining the true meaning of the agreement.

Beach, Modern Law of Contracts, § 721; *Burgess v. Badger*, 124 Ill. 288, 14 N. E. 850; *Davis v. Sexton*, 35 Ill. App. 407; *Dwellely v. Dwellely*, 143 Mass. 509, 10 N. E.

NOTE.—As to validity of purchase of indefinite quantity, see also *Wells v. Alexandre* (N. Y.) 15 L. R. A. 218, and note; *Minnesota Lumber Co. v. Whitebreast Coal Co.* (Ill.) 31 L. R. A. 529; *Hayes v. O'Brien* (Ill.) 23 L. R. A. 555; and *Hoffman v. Mamoli* (Wis.) 47 L. R. A. 427.

468; *Dwenger v. Geary*, 113 Ind. 106, 14 N. E. 903.

Montgomery, Ch. J., delivered the opinion of the court:

In 1895, Kreutzberger & Crabbe were engaged in the business of furnishing ice to their customers in Saginaw. John F. Lucas & Co. were also engaged in the ice business, and had equipment and conveniences for putting up ice in large quantities. On the 1st of March, 1895, a contract, to which John F. Lucas & Co. were designated as parties of the first part and Kreutzberger & Crabbe were parties of the second part, was executed by the parties. Its material provisions were as follows: "In consideration of the covenants and conditions hereinafter mentioned, first parties agree to furnish second parties with all the ice that they may require to carry on their ice business in said city for the period of five years from and after March 1, 1895, and to pay first parties therefor the sum of seventy-five (\$.75) cents per ton, to be paid for monthly from and after June 1, 1895. Second parties hereby agree to purchase from first parties all the ice necessary to carry on their business in said city for the period of five years from and after March 1, 1895, and to pay first parties therefor the sum of seventy-five (\$.75) cents per ton, to be paid monthly from and after June 1st, 1895. It is hereby further agreed by and between the parties hereto that, should first parties, during the continuance of their contract, be compelled, by reason of an open winter or otherwise, to harvest ice at a point distant from the Saginaw river, that second parties shall pay the first parties, in addition to the seventy-five (\$.75) cents per ton hereby agreed on, the additional cost per ton to first parties in harvesting, delivering, and caring for said ice during the season or seasons. It is hereby further agreed by and between the parties hereto that second parties shall at all times keep accurate and correct books of account of their ice business during the continuance of this agreement, and that the books of account so kept shall at all times be open to the access and inspection of the first parties." Kreutzberger & Crabbe continued to conduct the ice business until about December 19, 1896, when plaintiff claims to have purchased the property of the firm of Mr. Crabbe. John F. Lucas & Co. brought an action against Kreutzberger & Crabbe to recover damages for the breach of the contract on their part, instituting proceedings by attachment on the property which was transferred to plaintiff by Crabbe. The defendant O'Brien is a deputy sheriff, and seized the property by virtue of the attachment. This action is replevin for the property so seized. On the trial it was conceded that Kreutzberger & Crabbe had paid Lucas & Co. for all ice actually delivered, and that the claimed indebtedness named in the attachment suit was for damages for the breach of their contract to take ice at the price stipulated.

The circuit judge charged the jury as follows:

"Before you can find a verdict for the defendant in this case, you must find that the property in dispute is the property of Crabbe and Kreutzberger, or either one of them. If Hickey actually purchased the property, it makes little difference what he paid for it, as Lucas and Michel never had any lien on the property in question, and Crabbe and Kreutzberger had a perfect right to sell it to anyone they saw fit. If, as the testimony shows in this case, that Crabbe claimed to be the owner, and not Kreutzberger, and he had a perfect right to sell the property, if he had it, for the sole purpose of getting rid of the Lucas and Michel contract, and if Hickey purchased the property knowing the contract between Crabbe and Kreutzberger and Lucas and Michel was in existence, then the plaintiff in this suit is entitled to a verdict, because he had a perfect right to purchase it, and Crabbe had a perfect right to sell it." This instruction was based on a view that the contract did not bind Kreutzberger & Crabbe to take ice for any stated time. If the circuit judge was right in this, the other questions in the case appear to us of little moment; for, if the contract be so construed, there is no indebtedness to Lucas & Co. to support the attachment, and they were not, therefore, in a position to question the bona fides of the transaction. If, on the other hand, the contract bound Kreutzberger & Crabbe to take ice at the fixed price for five years, it can scarcely be claimed that the instruction quoted was correct. The cases which deal with contracts to supply goods to answer the needs of business are not in entire harmony. In *Bailey v. Austrian*, 19 Minn. 535, Gil. 465, it was held that a contract to supply plaintiff with all the pig iron wanted by him until a certain date was *nudum pactum*, as plaintiff did not engage to want any quantity whatever. A similar holding was made in Iowa in the case of *Drake v. Vorse*, 52 Iowa, 417, 3 N. W. 465. In *Cooper v. Lansing Wheel Co.* 94 Mich. 272, 54 N. W. 39, we had occasion to consider the case of *Bailey v. Austrian*, but did not in terms decide whether such engagement bound the orderer to take any particular quantity. In *National Furnace Co. v. Keystone Mfg. Co.* 110 Ill. 427, the case of *Bailey v. Austrian* is considered as to its bearing on the question here involved. The court points out that in the *Bailey Case* stress is laid on the word "want." In the Illinois case cited the plaintiff agreed to sell to the defendant all the iron needed in its business during the three ensuing years at \$22.35 per ton. The defendant agreed to take its year's supply at that price. The court says: "We do not regard the contract void on the ground stated. It is true that appellee was only bound by the contract to accept of appellant the amount of iron it needed for use in its business; but a reasonable construction must be placed upon this part of the contract, in view of the situation of the parties. Appellee was engaged in a large manufacturing business, necessarily using a large quantity of iron in the transaction of its business. It

is not to be presumed that appellee would close its business, and need no iron; but, on the contrary, the reasonable presumption would be that the business would be continued, and appellee would necessarily need the quantity of iron which it had been in the habit of using in previous years. It cannot be said that appellee was not bound by the contract. It had no right to purchase iron elsewhere for use in its business. If it had done so, appellant might have maintained an action for a breach of the contract. It was bound by the contract to take of appellant, at the price named, its entire supply of iron for the year: that is, such a quantity of iron, in view of the situation and business of

appellee, as was reasonably required and necessary in its manufacturing business." See also *Smith v. Morse*, 20 La. Ann. 220; *Wells v. Alexandre*, 130 N. Y. 642, 15 L. R. A. 219, 29 N. E. 142. In the present case we think the true construction is that Kreutzberger & Crabbe undertook to take ice of Lucas & Co. for a period of five years; that the quantity which they agreed to take was to be measured by the necessities of their business, but that this presupposed that they would have a business for the time agreed.

The judgment will be reversed, and a new trial ordered.

The other Justices concur.

OREGON SUPREME COURT.

Sam MACKIN, *Resp't.*,
v.

PORTLAND GAS COMPANY, *Appt.*

(.....Or.....)

1. A rule of a gas company, consented to by the consumer, that it will cease to furnish gas when a consumer becomes delinquent in paying bills therefor, may be enforced by discontinuing the gas supply at one set of premises until payment of a delinquent bill for gas previously furnished the consumer at another set.
2. Mandamus will not be granted to compel a gas company to furnish gas to a consumer pending the settlement of a dispute over a bill rendered for gas alleged to have been previously furnished.

(May 28, 1900.)

A PPEAL by defendant from a judgment of the Circuit Court for Multnomah County granting a writ of mandamus to compel defendant to supply plaintiff with gas. *Reversed.*

Statement by **Bean, J.:**

This is a proceeding by mandamus to compel the defendant company to supply the plaintiff with gas at his place of business, No. 107 Fourth street, in the city of Portland. The alternative writ alleges, in substance, that the defendant is a corporation organized for the purpose of, and is now engaged in, supplying gas to the city of Portland and its inhabitants, and, under a franchise from the city, has mains laid in the streets for such purpose; that on September 27, 1899, the plaintiff, who was engaged in the business of conducting an oyster eating house and restaurant at No. 107 Fourth street, requested the company to furnish him gas, and upon a deposit by him of \$7 as security, the com-

pany made the proper connections with his premises and supplied gas to him; that on October 27 it presented its bill for gas consumed up to that time, amounting to \$4.95, which the plaintiff paid; that plaintiff used gas from the 27th of October, until the 11th of November, for which he is able, ready, and willing to pay upon the presentation of a bill therefor; that he is solvent, and able to satisfy any judgment that the defendant may procure against him; that on the 11th of November the defendant demanded payment of a delinquent gas bill of \$5.25, which he refused to pay, whereupon it shut off the gas from his premises; that defendant's pretense for this action is that in the month of March, 1897, the plaintiff was engaged in business at No. 284 Morrison street, and was using gas supplied by the company, but that on the 16th of the month he sold out, and notified the company that he no longer desired to be furnished with gas, and would not be responsible for any supplied thereafter, notwithstanding which it presented him a bill of \$5.25, which he then and there and ever since has in good faith disputed and refused to pay; that at the time defendant threatened to discontinue his gas at No. 107 Fourth street he offered to deposit sufficient money in court to answer any judgment that it might obtain against him on such disputed bill, and requested defendant to bring an action for the purpose of testing his liability thereon. The answer of the defendant admits that it severed the connection between its gas main and plaintiff's premises, and shut off the supply of gas therefrom, as alleged in the alternative writ, but denies the other material allegations; and, for an affirmative defense, avers: That on the 26th of March, 1897, plaintiff was indebted to it in the sum of \$12.25 for gas furnished at No. 284 Morrison street, and had on deposit with it as security therefor the sum of \$7 which it applied to the payment of plaintiff's bill, leaving a balance of \$5.25 due, which the plaintiff has refused and neglected to pay. That such gas was furnished in compliance

NOTE.—As to right to stop supply of gas for default in payment, see *note* to *Tacoma Hotel Co. v. Tacoma Light & Water Co.* (Wash.) 14 L. R. A. 669.

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with a written request made by the plaintiff, in words and figures as follows:

Portland, Oregon, Nov. 2, 1896.

To the Directors of the Portland Gas Co. Gentlemen: You will furnish gas to premises No. 284 Morrison street, and I will be responsible for the same, until further notice. And I do further agree to comply with your rules and regulations.

Respectfully,

[Signed] Sam Mackin.

That one of defendant's rules at that time was, and still is, that, "in default of the regular payment of a bill, the company will discontinue the supply of gas until payment is made," which was at the time plaintiff made his application, ever since has been, and now is, well known to him. That, previous to severing the connection between its gas mains and plaintiff's premises, it demanded payment of the delinquent bill for \$5.25, and informed plaintiff that if he paid such bill the gas would not be discontinued. That on November 11, 1899, and ever since, it has been, and now is, ready and willing to make proper connections and turn on the gas at plaintiff's premises upon the payment of such amount, and so informed the plaintiff at the time the gas was shut off. To this answer a demurrer, on the ground that it does not state facts sufficient to constitute a defense, was sustained, and, defendant declining to amend or plead further, a peremptory writ was issued, commanding it to forthwith turn on the gas to the premises of the plaintiff at No. 107 Fourth street. From this judgment the defendant appeals.

Messrs. Dolph, Mallory, Simon, & Gearin, for appellant:

While the remedy by mandamus is not equitable, but strictly legal, yet by analogy to the principles prevailing in courts of equity it is a uniform requirement that the relator in seeking this remedy must come into court with clean hands.

2 Spelling, Extraordinary Relief, § 1380.

Where the answer to the petition for mandamus raised questions of fact, on the determination of which the right to a writ depended, a demurrer thereto was properly overruled.

Com. v. School Directors, 4 Pa. Dist. R. 314.

It is sufficient to say that the facts set up in the application are controverted by the affidavits attached to and made a part of the answer, so that, without proof being offered to support the allegations of the petition, a peremptory writ of mandamus could not properly issue.

American Waterworks Co. v. State ex rel. O'Connor, 31 Neb. 445, 48 N. W. 64; *State ex rel. Taylor v. Delafield Supers*, 64 Wis. 218, 24 N. W. 905; *State ex rel. Durkheimer v. Grace*, 20 Or. 154, 25 Pac. 382; *State ex rel. Short v. Sherman County Comrs.* 31 Neb. 465, 48 N. W. 146; *People ex rel. Del Mar v. St. Louis & S. F. R. Co.* 47 Hun, 543; *People ex rel. McMackin v. Board of Police*, 46 Hun, 296,

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Where the return of an alternative writ of mandamus presents traversable issues it is error for the court to grant a peremptory writ on sustaining the demurrer of the relator thereto *ore tenus*.

State ex rel. Taylor v. Delafield Supers, 69 Wis. 264, 34 N. W. 123; *State ex rel. Weise v. Sedalia Gaslight Co.* 34 Mo. App. 501; *People ex rel. Kennedy v. Manhattan Gaslight Co.* 45 Barb. 136.

Messrs. Pipes & Tift and John M. Pipes, for respondent:

The gas company cannot shut off the gas to coerce the payment of a bill for gas furnished to other premises of the owner.

Gaslight Co. v. Colliaday, 25 Md. 1; *Lloyd v. Washington Gaslight Co.* 1 Mackey, 331; *Cadieuz v. Montreal Gas Co.* 18 Can. L. T. 303, 28 Can. S. C. 382.

The company cannot coerce payment of an old and disputed bill by shutting off the gas.

Wood v. Auburn, 87 Me. 287, 29 L. R. A. 376, 32 Atl. 906; *Sickles v. Manhattan Gaslight Co.* 64 How. Pr. 33; *State ex rel. Webster v. Nebraska Teleph. Co.* 17 Neb. 126, 52 Am. Rep. 405, 22 N. W. 237.

Mandamus is the proper remedy.

Haugen v. Albina Light & Water Co. 21 Or. 419, 14 L. R. A. 424, 28 Pac. 244; *State ex rel. Webster v. Nebraska Teleph. Co.* 17 Neb. 126, 52 Am. Rep. 405, 22 N. W. 237.

The company cannot require the plaintiff to pay the gas bill upon the plea that, if not just, he can recover it back.

Wood v. Auburn, 87 Me. 287, 29 L. R. A. 376, 32 Atl. 906; *Sickles v. Manhattan Gaslight Co.* 64 How. Pr. 40.

The company cannot in this proceeding prove the old debt for the purpose of justifying the shutting off of the gas.

Wood v. Auburn, 87 Me. 287, 29 L. R. A. 376, 32 Atl. 906; *State ex rel. Webster v. Nebraska Teleph. Co.* 17 Neb. 126, 52 Am. Rep. 405, 22 N. W. 237.

The company is not the sole judge of the validity of the bill, and cannot deprive the plaintiff of his right to resort to the courts.

Smith v. Gold & Stock Teleg. Co. 42 Hun, 454; *Sickles v. Manhattan Gaslight Co.* 64 How. Pr. 35; *Morey v. Metropolitan Gaslight Co.* 6 Jones & S. 185; *State ex rel. Webster v. Nebraska Teleph. Co.* 17 Neb. 126, 52 Am. Rep. 405, 22 N. W. 237; *American Waterworks Co. v. State ex rel. Walker*, 46 Neb. 194, 30 L. R. A. 448, 64 N. W. 711; *Shepard v. Milwaukee Gaslight Co.* 6 Wis. 539, 70 Am. Dec. 479.

The company cannot cut off the supply of water that has been paid for in advance, because an old bill is unpaid.

Merrimack River Sav. Bank v. Lowell, 152 Mass. 556, 10 L. R. A. 122, 26 N. E. 97.

Doubt as to whether the facts of the particular case present the conditions upon which the defendant is to act may require a refusal of the writ, but a doubt as to the existence of the duty in matter of law will not. It is the duty of the court to resolve such doubt.

State ex rel. Brickman v. Wilson (Ala.) 45 L. R. A. 772, 26 So. 482.

The return showing that the refusal to furnish gas was because of the nonpayment of the old bill, no other ground can now be relied on.

Shepherd v. Milwaukee Gaslight Co. 11 Wis. 234.

On petition for rehearing.

The gas company demanded and received an ample deposit of \$7 from respondent as security to pay for the very gas it is withholding, and it has this deposit yet.

Upon these conceded facts, the decision of the court necessarily includes this proposition: That a rule of the company itself is reasonable that permits it to refuse gas to a customer who has secured it, or paid for it in advance, because he owes for other gas already consumed.

Such a proposition is not just, and it is not law.

If the rule is to be upheld it must be on the principle that the gas company has a remedy for the collection of debts due it, that no other citizen has. This rule is not for its protection. It is already protected by its deposit. It is coercion pure and simple.

When the company received and kept the money to pay for the gas, it was bound to furnish the gas paid for.

Our right is clear, for the gas we have paid for, upon the conceded facts, and the appellant's duty is plain, and mandamus lies.

Even if the old bill be legally due, the defendant company owed the respondent a balance of \$1.75 when it shut off the gas and when the writ issued, and it still owes it.

The court has fallen into the error of supposing that the question to be decided in this court is the justness of the bill, instead of the fact of the dispute.

When a bill is honestly disputed, it is the duty of the company to furnish the gas, and let the dispute be determined in an ordinary legal action.

If the defendant violates a plain duty, the plaintiff has a clear right. Because he has a remedy by injunction does not deprive him of his right to a mandamus.

It is never the duty anywhere of the consumer to prove that he does not owe the bill, but of the company to prove that he does; and it cannot prove it in mandamus, because that deprives the plaintiff of his right to have the dispute settled in an ordinary action at law before a jury.

That mandamus is the proper remedy was directly decided in *State ex rel. Webster v. Nebraska Teleph. Co.* 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237.

Since a rule of the company has been relied on to uphold such right, such rule so construed is unreasonable and void.

A rule that permits the company to deprive a customer of gas on account of the nonpayment of a disputed bill is depriving him of his property without due process of law, and deprives him of the equal protection of the law.

Bean, J., delivered the opinion of the court:

The only question on this appeal is whether

the court below erred in sustaining the demurrer to defendant's answer, and ordering a peremptory writ. Briefly, the facts are that in March, 1897, the plaintiff purchased gas of the defendant for use at No. 284 Morrison street, under a contract which provided that, in default of the regular payment of a bill, the company would discontinue the supply until payment should be made. Some time in that month he quit using the gas, and left, as the defendant alleges, an unpaid bill of \$5.25. Thereafter, and in September, 1899, he again applied to the company for gas to be used at No. 107 Fourth street, and it was furnished him up to November 11, when he was notified by the defendant that unless he paid the old bill it would be discontinued. This he refused to do, and the company cut off the gas. Upon these facts, the inquiry is whether the plaintiff is entitled to a writ of mandamus to compel the defendant to turn on the gas.

The right of a court to compel by mandamus a company engaged in furnishing gas for general consumption to supply all persons along its main or conduits who offer to and do comply with its rules and regulations is undoubted and unquestioned. *Haugen v. Albina Light & Water Co.* 21 Or. 411, 14 L. R. A. 424, 28 Pac. 244; *State ex rel. Webster v. Nebraska Teleph. Co.* 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237; *Crumley v. Watauga Water Co.* 99 Tenn. 420, 41 S. W. 1058; *Shepard v. Milwaukee Gaslight Co.* 70 Am. Dec. 479, and note, 6 Wis. 539; 27 Am. L. Reg. N. S. 277. And the authorities are agreed that such a company may adopt and enforce whatever reasonable rules and regulations may be necessary to protect its interests, which would include one providing that the supply of gas may be discontinued if a customer fails or neglects to pay his bills when due. *American Waterworks Co. v. State ex rel. Walker*, 46 Neb. 194, 30 L. R. A. 447, 64 N. W. 711; *State ex rel. Weiss v. Sedalia Gaslight Co.* 34 Mo. App. 501; *Tacoma Hotel Co. v. Tacoma Light & Water Co.* 3 Wash. 316, 14 L. R. A. 669, 28 Pac. 516.

The contention for the defendant is that, under its rules in force at the time the contract was made with the plaintiff, and which became a part of the contract, it had a right to discontinue the supply of gas to a customer at one set of premises until payment should be made of a delinquent bill for gas furnished him at another, and in this we think it is supported by the authorities. The cases of *People ex rel. Kennedy v. Manhattan Gaslight Co.* 45 Barb. 136, and *Montreal Gas Co. v. Cadieux* [1899] A. C. 589, are in point. In the former it appears that the relator commenced taking gas in 1858 at No. 61 Seventh avenue, and was supplied with same until the 28th of December, 1861. He paid his bills up to the 19th of August, 1861, but not thereafter. In May, 1864, he applied for gas at No. 121 West Sixteenth street, which was furnished without objection on account of the former indebtedness until the 9th of February, 1865, when the company shut off the supply, and refused to

furnish any more because of his failure to pay the balance due for gas furnished at No. 61 Seventh avenue. A judgment denying an application for a mandamus requiring the defendant to supply gas at No. 121 West Sixteenth street was affirmed. In *Montreal Gas Co. v. Cadieux* the statute defining the powers of the gas company provided that "if any person . . . supplied with gas by the company shall neglect to pay any rate, rent, or charge due to the . . . company at any of the times fixed for the payment thereof it shall be lawful for the company . . . on giving twenty-four hours' previous notice to stop the gas from entering the premises, service pipes, or lamps of any such person . . . by cutting off the said service pipe or pipes, or by such other means as the company shall think fit." The respondent was a customer of the company. He had two sets of premises in Montreal,—No. 1125 Notre Dame street, and No. 282 St. Charles Borromee street, where he resided,—and took gas for both. The company cut off the supply from No. 1125 Notre Dame street for nonpayment of the bill for gas furnished to that house. This measure had no effect in producing payment, whereupon the company gave notice that unless the other bill was paid it would cut off the gas at his residence, and, after repeated notices to that effect, carried its threats into execution, and cut off the gas at his residence, as well as at No. 1125 Notre Dame street; whereupon he brought an action to compel it to continue the supply of gas at his residence, and, upon appeal to the privy council, it was held that he was not entitled to the relief demanded. In the opinion it is said: "The only question is a question of fact. Is the respondent, in the words of the act, a person supplied with gas by the company who has neglected to pay a rate, rent, or charge due to the company at the time fixed for the payment thereof? It cannot be disputed that he is. The occasion, therefore, has arisen which authorizes the company to stop the gas from entering his service pipes. There is nothing in the act to limit the right of the company to the service pipes of the defaulter in a particular building, or connected with a particular meter, in respect of which the default has been committed. There is nothing in the act to throw the rate, rent, or charge for gas upon the premises for which the supply is furnished, or to make it payable out of the premises of the defaulter. The supply is to the consumer, and the default is the consumer's default. His liability to the company is a liability for the whole of the debt which he owes them at the time." This argument seems particularly applicable to the rule of the defendant. There is nothing in it limiting the right of the company to shut off the gas to the particular building in which default has been committed, but the provision, in effect, is that, in default of the regular payment of a bill by a customer of the company, it will not supply gas to him until payment is made. The cases principally relied upon by plaintiff are distinguishable from the one at bar. *Wood v. Au-*

burn, 87 Me. 287, 29 L. R. A. 376, 32 Atl. 906, was a suit to enjoin the defendant from cutting off the supply pending a judicial investigation; and, besides, in that case, and also in *State ex rel. Webster v. Nebraska Teleph. Co.* 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237, there was no rule of the company or stipulation in the contract providing for shutting off the supply in default of payment of bills. In *Gaslight Co. v. Colliday*, 25 Md. 1, the contract provided that gas should be introduced into the premises described, "and that in default of payment for gas consumed in said premises the flow of gas shall be stopped until the bill be paid," etc., and the court very naturally held that under such rule the company could not shut off the supply at one building on account of a default in payment for gas furnished another. *Lloyd v. Washington Gaslight Co.* 1 Mackey, 331, was also based upon the construction given by the court to the contract between the company and the consumer. If, therefore, we take the allegations of the answer to be true (as we are bound to do on this appeal), the defendant, under its rules and the terms of the contract, had a right to refuse to supply the plaintiff with gas at No. 107 Fourth street, because he had made default in payment for gas previously furnished to him at other premises.

The plaintiff contends, however, that, taking the alternative writ and the answer together, it appears that there is an honest controversy between the company and the plaintiff concerning the bill for gas furnished at No. 284 Morrison street, and the defendant had no right or authority to cut off the supply in order to coerce the payment of the disputed bill. But this is an application for a peremptory writ of mandamus, and to entitle plaintiff to the relief demanded his right must be clear. If he has paid or tendered payment of the rates legally due, he is entitled to the writ; otherwise, not. *People ex rel. McGrath v. Green Island Water Co.* 56 Hun, 76, 9 N. Y. Supp. 168. It is said to be well settled that a court of equity will, in cases of this character, prevent by injunction the shutting off of the supply pending the determination of a dispute between a customer and the company. 27 Am. L. Reg. N. S. 283; *Sickles v. Manhattan Gaslight Co.* 64 How. Pr. 33; *Wood v. Auburn*, 87 Me. 287, 29 L. R. A. 376, 32 Atl. 906. But a mandamus is an affirmative remedy, and before a peremptory writ will issue the plaintiff's right must be clearly established. 2 Spelling, Extraordinary Relief, § 1386; *American Waterworks Co. v. State ex rel. O'Connor* 31 Neb. 445, 48 N. W. 64; *State ex rel. Taylor v. Delafield Supers.* 69 Wis. 264, 34 N. W. 123.

We are of the opinion, therefore, that the court below erred in sustaining the demurrer to the answer.

The judgment is reversed, and the cause remanded for such further proceedings as may seem proper, not inconsistent with this opinion.

Rehearing denied.

PENNSYLVANIA SUPREME COURT.

Annie E. STORK

r.

City of PHILADELPHIA, *Appt.*

(195 Pa. 101.)

1. **Damage to a dwelling house by settling and cracking of the walls** caused by the improper manner of performing the work of constructing a subway on a street cannot be assessed as part of the compensation given by Const. art. 16, § 8, for property "taken, injured, or destroyed" by the construction of public improvements, since those damages extend only to injuries which are the direct, immediate, and necessary or inevitable consequence of the act of eminent domain itself, irrespective of care or negligence in the doing of it. The only appropriate remedy for injury by negligent performance of the work is by action of trespass.
2. **Notice from viewers in an eminent domain proceeding**, and an appearance in response thereto, cannot give them any authority to assess damages for injury by negligent construction of the work, as that is not within their jurisdiction.

(Dean and Mestrczat, JJ., dissent.)

(March 12, 1900.)

APPEAL by defendant from a judgment of the Court of Common Pleas, No. 4, for Philadelphia County confirming a report of viewers in favor of plaintiff in a proceeding to assess damages for injury to plaintiff's property by the change of grade of a public street. *Reversed.*

The opinion of the court below, referred to in the dissenting opinion, was as follows:

ARNOLD, P. J.:

"In the construction of a subway on Pennsylvania avenue for the use of the Philadelphia & Reading Railway Company, the plaintiff's house had been destroyed. It was deprived of its lateral support by removing an adjoining house, and became so dangerous that the municipal authorities compelled the plaintiff to take it down, by a bill in equity filed in court of common pleas No. 1, of September term, No. 774. The value of the house so destroyed is not in dispute, and the amount of the damages allowed for it by the jury is not objected to. No part of the plaintiff's land was actually taken. Her lot did not abut on Pennsylvania avenue, which is about 4 feet away. The subway was constructed by G. H. Flynn & Co., contractors, and it was contended for the city that the injury to the plaintiff's house was caused by the contractors neglecting to shore it up when digging out the subway.

"Two principal reasons for a new trial were filed, both of them based on legal grounds. It was contended that the plain-

tiff should have sued the city in an action of trespass, so that the defendant might have interposed in defense that the injury was caused by the negligence of the contractors in doing the work. This defense comes with a bad grace, in view of the fact that the city authorities had notified the plaintiff in the summer of 1894 that they would enter upon and take possession of such part of her property as should be required, under the authority of the ordinance to abolish grade crossings on Pennsylvania avenue, and the further fact that the viewers had notified her to present her claim before them, which she did. The city, it is true, did not take any part of the plaintiff's land, but it did injure and destroy her house, and also compelled her to take it down; and that her injury may be redressed by proceedings before a jury of view, and appeal from their award, seems to be too plain for extended argument. Similar proceedings on a like state of facts were had in *Snyder v. Lancaster*, 20 W. N. C. 185, 11 Atl. 872, and *Mellor v. Philadelphia*, 160 Pa. 614, 28 Atl. 991. It may also be redressed in action of trespass, although, when viewers have been appointed, and notice given to appear before them, it is better to comply with the notice. Having appeared before the viewers, who allowed her claim, on appeal by the city from the award of the viewers the plaintiff should not be turned out of court because she might have sued in trespass. In analogous cases against railroad companies the law is that an injured property owner may sue in ejectment, trespass, or before viewers, and appeal therefrom, when his damages have not been secured or paid. *McClinton v. Pittsburg, Ft. W. & C. R. Co.* 66 Pa. 404; *Dimmick v. Brodhead*, 75 Pa. 464; *Gilmore v. Pittsburg, V. & C. R. Co.* 104 Pa. 275; *Philadelphia, N. & N. Y. R. Co. v. Cooper*, 105 Pa. 239; *Pennsylvania R. Co. v. Duncan*, 111 Pa. 352, 5 Atl. 742. Hence a plaintiff may pursue any remedy which the facts of his case entitle him to. The forms of action are not to be made battledores and shuttlecocks, to cast suitors from one form to another, when either will do justice to both parties.

"The complaint of the city is that by proceeding before viewers, and appealing from their award, the city is sued alone, and its contractors, upon whom it places the blame for the injury, will escape liability for their negligence in the prosecution of the work. The claim of the plaintiff is *ex delicto*, and not *ex contractu*. The city and its contractors are joint tortfeasors, and the plaintiff is not bound to include all of them in her suit. If the city wishes to be indemnified for loss caused by its contractors, it should exact (as was said in argument it has exacted) from them an agreement to be responsible for any sums the city has to pay for their negligence. Nor is the city deprived of its defense that the injury was caused by the neglect of its contractors. It might show that defense, if it was available,

NOTE.—For damage to building by removal of lateral support in grading street, see also *Parke v. Seattle* (Wash.) 20 L. R. A. 68, 49 L. R. A.

in an action against the city alone. We are of opinion, therefore, that the plaintiff is right in her choice of the manner of obtaining damages for the injury due her by the construction of the subway.

"We are relieved from considering the question whether the plea of independent, responsible contractor is a good defense in this case, for the reason that the city did not offer in evidence the contract under which the work was done, nor show that the injury to the plaintiff's property was solely chargeable to the contractors. We have considered the defense of independent, responsible contractor in the case of *Marsh v. Philadelphia*, 195 Pa. 130, 45 Atl. 1094, for damages for an injury done in this same work. New trial refused."

Messrs. John L. Kinsey, John H. Maurer, and Francis L. Wayland for appellant.

Messrs. Charles L. Brown and John C. Bell, for appellee:

The plaintiff's case is directly within the letter and spirit of § 8, art. 16, of the Constitution of 1874, and of the act of May 16, 1891, providing for proceeding before viewers.

Ludd v. Philadelphia, 171 Pa. 485, 33 Atl. 62; *Mellor v. Philadelphia*, 160 Pa. 614, 28 Atl. 991; *Re Melon Street*, 182 Pa. 405, 38 L. R. A. 275, 38 Atl. 482; *Snyder v. Lancaster*, 20 W. N. C. 185, 11 Atl. 872; *Plumb's Appeal*, 166 Pa. 340, 31 Atl. 117; *Re Walnut Street Bridge*, 191 Pa. 156, 43 Atl. 88; *Re Chatham Street*, 191 Pa. 604, 43 Atl. 365.

The fact that the change of grade was made upon Pennsylvania avenue, and that Mrs. Stork's property fronts on Eighteenth street, 4 feet south of the south line of Pennsylvania avenue, is immaterial, as the evidence clearly establishes that the injury and destruction of her property were the direct and immediate result of the construction of the subway or change of grade on Pennsylvania avenue.

Snyder v. Lancaster, 20 W. N. C. 185, 11 Atl. 872, Approved in *Re Tucker Street*, 166 Pa. 340, 31 Atl. 117; *Mellor v. Philadelphia*, 160 Pa. 614, 28 Atl. 991; *Re Melon Street*, 182 Pa. 405, 38 L. R. A. 275, 38 Atl. 482; *Re Chatham Street*, 191 Pa. 604, 43 Atl. 365; *Re Walnut Street Bridge*, 191 Pa. 153, 43 Atl. 88.

For injuries like that to plaintiff's property, the remedy prior to the enactment of the act of May 16, 1891 (P. L. 75), was an action on the case.

Patent v. Philadelphia & R. R. Co. 14 W. N. C. 545, 17 W. N. C. 199; *Chester County v. Broecker*, 117 Pa. 647, 12 Atl. 577; *Re Plan 166*, 143 Pa. 414, 22 Atl. 669.

A different remedy was provided by the act of May 16, 1891.

Re Woodland Avenue, 178 Pa. 330, 35 Atl. 922; *Re Orthodox Street*, 1 Pa. Dist. R. 37; *Mellor v. Philadelphia*, 160 Pa. 614, 28 Atl. 991; *Re Walnut Street Bridge*, 191 Pa. 156, 43 Atl. 88; *Re Chatham Street*, 191 Pa. 604, 43 Atl. 365.
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Mitchell, J., delivered the opinion of the court:

In the construction of a public improvement, known as the "Subway," for the avoidance of grade crossings of the streets of the city and the tracks of the Reading Railroad, the grade of Pennsylvania avenue was lowered, and it became necessary to build a retaining wall to support the soil at the sides. Plaintiff was the owner of a house which fronted on Eighteenth street. Neither it nor the lot on which it was built abutted at any point on Pennsylvania avenue, but the lot extended back towards the avenue, so that the nearest corner was 4 feet at the bottom, and 12 feet at the top, from the excavation made to receive the retaining wall. During the construction the house next to plaintiff's, and between it and Pennsylvania avenue, was torn down; and some months later the plaintiff's house settled, the walls cracked, and had to be taken down. For this injury claim was made before the jury of view to assess damages for the construction of the subway, and on appeal to the common pleas the city defended on the ground that as the property did not abut on the line of the avenue, and the injury was not the result of the improvement itself, but of the manner in which it was done, the claim for damages was not within the jurisdiction of the viewers, and the liability of the city could only be sustained by an action of trespass for negligence. The court overruled this defense, and held that the case was one for the viewers. Although the contention is thus apparently in regard to the form of the remedy, yet the fundamental question in the case is whether, under the Constitution and the act of May 16, 1891 (P. L. 75), the liability of the city for damages for property injured in the construction of public work is limited to injury resulting from the work itself, or extends to that arising from the manner in which it was done.

Section 8, art. 16, of the Constitution provides that "municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements." The purpose of this provision is clearly shown by the history of litigation before its adoption. The Constitution of 1838, in article 7, § 4, provided that "the legislature shall not invest any corporate body or individual with the privilege of taking private property for public use, without requiring such corporation or individual to make compensation to the owners of said property;" and in the bill of rights (art. 9, § 10) it was declared: "Nor shall any man's property be taken or applied to public use . . . without just compensation being made." Under the uniform construction given to these provisions, and to similar ones in other states, there was no liability unless property was actually taken. If an inch of his lot was taken in widening a street, the owner had his claim for compensation, but the far greater injury of blocking up

or impeding his access by raising or lowering the street without actually encroaching on his line went without redress. Thus, in *Green v. Reading*, 9 Watts, 382, 36 Am. Dec. 127, the borough filled up the street in front of a house so as to obstruct the access, and deprive the owner of the use of an alley; in *Henry v. Pittsburgh & A. Bridge Co.* 8 Watts & S. 85, a similar obstruction was made by the erection of the abutments of a bridge; in *O'Connor v. Pittsburgh*, 18 Pa. 187, the street was lowered in grade to such extent as to impair the safety of the cathedral, and perhaps necessitate taking it down; and in *Monongahela Nav. Co. v. Coons*, 6 Watts & S. 101, the company, by its dam erected to aid slack-water navigation, backed the water up so as to make useless a milldam previously erected by a riparian owner under the license of the act of 1803. All of these cases were held to be consequential injuries, for which there was no right to compensation. In the last-mentioned case Chief Justice Gibson says: "In one instance a profitable ferry on the Susquehanna . . . was destroyed by the Pennsylvania Canal, and in another an invaluable spring of water at the margin of the river, near Selinsgrove, was drowned. These losses, like casualties in the prosecution of every public work, are accidental, but unavoidable." In *Henry v. Pittsburgh & A. Bridge Co.* 8 Watts & S. 85, the court said: "The plaintiffs recovered, doubtless rightfully, for turning the water on their ground, for the authority of the state cannot be implied for negligence or a gratuitous injury; but for unavoidable damage in the accomplishment of the object the defendants are not liable." So great was the hardship felt to be that in *O'Connor v. Pittsburgh*, 18 Pa. 187, Chief Justice Gibson said: "We have had this cause reargued in order to discover, if possible, some way to relieve the plaintiff consistently with law; but, I grieve to say, we have discovered none."

This was the condition of the law which the present Constitution meant to change by the provision for compensation for property "injured or destroyed." And the injury meant to be provided for was such as, in the language of *Monongahela Nav. Co. v. Coons*, 6 Watts & S. 101, and *Henry v. Pittsburgh & A. Bridge Co.* 8 Watts & S. 85, was "unavoidable in the accomplishment of the object." For such injury there was no redress under the former Constitution, and it was to remedy this defect that the present Constitution added property "injured or destroyed" to property "taken," compensation for which has always been secured. For negligence in the manner of doing the work there is and always has been a liability and adequate redress by an action on the case. Such injury was not in need of any additional remedy, and none was contemplated by the provision in question. The difference in the modes of procedure is much more than one of form. It involves substantial difference of the rights to be vindicated, and perhaps of the parties to be fixed with responsibility. For such injury as is the direct and necessary consequence of the act itself

of eminent domain, the liability of the city under the Constitution is absolute, and no care or diligence will relieve it. But for damage resulting from the manner in which the act is done the city is only liable by reason of negligence. Such damage is like the deprivation of land in an artificial state, with buildings on it, of its lateral support. It is subject to the right of the adjoining owner to excavate his own land, without liability for consequences, unless they are due to want of proper and reasonable care on his part. To throw these two kinds of claims into a single action involves the serious inconvenience of expecting the jury to keep the line of distinction clearly in view, and applying the evidence to each side of the line appropriately, with the further difficulty that the measure of damages is wholly different. In the present case the plaintiff's house was not directly affected by the city's act of eminent domain. If the subway had been dug by a private citizen on his own land, without negligence, there would have been no liability on his part. The necessary connection different, for there is no done and the injury between the thing to be done and the injury sued for. The plaintiff's could have been testified that the injury was done before taking avoided by proper precaution. It was therefore down the adjoining house. The manner of doing as much the result of the manner of the subway as the work as if in excavating a piece of rock excessive blast had thrown a stone away, and injured a house a square or more away. For that class of injuries the only remedy for negligence is an action of trespass.

The present question has not been before the court in reference to municipal improvements. In *Snyder v. Lancaster*, 20 W. N. C. 185, 11 Atl. 872, a part of the rear of plaintiff's lot was taken in the widening of a street. The case was then properly before a jury of view, and, though no part of the house was taken, yet, owing to the manner in which it was built against the adjoining house, a special injury to it was a necessary consequence of the act of taking the adjoining house. The court therefore held that the whole injury to the house, as well as to the lot, was a necessary result of the opening of the street. In *Ladd v. Philadelphia*, 171 Pa. 485, 33 Atl. 62, chiefly relied on by appellee, was an action of trespass, and all question on the remedy was expressly waived by agreement. The case was tried on the issue of fact whether the cause of the cracking of the walls was the construction of the sewer for the city, or the insecure nature of the manure ground on which plaintiff's house was built. The question developed in the present case was not the basis of decision, and the language of the opinion must be taken in connection with the case as then presented. Whether the result was consistent with the settled rule of law as to lateral support of land in an artificial state we are not now called upon to consider. In *Mellor v. Philadelphia*, 160 Pa. 614, 23 Atl. 991, access to plaintiff's house was cut off by the lowering

of the grade of the two cross streets between which the house was situated; and it was held that, although his house did not abut directly on the line of the improvement, yet the latter resulted in such proximate and immediate injury as to bring him within the constitutional protection. The word "necessary" or "unavoidable" was not used in connection with the injury, but was so obviously applicable that no question was raised which called for discussion of that point. In *Re Melon Street*, 182 Pa. 397, 38 L. R. A. 275, 38 Atl. 482, the question was whether the injury to plaintiff by cutting off the street at one end of the square in which his house was situated was an injury different in kind as well as in degree from that to the general public. There was no question that it was the direct and necessary result of the city's act in vacating the street. The cases of *Re Walnut Street Bridge*, 191 Pa. 153, 43 Atl. 88, and *Re Chatham Street*, 191 Pa. 604, 43 Atl. 365, rest on the same basis,—that the injury was the direct and necessary result of the city's act, without regard to the manner in which it was done. But, though the question has not directly arisen or been discussed in regard to municipal improvements, the principle has been clearly enunciated and applied to the analogous case of the exercise of eminent domain by a pipe line for transporting gas. In *Denniston v. Philadelphia Co.* 161 Pa. 41, 28 Atl. 1007, the defendant company, under its right of eminent domain, laid a pipe through plaintiff's farm; and plaintiff proceeded for damages before viewers, and on appeal before a jury in the common pleas. In the opinion of this court our Brother McCollum said: "The inconveniences and injuries caused by the location of a skillfully constructed and carefully operated pipe line may be considered in a proceeding for the assessment of damages to the land through which it passes, but such as are produced by the careless construction and operation of it cannot be. The former are the natural and ordinary consequences of the location, construction, and use of the line, and terminate only with the abandonment of it, while the latter are exceptional, and may be prevented by the use of the best known appliances and skill, and the observance of due care in the prosecution of the business, and they constitute an independent cause of action. In this case the plaintiffs were entitled to be compensated for the depreciation in the market value of their farm due to the location and construction of the pipe line, but not for injuries caused by the negligent operation of it." The learned judge at the trial had instructed the jury correctly in accordance with the rule thus laid down, but the judgment was nevertheless reversed because the evidence had failed to give the jury clear means of discriminating between two classes of injury. "The evidence in

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cases of this nature should be restricted to matters proper for consideration in ascertaining the depreciation in the market value of the land. . . . An injury which is or may be produced by negligence in the operation or care of the line is not such a matter. It may be that the leakage complained of in the case before us was due to the company's negligence. . . . There was no attempt to show that it was inseparable from, or a natural and ordinary consequence of, the location and construction of the line." *Denniston v. Philadelphia Co.* 161 Pa. 46, 28 Atl. 1008. After a second trial the case came up again for review before the superior court, and was again reversed for substantially the same errors. *Denniston v. Philadelphia Co.* 1 Pa. Super. Ct. 599. The rule which was thus emphatically enforced, and which is the logical deduction from the history of the amendment to the law, is that the absolute liability for injury to property imposed by the Constitution, and put by it on the same footing as a taking for public use, is such injury only as is the direct, immediate, and necessary or unavoidable consequence of the act of eminent domain itself, irrespective of care or negligence in the doing of it. For such injury a proceeding before viewers is the appropriate remedy. But for injury by negligent performance of the work the remedy must be by action of trespass. In the present case the injury complained of was not the necessary consequence of the improvement authorized and undertaken by the city. The plaintiff's own witnesses, as already noted, testified that it could have been avoided by due care. The liability declared upon therefore arose, if at all, from negligence, and could not be enforced in this form of proceeding. It is said that the city is estopped from setting up this objection by the fact that the plaintiff appeared before the viewers in response to notice to do so. But no notice from the viewers could give them any authority to pass on a question of liability which the law has not put within their jurisdiction.

Judgment reversed.

Dean, J., dissenting:

The city did not appropriate plaintiff's land, but, in constructing a lawful improvement, it injured and destroyed her house. The Constitution expressly gives her a remedy for damages. I can see no substantial distinction between the facts in this case and those in *Snyder v. Lancaster*, 20 W. N. C. 185, 11 Atl. 872. I would affirm the judgment, on what seems to me the unanswerable opinion of the learned judge of the court below on motion for a new trial. For the reasons therein given, I dissent from the judgment of the court in this appeal.

Mestresat, J.: I join in this dissent.

RHODE ISLAND SUPREME COURT.

Clarence E. CRAFTS

v.

David S. RAY, Town Treasurer.

(.....R. I.....)

The exemption from taxation for ten years of two private corporations, by vote of a town council under authority of Pub. Laws, chaps. 386, 389, on condition that they locate manufacturing property in the town, is not void as in violation of Const. art. 1, § 2, providing that the burdens of the state ought to be fairly distributed among its citizens.

(July 17, 1900.)

CERTIFICATION by the District Court for Providence County for the opinion of the Appellate Division of an action brought to recover back taxes alleged to have been illegally assessed and to have been paid under protest. *Judgment for defendant.*

The facts are stated in the opinion.

Mr. John A. Tillinghast, for plaintiff:

The legislature has no constitutional power to exempt from taxation an enterprise primarily conducted for the benefit of an individual, as it has no constitutional power to levy a tax for such purpose, and therefore chap. 44, § 4, R. I. Gen. Laws 1896, is unconstitutional.

The assessment was in conflict with art. 1, § 2, of the state Constitution.

Where a legislative act is clearly subversive of the Constitution, or clearly transcends the power confided to that department, the judiciary may interpose and arrest the course of legislation by declaring such acts void.

1 *Desty*, Taxn. p. 86.

That the legislation in this case is in conflict with the Rhode Island Constitution has been practically decided in this state.

McTigigan v. Hunter, 18 R. I. 776, 30 Atl. 962, 19 R. I. 265, 29 L. R. A. 526, 33 Atl. 5; *Brown University v. Granger*, 19 R. I. 704, 36 L. R. A. 847, 36 Atl. 720.

It was no taxation for public, but for private purposes.

Cooley, Const. Lim. 6th ed. 587.

Where a town assesses a tax upon its inhabitants, and collects the same, for the purpose of giving the proceeds or a portion thereof to certain favored manufacturers, it is not a tax for public or private purposes.

1 *Hare*, Am. Const. Law, p. 283; *Brewer Brick Co. v. Brewer*, 62 Me. 62, 16 Am. Rep. 395; *Farnsworth Co. v. Lisbon*, 62 Me. 451; *Weeks v. Milwaukie*, 10 Wis. 243; *Lancaster v. Clayton*, 86 Ky. 373, 5 S. W. 864; *Al-*

NOTE.—As to municipal power to exempt property from taxation, see *Whiting v. West Point* (Va.) 15 L. R. A. 860, and *note*; *McTigigan v. Hunter* (R. I.) 29 L. R. A. 526.

For power of legislature to exempt property, see *Hogg v. Mackay* (Or.) 19 L. R. A. 77, and *note*; also *Wells v. Hyattsville Comrs.* (Md.) 20 L. R. A. 89.

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len v. Jay, 60 Me. 124, 11 Am. Rep. 185; *Citizens' Sav. & L. Asso. v. Topcka*, 20 Wall. 655, 22 L. ed. 455; *Weismer v. Douglas*, 64 N. Y. 91, 21 Am. Rep. 586; *MacKenzie v. Wooley*, 39 La. Ann. 944, 3 So. 128.

The aid of private manufacturing is not a public purpose for which a city or local subdivision of the state can issue its bonds or loan to its credit.

Parkersburg v. Brown, 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. Rep. 442; *Cole v. La Grange*, 113 U. S. 1, 28 L. ed. 896, 5 Sup. Ct. Rep. 416; *Opinion of the Justices*, 58 Me. 590; *Mather v. Ottawa*, 114 Ill. 659, 3 N. E. 216; *Commercial Nat. Bank v. Iola*, 2 Dill. 353, Fed. Cas. No. 3,061, 9 Kan. 689; *Central Branch Union P. R. Co. v. Smith*, 23 Kan. 745; *English v. People*, 96 Ill. 566; *Clee v. Sanders*, 74 Mich. 692, 42 N. W. 154; *Adams v. Nemeyer*, 54 Ohio St. 614, 46 N. E. 1154.

A town cannot give money to a private cemetery corporation.

Luques v. Dresden, 77 Me. 186.

The expenditure of money to make the water in a river available for manufacturing purposes is not a public purpose for which a city can issue its bonds.

Ottawa v. Carey, 108 U. S. 110, 27 L. ed. 669, 2 Sup. Ct. Rep. 361; *Coates v. Campbell*, 37 Minn. 498, 35 N. W. 366.

Neither is the construction of a dam, in order to lease the water for manufacturing.

Atty. Gen. v. Eau Claire, 37 Wis. 400.

Nor aid to a steam grist mill.

Osborne v. Adams County, 106 U. S. 181, 27 L. ed. 129, 1 Sup. Ct. Rep. 168; *State ex rel. Bowen v. Adams County*, 15 Neb. 569, 20 N. W. 96.

The use of the money or bonds of a town or other municipal subdivision to provide destitute farmers with seed grain and grain to feed while putting in crops cannot be authorized by statute, because not for a public purpose.

State ex rel. Griffith v. Osawkee Twp. 14 Kan. 418; *Hooper v. Emery*, 14 Me. 375; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Feldman v. Charleston*, 23 S. C. 57, 55 Am. Rep. 6.

A private educational institution, though incorporated, cannot be aided by a town by moneys raised by taxation.

Jenkins v. Andover, 103 Mass. 94; *Curtis v. Whipple*, 24 Wis. 350, 1 Am. Rep. 187.

Taxes cannot be levied to donate to benevolent and charitable societies, which are controlled by private individuals, and over which the public authorities have no supervision and control.

St. Mary's Industrial School for Boys v. Brown, 45 Md. 310.

The common council of a city cannot furnish free entertainment for citizens and guests of the city.

Austin v. Coggeshall, 12 R. I. 329.

The term "public purposes," as employed to denote the objects for which taxes may be levied, has no relation to the urgency of the

public need, or to the extent of the public benefit which is to follow.

People ex rel. Detroit & H. R. Co. v. Salem Twp. Board, 20 Mich. 452, 4 Am. Rep. 400; *Whiting v. Sheboygan & F. du L. R. Co.* 25 Wis. 167, 3 Am. Rep. 30; *People ex rel. Butler v. Saginaw County Supers.* 26 Mich. 22; *Re Eureka Basin Warehouse & Mfg. Co.* 96 N. Y. 42; *State ex rel. Garth v. Switzler*, 143 Mo. 287, 40 L. R. A. 280, 45 S. W. 245; Cooley, Const. Lim. 6th ed. 263, 264, note 3; Cooley, Taxn. 2d ed. pp. 126, 214; 1 Desty, Taxn. pp. 22-26; 1 Hare, Am. Const. Law, 278, 287; Dill. Mun. Corp. 4th ed. § 736, note 1.

There is no difference between the nature of a public use that warrants the exercise of the power of eminent domain, and that which warrants the exercise of the taxing power in its behalf.

Stewart v. Polk County Supers. 30 Iowa, 9; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Opinion of the Justices*, 150 Mass. 592, 8 L. R. A. 487, 24 N. E. 1084; *Opinion of the Justices*, 58 Me. 590; *Astor v. New York*, 5 Jones & S. 539; *Corvinton v. Southgate*, 15 B. Mon. 491.

It not being such a public use as would warrant the exercise of the power of eminent domain, then it does not warrant the exercise of the taxing power in its behalf.

State v. Nelson County, 1 N. D. 88, 8 L. R. A. 283, 45 N. W. 33.

Messrs. Edwards & Angell, with Mr. Edward L. Mitchell, for defendant:

The omission of property from the assessment, not being occasioned by an intentional disregard of law or other wrongful or fraudulent purpose, the assessment is valid and the question as to the constitutionality of the exemption act cannot be considered by the court.

2 Dill. Mun. Corp. § 776, note 1, pp. 953, 954; *People v. McCreery*, 34 Cal. 434; *Dunham v. Chicago*, 55 Ill. 357; *Merritt v. Faris*, 22 Ill. 303; Cooley, Taxn. pp. 216, 217; *LeRoy v. New York*, 4 Johns. Ch. 353; *Wilson v. Wheeler*, 55 Vt. 454; *Muscatine v. Mississippi & M. R. Co.* 1 Dill. 542, Fed. Cas. No. 9,971; 2 Desty, Taxn. 674; *Burlington & M. River R. Co. v. Saline County Comrs.* 12 Neb. 396, 11 N. W. 854; *Burlington & M. River R. Co. v. Seward County Comrs.* 10 Neb. 211, 4 N. W. 1016; *Sanford v. Dick*, 15 Conn. 456; *Dillingham v. Snow*, 5 Mass. 558; *Van Deventer v. Long Island City*, 130 N. Y. 133, 34 N. E. 774; *Exchange Bank v. Hines*, 3 Ohio St. 50; *Williams v. School Dist. No. 1*, 21 Pick. 75, 32 Am. Dec. 243; *George v. Second School Dist.* 6 Met. 512; *Watson v. Princeton*, 4 Met. 599; *Insurance Co. v. Yard*, 17 Pa. 339; *Fifield v. Marinette County*, 62 Wis. 541; *McTriggan v. Hunter*, 19 R. I. 265, 29 L. R. A. 526, 33 Atl. 5.

The statute in question, and the exemption made under authority thereof, are valid unless they clearly violate some provision of the Constitution of Rhode Island, or of the Constitution of the United States.

Cooley, Const. Law, 3d ed. 166-170; *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759; *Bertholf v. O'Reilly*, 74 N. Y. 49 L. R. A.

509, 30 Am. Rep. 323; *People v. Gillson*, 109 N. Y. 398, 17 N. E. 343; *Henley v. State*, 98 Tenn. 665, 39 L. R. A. 126, 41 S. W. 352, 1104; *People ex rel. Drake v. Mahaney*, 13 Mich. 482; *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24; *Phœnia Assur. Co. v. Fire Dept. of Montgomery*, 117 Ala. 631, 42 L. R. A. 468, 23 So. 843; *St. Vincent's College v. Schaefer*, 104 Mo. 261, 16 S. W. 395.

The exemption in question is not repugnant to the Constitution of the state of Rhode Island.

The clause, "the burdens of the state ought to be fairly distributed among its citizens," does not deprive the general assembly of the power to exempt property from taxation.

Brown University v. Granger, 19 R. I. 705, 36 L. R. A. 847, 36 Atl. 720.

The words "fairly distributed" mean such a distribution as will effect the purposes for which free governments are declared to be instituted, viz., "the protection, safety, and happiness of the people," and such a distribution as will promote "the good of the whole."

Wood v. Quimby, 20 R. I. 482, 40 Atl. 161.

Such clauses are not mandatory, nor do they impose any definite restriction upon the legislature. They are merely "guides to the legislative judgment," and do not mark a definite limitation of legislative power.

Re Dorrance Street, 4 R. I. 230; Cooley, Const. Lim. 6th ed. p. 209; *Wisconsin C. R. Co. v. Taylor County*, 52 Wis. 37, 8 N. W. 833; *Lund v. Chippewa County*, 93 Wis. 640, 34 L. R. A. 131, 67 N. W. 927; *New Orleans v. Fourchy*, 30 La. Ann. 910; *State, Stratton, Prosecutor, v. Collins*, 43 N. J. L. 562; *Daughdrill v. Alabama Life Ins. & T. Co.* 31 Ala. 91; *Bank of State v. New Albany*, 11 Ind. 139; *Mississippi Mills v. Cook*, 56 Miss. 40.

The whole course of legislation in this state, from the adoption of the Constitution to the present time, shows that the provision in question has never been understood to forbid the legislature to grant exemptions from taxation.

Brown University v. Granger, 19 R. I. 704, 36 L. R. A. 847, 36 Atl. 720.

The power to designate what property shall be the subject of taxation is a legislative power.

Cooley, Taxn. 2d ed. p. 41.

The court will not in any event annul or review the action of the legislature in exempting property from taxation, unless the purpose and effect of such exemption are merely to confer a benefit upon the person whose property is exempted, and not to promote the public interests, or, in the language of the Constitution, "the good of the whole."

State ex rel. Douglas County v. Cornell, 53 Neb. 556, 39 L. R. A. 513, 74 N. W. 59; *Cleveland v. Tripp*, 13 R. I. 50.

The legislature is that department of the state which, under the Constitution, and according to our theory of government, as its proper and usual function, not only imposes taxes, and provides means for collecting them, but apportions them, and decides what shall be taxed, and what shall be exempted.

Cooley, Taxn. 2d ed. pp. 41 *et seq.*; *Merriweather v. Garrett*, 102 U. S. 472, 26 L. ed. 197.

There does not exist any object for which a tax may be laid, or for which an exemption may be made, which is, *per se*, a public purpose.

Perry v. Keene, 56 N. H. 514.

The question "What is a public purpose?" is, then, a question of fact.

A question of fact may come before the court after it has been passed on by the legislature, just as a question of fact may come before a judge after it has been passed on by the jury.

But in each case the court and the judge are not to determine the question of fact as an original question before them, but to see that the legislature and the jury respectively, in performing their proper functions of deciding the question of fact, have kept themselves within the prescribed limits in reaching their conclusion.

Thayer, *Origin and Scope of the American Doctrine of Const. Law*, 7 Harvard Law Rev. p. 129, at p. 150; *Cleveland v. Tripp*, 13 R. I. 50.

The prescribed limits set to a legislature in determining a question of political policy are only that it should act within the bounds of reason.

Cooley, Taxn. 2d ed. p. 106; *Brodhead v. Milwaukee*, 19 Wis. 625, 88 Am. Dec. 711; *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759; *State ex rel. Douglas County v. Cornell*, 53 Neb. 556, 39 L. R. A. 513, 74 N. W. 59; *Booth v. Woodbury*, 32 Conn. 118; *Perry v. Keene*, 56 N. H. 514; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606; *Sinking-Fund Cases*, 99 U. S. 700, *sub nom. Union P. R. Co. v. United States*, 25 L. ed. 496; *Com. v. People's Five Cents Sav. Bank*, 5 Allen, 428; *Com. ex rel. O'Hara v. Smith*, 4 Binn. 117; *Grimball v. Ross*, T. U. P. Charlt. (Ga.) 175; *Byrne v. Stewart*, 3 Desauss. Eq. 466.

Public aid to a private enterprise may indisputably be a means of effecting a public purpose.

Lewis County v. Gordon, 20 Wash. 80, 54 Pac. 779; *Dayton Gold & S. Min. Co. v. Seawell*, 11 Nev. 394.

The grant of eminent domain to a railroad is conclusive that aid to a private enterprise may be for a public purpose.

Stewart v. Polk County Supers. 30 Iowa, 9.

Many corporations have been exempted from taxation by their charters.

Wilmington & R. R. Co. v. Reid, 13 Wall. 264, 20 L. ed. 568.

The validity of charter provisions concerning taxation has been repeatedly affirmed in the case of such distinctly so-called "private" corporations as banks.

Piqua Branch of State Bank v. Knoop, 16 How. 369, 14 L. ed. 977; *Dodge v. Woolsey*, 18 How. 331, 15 L. ed. 401.

Cases which have sustained the constitutionality of taxation or exemption from taxation on the ground that the purpose was public, though private persons were the ones directly benefited, are:

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Bounty cases:

Lowell v. Oliver, 8 Allen. 247; *Brodhead v. Milwaukee*, 19 Wis. 625, 88 Am. Dec. 711; *Booth v. Woodbury*, 32 Conn. 118.

State funds for local sewers:

Kingman, Petitioner, 153 Mass. 566, 12 L. R. A. 417, 27 N. E. 778.

Aid to steam custom mill:

Burlington Twp. v. Beasley, 94 U. S. 310, 24 L. ed. 161.

Seed and grain bonds:

State v. Nelson County, 1 N. D. 88, 8 L. R. A. 283, 45 N. W. 33.

Aid to railroads:

Perry v. Keene, 56 N. H. 514; *Sharpless v. Philadelphia*, 21 Pa. 147, 57 Am. Dec. 759; *Chicago, B. & Q. R. Co. v. Otoe County*, 16 Wall. 667, 21 L. ed. 375; *Stewart v. Polk County Supers.* 30 Iowa, 9; *Olcott v. Fond du Lac County Supers.* 16 Wall. 678, 21 L. ed. 382; *Talbot v. Dent*, 9 B. Mon. 526; *Gibson v. Mason*, 5 Nev. 283; *Coler v. Santa Fe County Comrs.* 6 N. M. 88, 27 Pac. 619; *Louisville & N. R. Co. v. Davidson County Ct.* 1 Sneed, 637, 62 Am. Dec. 424; *Neale v. Wood County Ct.* 43 W. Va. 90, 27 S. E. 370.

Bonds for natural gas plant:

State ex rel. Atty. Gen. v. Toledo, 48 Ohio St. 112, 11 L. R. A. 729, 26 N. E. 1061.

Exemption of railroad:

Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 908.

Gratuities to firemen:

Phoenix Assur. Co. v. Fire Dept. of Montgomery, 117 Ala. 631, 42 L. R. A. 468, 23 So. 843.

Irrigation of land for private use:

Cummings v. Hyatt, 54 Neb. 35, 74 N. W. 411.

Courts seem to have recognized the validity of statutes like the one in question, in—

Franklin Needle Co. v. Franklin, 65 N. H. 177, 18 Atl. 318; *Gillan v. Gillan*, 55 Pa. 430; *First Municipality v. New Orleans Theatre Co.* 2 Rob. (La.) 209; *Bradford v. Motc.* 2 Marv. (Del.) 159, 42 Atl. 445; *Yocoma Cotton Mills v. Duke*, 71 Miss. 790, 15 So. 929; *East Saginaw Salt Mfg. Co. v. East Saginaw*, 13 Wall. 373, 20 L. ed. 611; *Wilmington & R. R. Co. v. Reid*, 13 Wall. 264, 20 L. ed. 568; *Welch v. Cook*, 97 U. S. 541, 24 L. ed. 1112; *Bowen v. Newell*, 16 R. I. 238, 14 Atl. 873.

That the encouragement of manufacturing industry may be regarded as a public purpose is clearly evidenced by the so-called "Mill Acts."

Motery v. Sheldon, 2 R. I. 372; *Boston & R. Mill Corp. v. Newman*, 12 Pick. 467; *Talbot v. Hudson*, 16 Gray, 417; *Olmstead v. Camp*, 33 Conn. 532, 89 Am. Dec. 221; *Todd v. Austin*, 34 Conn. 79; *Great Falls Mfg. Co. v. Fernald*, 47 N. H. 444; *Amoskeag Mfg. Co. v. Goodale*, 62 N. H. 66; *Holyoke Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133.

The exemption in question is not prohibited by the Constitution of the United States.

Picard v. East Tennessee, V. & G. R. Co. 130 U. S. 637, 32 L. ed. 1051, 9 Sup. Ct. Rep. 640; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *New Jersey v. Wilson*, 7 Cranch, 164,

3 L. ed. 303; *Given v. Wright*, 117 U. S. 648, *sub nom. New Jersey v. Wright*, 29 L. ed. 1021, 6 Sup. Ct. Rep. 907; *Cooley*, Const. Lim. 4th ed. 341.

Stiness, Ch. J., delivered the opinion of the court:

The plaintiff sues to recover a tax paid by him in 1899, under protest, upon the ground that it was illegal. The case was submitted to the district court upon an agreed statement of facts, and certified to this court under Gen. Laws, chap. 239, § 1. The facts show that the assessors of taxes of East Providence intentionally omitted from assessment the manufacturing property of the Grosvenordale Company and the American Electrical Works, and that they did so under a vote of the town council, authorized by the electors of said town, whereby said properties were exempted from taxation for a period of ten years from and after April 11, 1892, and March 22, 1893, respectively; said corporations having agreed to locate, and having subsequently located, manufacturing property in said town in consequence of such exemption. The right to make such an exemption was given in Pub. Laws, chap. 1088 (May 19, 1892); but it was held in *McTwiggan v. Hunter*, 19 R. I. 265, 29 L. R. A. 526, 33 Atl. 5, that the statute was not retroactive, and hence did not authorize the contract of April 11, 1892, previous to its passage, no further action having been taken. By Pub. Laws, chap. 386 (Jan. Sess. 1896), the action of the town of East Providence was ratified by the general assembly, and the property of the Grosvenordale Company was expressly exempted from taxation for a period of ten years from April 11, 1892, and by chapter 389 the same action was taken with reference to the property of the American Electrical Works for the period of ten years from March 22, 1893. The question raised is whether the acts were unconstitutional and void, upon the ground that the Constitution of the state provides (art. 1, § 2) that "the burdens of the state ought to be fairly distributed among its citizens." It is also claimed that the effect of the acts was to take the property of citizens under the guise of taxation, and to use it in aid of the enterprises of others, which are not of a public character, thus perverting the right of taxation, which can only be exercised for public purposes, to aid individual interests and private purposes of profit and gain.

The question presented is one of great importance. The taxing power is one of the most delicate, difficult, and far-reaching functions of government. It affects all classes and all property. Under our form of government, however, it is, theoretically, a self-imposed burden. Since the days of the Revolution, taxation has been recognized as a representative act. The power to tax necessarily implies a power to exempt. Taxation being a legislative power, it is not the province of a court to review it, except in cases where the power is limited by constitutional restrictions. The court is then to say whether the legislature had power to pass

a given law; not whether it should have passed it. The provisions of our Constitution which the plaintiff claims to be a limitation on the taxing power is the clause quoted above: "All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens." The form of this clause is advisory, not mandatory. Ames, Ch. J., in *Re Dorrance Street*, 4 R. I. 230, 249, spoke of it as "addressed rather to the general assembly, by way of advice and direction, than to the courts, by way of enforcing restraint upon the lawmaking power." But he added: "We do not mean to say that a law purporting to impose a tax or burden of some sort upon the citizen may not be, in its distribution of the burden, both in design and effect, so outrageously subversive of all the rules of fairness as not to come so far within the purview of this general clause as to enable the court to save the citizen from oppression by declaring it to be void. But evidently a wide discretion with regard to the distribution of the burdens of state amongst the citizens was intended to be reposed in the general assembly by the will of the people, as signified in this clause of the Constitution. The form is 'ought to be;' the word is 'fairly' distributed, not 'equally' even,—unless equality be fair, which it is not always, in any sense, and never, in some senses; and especially the words are not 'equally upon property,' or words to that effect, as in the Constitution of Louisiana. . . . Indeed, the language in question can hardly be said to impose any restriction upon the assembly at all, except what would be imposed by the fact of our free institutions, and the general principles of constitutional law, here and everywhere in this country prevalent. Had the Constitution been wholly silent upon this subject, a greater latitude could not have been given by these principles than seems to have been studiously implied in the form, spirit, and general terms of the sentence." The case in which these words were used was different from the case at bar, in this: that it involved an assessment for a benefit arising from the opening of a street, and not an ordinary tax. But the words quoted are entitled to great weight, as an interpretation of the Constitution, not only from the eminence of Judge Ames as a jurist, but also from his prominence as a member of the general assembly when the Constitution was adopted, giving him a peculiar opportunity to know the intended scope of its provisions. Further evidence that the clause in question has been understood to be directory merely is found in the fact that in the proposed revision of the Constitution, reported to the general assembly in 1898, the commission recommended a change from the directory form of "ought to be fairly distributed among its citizens," to the mandatory form of "shall be fairly distributed." Historically, therefore, the clause has been treated as directory rather than mandatory. Nevertheless, a declaration of right or duty, which has been deemed sufficiently important to be

embodied in the Constitution, should not be put aside as a mere generality, if it is of such a character that effect can be given to it as the equivalent of a more positive statement. But suppose the clause in question to be equivalent to the mandatory form: can we hold it to be a limitation on the power of exemption? Undoubtedly, taxation may be included among the burdens which are to be fairly distributed. From this postulate the plaintiff argues that an exemption is contrary to the practical direction of the Constitution, and hence unconstitutional. This conclusion does not follow. There are burdens of citizenship besides taxation. Indeed, taxation is not strictly a burden incidental to citizenship, since persons not citizens of the state may be taxed for property within it. Jury and military duty at once come to mind as among the burdens of the state. Hence, if it be held that, because taxation is a burden which "ought to be fairly distributed," the legislature has no power to make exemptions, it must follow that no exemptions from jury or military duty could be made. But, immediately following the adoption of the Constitution, the act relating to jurors exempted some, but not all, state and town officers, and some who had no public duties, such as cashiers of banks and all persons over sixty-five years of age. The act relating to the militia embraced only white male citizens not over forty-five years of age, and specially exempted many, but not all, state and town officers, persons who had held the office of governor or lieutenant governor of the state, the inhabitants of New Shoreham and Jamestown, and all persons who had conscientious scruples against bearing arms.

In the act relating to taxes, houses for schools, academies, and colleges, owned by any company or corporation, and the land on which they stood, were exempted. These exemptions have not only been continued, but have been enlarged, without any question as to their validity. It may be said that these exemptions are fair, because they apply to classes of persons. Some of them are essentially personal; but, if they are to be sustained only on the ground of fairness, then the power of the general assembly to make exemptions is no longer a question. We have cited these instances to show that immediately upon the adoption of the Constitution, and continuously since, the power of the general assembly to make exemptions from the burdens of the state, notwithstanding the clause above quoted, has not been questioned. The same conclusion was forcibly stated by Tillinghast, J., in *Brown University v. Granger*, 19 R. I. 704, 36 L. R. A. 847, 36 Atl. 720: "That it means that the general assembly has no power to exempt any property whatever from taxation, or that property theretofore exempted by charter was to be affected thereby, is wholly unreasonable. The whole course of state legislation, from the adoption of the Constitution to the present time, conclusively negatives any such intention. It is axiomatic that a law is to be held constitutional unless it violates

a provision of the Constitution. In view of the equality of the branches of government, the judicial cannot annul the action of the legislative branch unless its duty to do so is plain and peremptory. Hence, the provision which a court is asked to apply as a limitation of legislative power must also be plain and peremptory. The statement of a result to be reached, which leaves the mode of reaching it to the discretion of the legislature, gives no power to the court to say that a law which may tend to that result is void, even though it may seem to be unwise or unjust. Whether, therefore, a declaration in a Constitution is a limitation of the power of the legislature, depends upon its terms. As stated in *Cooley*, Const. Lim. 6th ed. 200, 201: "Any legislative act which does not encroach upon the powers apportioned to the other departments of the government . . . must be enforced, unless restrictions upon the legislative authority can be pointed out in the Constitution, and the case shown to come within them." See also *State v. Narragansett*, 16 R. I. 424, 3 L. R. A. 295, 16 Atl. 901; *Carr v. Brown*, 20 R. I. 215, 38 L. R. A. 294, 33 Atl. 9; *State v. Dalton*, 22 R. I. 77, 46 Atl. 234.

We have already said that taxation is a legislative function. In *Merriether v. Garrett*, 102 U. S. 472, 501, 26 L. ed. 197, 200. Waite, Ch. J., announced as the proposition of the court: "The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature." This being so, a law relating to taxation cannot be held to be unconstitutional upon general or uncertain expressions, but only upon plain restrictions.

Courts have been very strict in requiring these plain limitations. *Henley v. State*, 98 Tenn. 665, 39 L. R. A. 126, 41 S. W. 352, 1104; *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759; *People v. Gillson*, 109 N. Y. 389, 398, 17 N. E. 343; *Bertholf v. O'Reilly*, 74 N. Y. 509, 516, 30 Am. Rep. 323; *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24; *Phoenix Assur. Co. v. Fire Dept. of Montgomery*, 117 Ala. 631, 42 L. R. A. 468, 23 So. 843.

In cases of taxation the following are examples: In *Booth v. Woodbury*, 32 Conn. 118, relating to gratuities to men drafted in the Civil War, the court said: "If there be the least possibility that making the gift will be promotive in any degree of the public welfare, it becomes a question of policy, and not of natural justice, and the determination of the legislature is conclusive. Under the Constitution of Wisconsin, requiring that the rule of taxation shall be uniform, it was held that an exemption of certain railroad lands from taxation did not violate this provision. *Wisconsin C. R. Co. v. Taylor County*, 52 Wis. 37, 8 N. W. 833; *Lund v. Chippeau County*, 93 Wis. 640, 34 L. R. A. 131, 67 N. W. 927. La. Const. art. 118: "Taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value." Held, that the legislature might exempt a certain

amount of property and income. *New Orleans v. Fourchy*, 30 La. Ann. 910. N. J. Const. Amend. art. 4, § 7, par. 12: "Property shall be assessed for taxes under general laws and by uniform rules according to its true value." Held, that this did not preclude the legislature from exempting shares in all corporations except banks. *State, Stratton, Prosecutor, v. Collins*, 43 N. J. L. 562. Ala. Const. art. 1, § 1: "No man or set of men are entitled to exclusive, separate, public emoluments or privileges, but in consideration of public services." Held, that the legislature might commute the tax of corporations. *Daughdrill v. Alabama Life Ins. & T. Co.* 31 Ala. 91. In *Bank of State v. New Albany*, 11 Ind. 139, it was held that the legislature could exempt a bank from taxation for municipal purposes, and in *Mississippi Mills v. Cook*, 56 Miss. 40, that the legislature could exempt from taxation a private manufacturing corporation.

The rationale of these decisions is that, although there have been constitutional restrictions on taxation, from which it might be argued that the same reasons would apply to the case in question, yet if the case was not necessarily included within the restriction, and there was no specific provision of restraint, the court could not declare an act void which the legislature had passed upon the subject within its proper sphere. Applying this doctrine to the case at bar, we have a constitutional provision which necessarily leaves to the legislature the mode of carrying it out, with no other restriction, if we assume it to be one, than that the burden shall be fairly distributed. This clearly implies a reasonable power of exemption, at the least, since the distribution is not to be positive, but fair. Hence, the power of the general assembly to make exemptions is clear.

The cases cited by the plaintiff are distinguishable. In *Brewer Brick Co. v. Brewer*, 62 Me. 62, 16 Am. Rep. 395, the constitutional provision was: "All taxes upon real estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just value thereof." An act which authorized towns to exempt manufacturing establishments thereafter erected was held to violate this provision of the Constitution, because, as taxes were apportioned among towns in the ratio of their valuations, if some towns exempted such establishments, and others did not, the apportionment would not be equal. In *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185, an act authorizing a town to loan money to a private enterprise was held to be unconstitutional. In *Lancaster v. Clayton*, 86 Ky. 373, 5 S. W. 864, the Constitution providing "that no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services," it was held that an act exempting a hotel estate was in violation of this provision. Without reviewing the cases in detail, they deal, generally, with two classes of acts,—those which authorize direct aid to private affairs, and those which violate some express or evident restriction of the 49 L. R. A.

Constitution. With such a doctrine we should not disagree.

It is argued that the exemption in this case is equivalent to taking a taxpayer's money, and giving it to the manufacturer. It is not quite that. The theory of the transaction is that a public benefit will accrue to the town and its inhabitants by the introduction of the business enterprise, equivalent to an exemption from taxes for a certain time, and on this ground it is offered. Suppose the offer is not accepted, and the manufacturer does not build in the town. The plaintiff's tax, for example, would be just the same in either case. A's money is not taken to be given to B, but, for a time, B is not taxed. Possibly A's tax might be a trifle smaller if B should be taxed for his added property, but how does this differ in principle from other exemptions to which we have already referred? It is a question of policy, with which the court has nothing to do, the legislature having the power to decide. The remedy is in the hands of the people, and not of the court. The property of a town is benefited, both in value and income, by the introduction of business, and the consequent increase of inhabitants. When, therefore, one erects a factory under a contract of exemption, the consideration for which is an expected public benefit, the case is quite different from that of a pure gift.

Conceding the power of the general assembly to make exemptions, the question remains as to its fairness, and the argument is pressed that these laws are so manifestly unfair that the court ought to say that they exceed a permissible legislative discretion. The question of unfairness is quite distinct from approval. Under our system, the towns order their own taxes. By the statute in question, the electors themselves make the exemption. Doubtless, they see an advantage in it. Much has been said of late in favor of the referendum. Here is an example of it, and the court would be slow to say that an exemption is unfair which a majority of the taxpayers authorize and the town council approve. We appreciate the force of the argument that such a law permits unseemly competition to entice business from another town, but the point is one of policy, and not of law. It should be addressed to the legislature, and not to the court. It may be said that it is unfair to tax one whose factory is built, while a new competitor is exempt. This seems to be so at first glance, and in *McTwiggan v. Hunter*, 18 R. I. 776, 30 Atl. 962, a case of intentional and unauthorized omission, we said that it would be illegal. The acts in question were not then before us. In *McTwiggan v. Hunter*, 19 R. I. 265, 29 L. R. A. 526, 33 Atl. 5, the constitutionality of Pub. Laws, chap. 1088, not being directly involved, we remarked, *obiter*, that it was at least susceptible of doubt. But now, upon a closer view of the question, we are unable to say that the laws before us violate the Constitution, either in respect of power or fairness, since the general power is clear; the matter

of fairness is left to the taxpayers themselves; the burden of other taxpayers is not increased, if the new property would not have come into the town without the exemption; and the action is taken with a view to general public benefit. As stated in *Colton v. Montpelier*, 71 Vt. 413, 45 Atl. 1039, by the supreme court of Vermont, in regard to a similar statute: "The primary object of this state is not to aid and benefit private persons for private ends, but its purpose is to benefit the public at large by increas-

ing, in the end, the resources of the state and its taxable property through the establishment of new industries." It was held to be constitutional, although the bill of rights in the Constitution of Vermont, in this respect, is much more explicit than our own. Our conclusion is that Pub. Laws, chaps. 386, 387, are not unconstitutional. The court takes pleasure in acknowledging the aid it has received from the able briefs on both sides of this case.

SOUTH DAKOTA SUPREME COURT.

John McCLAIN, *Respt.*,

v.

A. J. WILLIAMS, *Appt.*

(11 S. D. 227.)

No innkeeper's lien exists upon property of a third person brought to the inn by a guest, under a statute giving a lien on property placed by guests under his care, and providing that effects "belonging to" any person who departs without paying his bill may be sold to satisfy the claim.

(October 18, 1898.)

A PPEAL by defendant from a judgment of the Circuit Court for Hutchinson County in favor of plaintiff in an action brought to recover possession of certain property upon which defendant claimed an innkeeper's lien. *Affirmed.*

The facts are stated in the opinion.

Mr. W. J. Hooper, for appellant:

Our statute, § 3686, Code, is declaratory of the common-law rule.

Calye's Case, 8 Coke, 32, 1 Smith, Lead. Cas. p. 259; *Wilkins v. Earle*, 44 N. Y. 172, 3 Am. Rep. 655; *Fuller v. Coats*, 18 Ohio St. 343.

The lien extends to all goods deposited in the house of the innkeeper, or intrusted to the care of his family or servants, and is not limited to such goods as the guest ordinarily takes with him.

11 Am. & Eng. Enc. Law, pp. 45, 46, 72; *Calye's Case*, 8 Coke, 32, 1 Smith, Lead. Cas. pp. 257-259; *Berkshire Woollen Co. v. Proctor*, 7 Cush. 417; *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657; 1 Jones, Liens, §§ 498-501.

Although the goods belong to a third party.

1 Jones, Liens, §§ 498-501; 11 Am. & Eng. Enc. Law, p. 41; *Cook v. Kane*, 13 Or. 482, 57 Am. Rep. 28, 11 Pac. 226; *Singer Mfg. Co. v. Miller*, 52 Minn. 516, 21 L. R. A. 229, 55 N. W. 56; *Manning v. Hollenbeck*, 27 Wis. 202; *Nichols v. Halliday*, 27 Wis. 406; *Jones v. Morrill*, 42 Barb. 623.

NOTE.—As to innkeeper's lien, see also *Singer Mfg. Co. v. Miller* (Minn.) 21 L. R. A. 229, and note; *Brown Shoe Co. v. Hunt* (Iowa) 39 L. R. A. 291; and *Lambert v. Nicklas* (W. Va.) 44 L. R. A. 561.
40 L. R. A.

The innkeeper's lien can only be defeated by the actual knowledge that the goods are the property of third persons.

1 Jones, Liens, § 502.

Mr. Wellington Brown, for respondent:

In *Domestic Sewing Mach. Co. v. Watters*, 50 Ga. 573, the supreme court of Georgia, under statutory regulations, held that the lien of the landlord of an inn upon goods in possession of a guest, which belong to a third person, is limited to charges for keeping, storing or feeding the specific property sought to be subjected to the lien, and does not extend to a claim for board of a guest.

The lien of innkeepers and boarding-house keepers is confined by the statute "to the baggage and other valuables of their guests and boarders."

Jones v. Morrill, 42 Barb. 623; *Cutler v. Bonney*, 30 Mich. 259, 18 Am. Rep. 127.

Corson, P. J., delivered the opinion of the court:

This was an action in claim and delivery. verdict and judgment for plaintiff, and the defendant appealed. The defendant did not controvert the plaintiff's ownership of the property, but he claimed the right to the possession by virtue of an hotel keeper's lien thereon for a balance due him for board of one Kirk, who brought the property to defendant's hotel. The case was tried to a jury, and a verdict rendered in favor of the plaintiff on all the issues.

Several errors are assigned, but, in the view we take of the case, the only question requiring consideration is, Did the defendant have an hotel keeper's lien upon the property of the plaintiff taken by Kirk to his room in the hotel? This question was properly raised by defendant's motion for the direction of a verdict in his favor, which was denied, and exception taken. The record does not disclose the grounds upon which the motion was made or denied, and hence, if the court's ruling was correct upon any ground, it must be sustained. From the evidence it appears that Kirk boarded at defendant's hotel for some weeks, and while so boarding there he leased the gun in controversy from the plaintiff, and took it to his room in the hotel, in which defendant found it after Kirk had left, and took it into his possession, and

claims the right to hold it for Kirk's unpaid board bill. The defendant contends that at common law the innkeeper had a lien, not only upon the property owned by the guest, but upon all property brought with him, and in good faith received by the innkeeper as the property of the guest, and that the Code of this state recognizes and adopts this rule. This seems to have been the rule at common law (Jones, Liens, § 498), but we are of the opinion that under the provisions of the Code of this state the common law has been changed, so far as it affects the property of a third person. The Code of this state provides that "in this state there is no common law in any case where the law is declared by the Codes." Comp. Laws, § 2505. And by § 4802 it is provided: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this territory respecting the subjects to which it relates, and its provisions, and all proceedings under it are to be liberally construed with a view to effect its objects and to promote justice." Section 3686, as amended by chapter 102, Laws 1893, provides: "An innkeeper or keeper of a boarding house is liable for all losses of or injuries to personal property placed by his guests or boarders under his care, . . . and upon such property the innkeeper or keeper of a boarding house shall have a lien and right of detention for the payment for such amount as may be due him. . . . Subd. 3. Baggage and other property and effects belonging to any person who, after obtaining board, lodging, or other accommodations at any hotel or inn, shall abscond or absent himself or herself, from such hotel or inn without having paid for such board, lodging, or other accommodations may at the expiration of thirty (30) days be disposed of by the keeper of such hotel or inn at private or public sale, and the net amount realized from such sale shall be credited to the unpaid account of the absconder." The qualification, "belonging" to the guest, in the third subdivision, is important, and shows clearly that the legislature intended to limit the lien to the property of the guest. It is true that the first clause of the section does not contain this qualification or limitation, but the whole section must be construed together. It will not be presumed that the lawmaking power intended that the lien should attach to property the hotel keeper was not authorized to sell in satisfaction of the lien. Reading the two provisions of the section together, it seems clear that the defendant's lien could only attach to property belonging to Kirk, and did not attach to property belonging to the plaintiff, though brought to the hotel by Kirk. We think "belonging to" must be deemed to be inserted in the last clause of the first part of the section, as to the hotel keeper's lien, leaving the hotel keeper's liability as provided in the first clause of the section. This seems to us to be a fair construction of the section as amended, but independently of this amendment we should feel inclined to take the same view of the section.

49 L. R. A.

As will be noticed, the provisions of our Code "are to be liberally construed with a view to effect its objects and promote justice." A construction that would enable an hotel keeper to acquire a lien, for his guest's hotel bill, upon the property intrusted to such guest by its owner, would not be promotive of justice, and would, in our opinion, render the section unconstitutional, under the provisions of our state Constitution. No person can legally be deprived of his property, against his consent, express or implied, except by due process of law. Loaning or leasing personal property to a guest at an hotel, without some agreement, expressed or implied, that it may be pledged for the board of such guest, or the doing of some act by the owner in reference thereto by which such owner is estopped from asserting his rights as against the hotel proprietor, will not confer upon such hotel keeper the right to a lien upon it for his guest's board. The old common-law rule was established centuries ago, when the rights of persons and property were not as clearly understood and defined as they are under our modern system of state Constitutions, in which these rights are clearly defined and protected. The customs of the realm which authorized such a lien cannot properly be invoked to sanction a claim that is in contravention of the letter and spirit of our modern system.

While courts of states in which the common law still prevails have held to the old rule, we notice that the court of appeals of Missouri, in a case quite similar to the one at bar, speaking by Mr. Justice Thompson, vigorously questions its applicability to our present system. He says: "Nor are we prepared to agree with those courts which have found a plain principle of justice in a rule of law by which one man's property is confiscated to pay another man's debts. It is, to say the least, doubtful whether the extraordinary liability which the common law imposed upon the innkeeper in respect of goods brought to his inn by his guest furnishes a good reason for such a rule. It is also doubtful whether such a rule is not in conflict with the spirit of those guaranties of the right of private property which are embodied in American constitutions. It would be beyond the power of the legislature to pass a law under which the property of one man should be arbitrarily taken from him and given to another man. *Citizens' Sav. & L. Assn. v. Topeka*, 20 Wall. 655, 22 L. ed. 455. If the legislature could not pass such a law, we are not prepared to sanction a course of reasoning by which the conclusion is arrived at that the legislature intended to preserve such a rule of common law, by enacting a statute, the terms of which, read in accordance with their sense, import the contrary. Again, the liability of a common carrier at common law is precisely that of an innkeeper. He is liable for the loss or damage of the goods committed to him for carriage happening from every other cause except the act of God or the public enemy. Both the liability of the carrier and that of the innkeeper were grounded at common law

upon what was called the 'custom of the realm.' They were co-extensive with each other, had their origin in the same source, and rested upon the same considerations of public policy. And yet modern American courts have not hesitated to declare that a common carrier has no lien for the carriage of goods, which he has innocently received from a wrongdoer, without the consent of the owner, express or implied. *Fitch v. Newberry*, 1 Dougl. (Mich.) 1, 40 Am. Dec. 33; *Robinson v. Baker*, 5 Cush. 137, 51 Am. Dec. 54; *Stevens v. Boston & W. R. Corp.* 8 Gray, 262; *Clark v. Lowell & L. R. Co.* 9 Gray, 231. Upon the whole, we are satisfied

that the lien of an hotel or innkeeper does not exist in this state in such a case as the present." *Wyckoff v. Southern Hotel Co.* 24 Mo. App. 382.

Giving to the hotel keeper a lien upon the baggage and effects belonging to his guest is, in our opinion, as far as the legislature would have a right to go, and as far as it was its intention to go in the passage of the law in question. The court was therefore clearly right in denying the motion of the defendant, and the verdict of the jury was right in finding for the plaintiff.

The judgment of the Circuit Court is affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

John P. WESTON

v.

Frederick BARNICOAT.

(175 Mass. 454.)

1. A sample of granite sent by seller to buyer does not become a part of a subsequent contract for a monument ordered to be of "first quality white Westerly granite," free from imperfections, and first class in every respect.
2. Letters declining to deal with one because his name is on the black list, written after the beginning of an action for damages for placing it there, are proper evidence in the action, since all damages must be included in one recovery.
3. A letter declining to deal with one because his name is on the black list is not inadmissible in an action for placing it there, because it contained a compliment to the one to whom it was written, the plaintiff in the action.

4. The possibility that a letter written after the commencement of an action may be manufactured evidence goes to its weight, not its competency.

5. The existence of a debt will not defeat a recovery for placing a debtor's name on the black list, on the ground that the publication imported a general habit of not paying debts, that there was a counterclaim which justified the nonpayment, or that the publication was malicious.

6. The placing of the name of a member of a voluntary association upon the black list, for failure to pay a debt, as authorized by its by-laws, is not privileged as matter of law.

7. A member of a voluntary association is responsible for the acts of its officers in placing the name of another member on the black list, as provided by the by-laws of the association, when he sent them the name for that purpose.

(March 2, 1900.)

NOTE.—Blacklisting dealer as libel.

The question as to the actionable character of a publication imputing want of credit in trade or profession is discussed in *Hayes v. Press Co.* 127 Pa. 642, 5 L. R. A. 643, 18 Atl. 331.

This note does not cover the question of liability for publishing reports with reference to the financial condition or transactions of a merchant merely for the purpose of furnishing information to the trade as a basis upon which they may form their own judgment as to the propriety or expediency of dealing with him, but is confined to that class of publications which carry with them a prohibition or recommendation against dealing with the persons to whom they relate.

There seems to be no doubt that publications of this class are libelous *per se*, unless justified or privileged. There was proof of special damages in the principal case, and so the question as to whether the publication was libelous *per se* did not arise; but *Hartnett v. Plumbers' Supply Assn.* 169 Mass. 229, 38 L. R. A. 194, 47 N. E. 1002, expressly held that a publication like that involved in the principal case would be libelous *per se*.

So, also, *Reynolds v. Plumbers' Material Protective Assn.* 30 Misc. 709, 63 N. Y. Supp. 303, impliedly, and *McIntyre v. Weinert*, 195 Pa. 52, 45 Atl. 666, expressly, held that such a publication was libelous *per se*.

It will be observed that the distinctive characteristics of the publications involved in these cases were: that they concerned persons in their business relations, and carried with them a prohibition against the further extension of credit to such persons, and were thus directly calculated to injure the latter in their business. When the publication does not carry with it such a boycott it is not so clear that it is actionable *per se*.

The opinion in *Windisch-Muhlhauser Brewing Co. v. Bacon*, 21 Ky. L. Rep. 928, 53 S. W. 520, states, *arguendo*, that a notice sent by a brewers' protective association to its members, stating that a certain person was indebted to a member "for beer and loan," and was delinquent, was not actionable *per se*, and that no recovery could be had unless plaintiff was actually injured.

It does not appear in this case that under the rules of the association the notice carried with it a prohibition preventing members from selling to the delinquent while in arrears; nor does it appear that the notice necessarily imported that the delinquent was dishonest or unworthy of credit. It does appear, however, as a matter of fact, that in consequence of the notice members of the association declined to sell to him while he was so in arrear.

Nettles v. Somervell, 6 Tex. Civ. App. 627, 25 S. W. 658, however, holds that the publication,

EXCEPTIONS by defendant to rulings of the Superior Court for Norfolk County made during the trial of an action to recover damages for the alleged wrongful publication of plaintiff's name upon a black list. *Overruled.*

The material facts are stated in the opinion.

The following is a sample of the letters which were admitted in evidence over defendant's exception, and which the court held were properly admitted:

Wm. C. Townsend.
New York, June 26, 1895.

J. P. Weston,
Rochester, N. Y.

Dear Sir:—I have your letter of June 22nd, and regret very much indeed that it is impossible for me to come to your prices,

owing to the fact that I have received notification not to do so. As far as I am individually concerned we should not hesitate to give you figures as we have never done business with anybody more satisfactory than yourself. If we could be of any service to you in regard to the matter to which we refer indirectly should be pleased to have you advise us.

We have been instrumental in giving assistance to a number of A1 people, and we should certainly like to see some steps taken to have your name removed from our records.

In conclusion we again assure you that we regret our position in the matter,

Yours truly,
W. C. Townsend, New York.

F. D.
E. D. Townsend, manager.

for the purpose of collecting claims, of a dealer's name in a list issued by a merchant's association purporting to give the names of persons who will not pay their honest debts, and who are unworthy of credit and trust, is libelous *per se*.

White v. Parks, 93 Ga. 633, 20 S. E. 78, held that a declaration which directly charged that the plaintiff was falsely and maliciously "black-listed" in writing and published to the world as a delinquent debtor, when in fact he owed nothing, was good upon the ground that such a publication tended to some extent to injure his reputation, render him in some degree odious, and expose him to some contempt within Ga. Code, § 2974, and was therefore actionable *per se*.

A communication which in effect blacklists a person as a delinquent debtor, furnished by one telegraph company to another pursuant to a private arrangement between them, entered into solely with a view to their mutual benefit, whereby each furnishes to the other information concerning the standing and credit of all persons deemed by it to be of questionable responsibility in business transactions, is libelous *per se*. *Western U. Teleg. Co. v. Pritchett*, 108 Ga. 411, 34 S. E. 216.

It will be observed that the publication involved in *Nettles v. Somervell*, 6 Tex. Civ. App. 627, 25 S. W. 658, *supra*, imputed, not only that the dealer was indebted, but also that he was dishonest and unworthy of credit. The exact nature and extent of the imputation conveyed by the publication involved in *Western U. Teleg. Co. v. Pritchett*, 108 Ga. 411, 34 S. E. 216, *supra*, and *White v. Parks*, 96 Ga. 633, 20 S. E. 78, *supra*, are not clearly shown, but the use of the term "blacklist" implies that there was something more than a mere imputation of indebtedness.

Muetze v. Tuteur, 77 Wis. 236, 9 L. R. A. 86, 46 N. W. 123, held that communications sent to members of an organization formed for the purpose of compelling delinquent debtors to pay up, showing the name of a debtor on the delinquent list, were libelous *per se*; but in that case, also, there were circumstances showing that the intention was to impute dishonesty or financial irresponsibility to the person to whom they related.

In *McDermott v. Union Credit Co.* 76 Minn. 84, 78 N. W. 967, 79 N. W. 673, the court, after considerable hesitation, held that a publication by a commercial agency to the effect that plaintiff, who was a lawyer, was slow in the payment of his bills, was libelous *per se*, although published of him as an individual, and not in rela-

tion to his business as an attorney, and notwithstanding that the "key," taken as a whole impliedly negated any charge that the plaintiff was either dishonest or insolvent; but upon the reargument (79 N. W. 673) the court changed its opinion, and held that the publication was not libelous *per se*, upon the ground that there was nothing in the word "slow" as limited by the key that tended *per se* to appreciably diminish a man's credit or reputation for integrity and honesty, or affect his standing in the community in the esteem and respect of his neighbors. In this case the question came up on an appeal from an order overruling a demurrer, and the complaint alleged that the publication was made falsely and maliciously, so that there was no question of privilege.

The effect of the opinion in the principal case with reference to the question of privilege is merely to deny that a communication like the one involved in the case is the subject of an absolute privilege, but does not deny that it may be the subject of a qualified privilege. Such a privilege, however, even if it exist *prima facie*, is not available if the publication be malicious or proceed from improper motives, and, in the view of the court, such privilege would be unavailable if the organization were a mere scheme to enforce, colorable claims of members by a boycott intended to take the place of legal process.

The latter suggestion has support in *Muetze v. Tuteur*, 77 Wis. 236, 9 L. R. A. 86, 46 N. W. 123, *supra*, which held that communications sent to the members of an organization, showing the name of the debtor on the delinquent list, were not privileged, where the object was, not to protect members from trusting such debtors, but merely to aid them in coercing payment, and the members to whom the communications were sent were not interested therein in any other way than to make their own debtors pay up.

Western U. Teleg. Co. v. Pritchett, 108 Ga. 411, 34 S. E. 216, *supra*, held that the communication involved in that case was not within the provision of Ga. Civ. Code, § 3840, par. 3, declaring that statements made with a bona fide intent on the part of the speaker to protect his own interests in a matter where it is concerned shall be deemed privileged.

The court in *Hartnett v. Plumbers' Supply Asso.* 169 Mass. 229, 38 L. R. A. 194, 47 N. E. 1002, in discussing the question whether the sending of communications like the one involved in the principal case by an incorporated association would amount to a usurpation of a franchise, after holding that such a communication

Messrs. James E. Cotter, George W. Wiggins, and John W. McAnarney, for defendant:

It was error not to allow the sample to be introduced in evidence as a part of the contract.

Pike v. Fay, 101 Mass. 134; *Atwater v. Clancy*, 107 Mass. 369.

The letter from Townsend to the plaintiff was inadmissible.

a. It was the private declaration of a stranger to the action, who had no relation to, or connection with, the defendant. Townsend was not before the court, the jury did not see him, and the defendant had no opportunity to cross-examine him. The introduction of this letter in evidence against the objection of the defendant was a clear violation of the rules of evidence.

Lyon v. Manning, 133 Mass. 439; *Silverstein v. O'Brien*, 165 Mass. 512, 43 N. E. 496; *Wesson v. Washburn Iron Co.* 13 Allen, 95, 90 Am. Dec. 181; *Farrell v. Weitz*, 160 Mass. 288, 35 N. E. 783; *Nutting v. Page*, 4 Gray, 581; *Smith v. Slack*, 125 Mass. 474.

b. The letter was in reply to one from the plaintiff, written while this suit was pending, and which was not put in evidence. There was no proof of the signature to the Townsend letter. The evidence was open to the objection that the same might have been collusively procured. Evidence open to this objection is not competent.

King v. Donahue, 110 Mass. 155, 14 Am. Rep. 589; *Lawrence v. Wilson*, 160 Mass. 304, 35 N. E. 858; *Fearing v. Kimball*, 4 Allen, 125, 81 Am. Dec. 690; *Com. v. Allen*, 128 Mass. 46, 35 Am. Rep. 356; *Burns v. Stuart*, 168 Mass. 19, 46 N. E. 399; *Whitney v. Houghton*, 125 Mass. 451.

c. It was open to the further objection that it put in evidence the general good character of the plaintiff.

Day v. Ross, 154 Mass. 13, 27 N. E. 676; *McCarty v. Leary*, 118 Mass. 509; *Heland v. Lowell*, 3 Allen, 407, 81 Am. Dec. 670; *Schmidt v. New York Union Mut. F. Ins. Co.* 1 Gray, 520.

It cannot be maintained that the admission

would be libelous *per se*, remarked that, the corporation having as a distinct legal person no interest in the trade, or in the dispute between the purchaser and its members, there is no privilege to justify the communication to it or by it of the facts which it assumes to communicate. The language in which this view is expressed suggests a distinction between publications issued by incorporated, and those issued by unincorporated, associations. When the association is incorporated an element is introduced that, in the view expressed in that case, is fatal to the existence of a qualified privilege, *i. e.*, the intervention of a legal person, having no interest in the matter to which the publication relates, while in the case of an unincorporated association there is no distinct legal personality independent of the members of the association, and they have an interest in the matter.

Reynolds v. Plumbers' Material Protective Asso. 30 Misc. 709, 63 N. Y. Supp. 303, *supra*, held that the publication involved in that case was qualifiedly privileged, and afforded the indebted member no ground for an action of libel, 49 L. R. A.

of this letter containing statements so favorable to the plaintiff did not prejudice the defendant.

Silverstein v. O'Brien, 165 Mass. 512, 43 N. E. 496.

Truth of the charge is an absolute defense unless express malice is shown.

Pub. Stat. chap. 167, § 80; *Perry v. Porter*, 124 Mass. 338; *Perry v. Breed*, 117 Mass. 155; *Lothrop v. Adams*, 133 Mass. 471, 43 Am. Rep. 528.

There was evidence that the publication was without malice.

"Where the defendant has an interest in the subject-matter of the communication, and the person to whom the communication is made has a corresponding interest, or some duty in connection with the matter," the communication is privileged if made *bona fide*.

Odgers, Libel & Slander, 3d ed. pp. 256, 259; *Townshend, Slander & Libel*, § 241; *Shurtleff v. Parker*, 130 Mass. 293, 39 Am. Rep. 464; *Houlard v. Flood*, 160 Mass. 509, 36 N. E. 482; *Farnsworth v. Storrs*, 5 Cush. 412; *Barrows v. Bell*, 7 Gray, 301, 66 Am. Dec. 479; *Bradley v. Heath*, 12 Pick. 163, 22 Am. Dec. 418; *Missouri P. R. Co. v. Richmond*, 73 Tex. 568, 4 L. R. A. 280, 11 S. W. 555; *Hunt v. Great Northern R. Co.* [1891] 2 Q. B. 189; *Bacon v. Michigan R. Co.* 66 Mich. 166, 33 N. W. 181; *Shurtleff v. Stevens*, 51 Vt. 501; *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 202, 16 L. ed. 72; *Lawless v. Anglo-Egyptian Cotton & Oil Co.* L. R. 4 Q. B. 262; *Quartz Hill Consolidated Gold Min. Co. v. Beall*, L. R. 20 Ch. Div. 501; *Tench v. Great Western R. Co.* 32 U. C. Q. B. 452; *Albutt v. General Council of Medical Edu. & Registration*, L. R. 23 Q. B. Div. 400.

The publication by a railroad company of a list of discharged employees, giving the reasons for their discharge, is privileged if the publication is restricted to employees of the road, or those having an interest otherwise in knowing such facts.

Missouri P. R. Co. v. Richmond, 73 Tex. 568, 4 L. R. A. 280, 11 S. W. 555; *Hunt v.*

unless the presumption of good faith was overcome by proof of a malicious purpose to defame his character and credit in his business, under cover of the privilege.

The court in *McIntyre v. Weinert*, 195 Pa. 52, 45 Atl. 666, *supra*, which held that a statement in libel declaring upon a publication like that involved in the principal case was not demurrable, admitted that the publication might be a privileged one, but that the privilege was not an absolute one, and might be overcome by evidence of malice; and that, since the statement averred that it was malicious, the question could not be determined on demurrer.

The portion of the charge referred to in the opinion in the principal case, that makes the effect of the truth as a justification for the publication dependent upon the absence of malice, has its justification in a statute of Massachusetts, providing that the truth of the charge shall be a justification unless malice is proved.

The blacklisting of employees by employers has been left for treatment in a separate note.

G. H. P.

Great Northern R. Co. [1891] 2 Q. B. 189; *Bacon v. Michigan C. R. Co.* 66 Mich. 166, 33 N. W. 181; *Tench v. Great Western R. Co.* 32 U. C. Q. B. 452.

The publication by a mercantile agency of information as to the credit and standing of persons engaged in business, to subscribers having an interest in knowing the credit and standing of such persons, is privileged if made in good faith.

Locke v. Bradstreet Co. 22 Fed. Rep. 771; *King v. Patterson*, 49 N. J. L. 417, 9 Atl. 705; *State v. Lonsdale*, 48 Wis. 348, 4 N. W. 390; *Ormsby v. Douglass*, 37 N. Y. 477.

In order to rescind an entire contract, the party who seeks to rescind cannot retain any part of the benefit of the contract,—he must place the other party in *statu quo*. There was no rescission in this case, and the plaintiff was indebted to the defendant at the time of the publication.

Snow v. Alley, 144 Mass. 546, 59 Am. Rep. 119, 11 N. E. 764; *Drohan v. Lake Shore & M. S. R. Co.* 162 Mass. 435, 38 N. E. 1116; *Morse v. Brackett*, 98 Mass. 205; *Bassett v. Brown*, 105 Mass. 551; *Peru Steel & Iron Co. v. Whipple File & Steel Mfg. Co.* 109 Mass. 464; *Brown v. Hartford F. Ins. Co.* 117 Mass. 479; *Handforth v. Jackson*, 150 Mass. 149, 22 N. E. 634; *Barrie v. Earle*, 143 Mass. 1, 58 Am. Rep. 126, 8 N. E. 639; *Mansfield v. Trigg*, 113 Mass. 350.

Messrs. C. W. Bartlett and E. R. Anderson for plaintiff.

Holmes, Ch. J., delivered the opinion of the court:

This is an action of tort brought against a member of an association of the type considered in *Hartnett v. Plumbers' Supply Assn.* 169 Mass. 229, 38 L. R. A. 194, 47 N. E. 1002, for using the machinery provided by the association's by-laws. The defendant made a claim against the plaintiff for the price of a granite monument, which the plaintiff declined to pay. The defendant thereupon notified the plaintiff that, if the plaintiff did not pay, he should report the plaintiff's name to the association, to be placed upon its record of those who did not pay their honest debts. The plaintiff not paying, the defendant notified the local secretary; and thereupon the plaintiff received a letter from the association, urging him to settle or explain, with a threat of placing his name upon the record if he did not. The consequence of placing a name upon the record or black list was a boycott by the association, as the plaintiff was notified by a copy of the following by-law: "No member of this association shall quote prices or do any work, either directly or indirectly, for any person or persons whose name appears on the list." The plaintiff did not pay, and a little later his name was placed upon the list, with the anticipated result, and with the effect of serious damage, at least, to the plaintiff's business. The plaintiff thereupon brought this action for causing the circulation of the report, and had a verdict. The case is here on exceptions. 49 L. R. A.

It was treated at the trial as an action for libel, so that some questions touched upon in *May v. Wood*, 172 Mass. 11, 51 N. E. 191, do not arise. In the opinion of a majority of the court, the exceptions must be overruled.

1. The defendant set up the truth of the alleged libel, and so the question who was in default under the contract came before the jury. The defendant contended, with reference to the quality of the stone used, that the contract was by sample, and offered the alleged sample in evidence. It was excluded for that purpose, and, although it was admitted upon other grounds, the court instructed the jury that "the sample was not a part of the terms of the contract," and an exception was saved to the ruling. The contract was made by letters. Before the bargain was made the defendant wrote that he would send a sample of stock, and did so. In reply the plaintiff wrote that he had decided to give the defendant the order for the monument, etc.; "the same to be made of first quality white Westerly granite." Further on he added: "This job must be free from iron, knots, streaks, or any imperfections, and cut as fine as it is possible to cut Westerly granite, and first-class in every respect." It does not matter whether the contract was made by this letter, or only after some further correspondence, as this letter fixed the terms. It seems to us that the order in the words quoted was an order by description, not by sample, and that the ruling was correct. Possibly the fact that the sample had been exhibited might have some bearing on the meaning of "white Westerly granite" and of "first-class," so far as it applied to the quality of the stone; but the letter made the test of performance conformity to the words of description used, not conformity to the piece of stone previously shown. In the language of *Pike v. Fay*, 101 Mass. 134, 137, cited by the defendant, the writing distinctly defined the article to be delivered.

2. The next exception is to the admission of letters, written after the action was begun, declining to deal with the plaintiff on the ground that his name was on the black list. "There can be but one assessment of damages for the cause of action on which this suit is based, and all the damages (those accruing after as well as before the bringing of the action) must be included in it. Evidence as to damages after the date of the writ was therefore rightly admitted. *Fay v. Guynon*, 131 Mass. 31." *Wheeler v. Hanson*, 161 Mass. 370, 377, 37 N. E. 382. The letter embodied the act of refusal, which was an example of the precise damage which the libel did and was intended to do. The act was not qualified or made inadmissible by the fact that the letter contained a compliment to the plaintiff. Generally speaking, admissible evidence is not made inadmissible by carrying with it some collateral facts disadvantageous to the other side, which of itself could not be put in proof. Thus, even in a criminal case, where previous disposition or intent is to be proved, the evidence of it

is not to be rejected because it may prove another crime. *Com. v. Bradford*, 126 Mass. 42, 45; *Com. v. Corkin*, 136 Mass. 429, 431; *Com. v. Robinson*, 146 Mass. 571, 578, 579, 16 N. E. 452. The possibility that the evidence might be manufactured goes to its weight, not to its competency. Such a possibility exists generally after a suit is begun. The plaintiff's testimony imported that the letter was written bona fide in the regular course of business, and the defendant had the chance to cross-examine him. The letter from the plaintiff was not called for, and no objection upon the ground of its not being produced is open.

3. At the end of the charge the court said: "In order to save any misunderstanding, the plaintiff wishes me to state: The fact that there is a debt existing here, or may be a debt here existing, between the plaintiff and defendant, is not to be considered by you as any obstacle to the plaintiff's recovery in this case. You are to follow the rule which I have indicated in the charge." The defendant excepted, and both sides argue the exception on the footing that the judge gave the ruling asked by the plaintiff. No doubt, the words "in order to save misunderstanding" suggested that he was about to do so. But we should have thought from what followed that the judge simply read a request, without adopting it, and then, for his own view of the law, referred the jury to what he had said before. He previously had instructed the jury that, if the statement in the publication was true, it was justified, unless the defendant acted from malevolent motives. But if, as we take it, the ruling asked by the plaintiff was given, the judge showed by the words which he added that he did not mean to modify or revoke what he had said before, and what the whole course of the trial made manifest,—that the existence of a debt, if there was any, was an element to be considered in deciding whether the defense of truth was made out. Even if there was a debt, however, the plaintiff might have recovered upon one of several grounds,—that the publication imported a general habit on the part of the plaintiff of not paying his debts (whether it had that meaning was one question left to the jury), or that, although there was a debt, there was a counterclaim in recoupment, which manifestly justified the plaintiff in not paying until it was adjusted, or that the publication was caused with malicious intention.

4. Several rulings were asked on the question of privilege. As we have said, the case is to be considered solely on the footing of libel. From this point of view, it is perfectly plain that the judge could not have ruled that the communication was privileged as matter of law. The jury well might have found facts that would cut at the roots of such a ruling. They might have found, not only that the proposition that the plaintiff was a man who refused or neglected to pay his honest debts was false, as they have found, but also that it was known by the de-

fendant to be false. They might have found that it was volunteered for malevolent motives. They might have found that the whole organization was a mere scheme to oust the courts of their jurisdiction, and to enforce colorable claims of the members by a boycott intended to take the place of legal process, and that there was no pretense of any duty about the matter. Indeed, it is hard to see how the by-laws, or any understanding of the defendant about the by-laws, could have afforded him a justification, as the by-laws merely expressed the terms on which he saw fit to enter into a voluntary organization. A man cannot justify a libel by proving that he has contracted to libel. More specifically a false statement of a kind manifestly hurtful to a man in his credit and business, and intended to be so, is not privileged because made in obedience to the requirements of a voluntary association got up for the purpose of compelling by a boycott the satisfaction of its members' claims to the exclusion of a resort to the courts.

We do not assume that the character of this organization was what we have described. We only say that the jury might have found it to be such, and that the requests for rulings do not exclude that possible view of the facts. Of course, we do not mean to say that the statement might not have been privileged, if believed to be true, and if the purpose of the association and publication was, and was understood to be, merely to give information to the members concerning the credit of people with whom they might deal. But none of the requests were limited to such a state of facts. The difficulty in supposing it is that the by-laws expressly require the members to have no dealings with any person whose name is on the list.

5. The fifth request, that if the plaintiff set up the monument, exercised control over it, and retained part of it in Rochester, the contract was not rescinded, and the plaintiff was indebted to the defendant when the latter reported his name, was covered by more accurate instructions upon the same point, leaving to the jury, as a question for them, whether the plaintiff retained the monument for an unreasonable time, or used it in an unreasonable manner. It is to be observed further in this connection that the important question was not so much whether the contract was rescinded, as whether the defendant had broken it. If the plaintiff had not rescinded, but had made a claim in recoupment, that equally would have explained his not paying the bill.

6. It hardly needs to be said that the judge was right in refusing to rule that the defendant was not responsible for what the association or their officers did under their by-laws in connection with publishing the plaintiff's name. The whole and avowed purpose of the defendant in sending in the plaintiff's name was that the officers should do what they did.

Exceptions overruled.

TEXAS SUPREME COURT.

FIRST BAPTIST CHURCH OF PARIS *et al.*, Plffs. in Err.,
v.

J. M. FORT *et al.*

(.....Tex.....)

1. An implied trust for the promulgation of the tenets and doctrines of a particular religious denomination does not arise on the acquisition of property by a church of that denomination.
2. There is no presumption that contributions to aid the building of a church are intended to be made on condition that the building shall continue to be used for the teaching of the peculiar views then professed by the members of the church or declared by the religious body to which it belongs.
3. A change of belief on the part of a majority of the members of a church by the rules of which a majority shall control will not forfeit their right to control or entitle the minority to interfere in order to prevent the use of the church property for teaching the new beliefs.
4. A judgment foreclosing a deed of trust cannot be ordered, when neither party to the suit has sought a foreclosure, and there is no pleading to sustain it.

(January 15, 1900.)

ERROR to the Court of Civil Appeals for the Fifth Supreme Judicial District to review a judgment reversing a judgment of the District Court for Lamar County in favor of plaintiffs in a proceeding brought to establish title to certain church property. *Affirmed in part.*

The facts are stated in the opinion.

Messrs. W. S. Moore and Dudley & Dudley for plaintiffs in error.

Messrs. Hale & Hale, for defendants in error:

The mortgage was valid, and the sale thereunder to defendants in error valid, and passed the title to the property sold to them, and the prior sale to plaintiffs in error conveyed no title to them, because they failed to comply with their bid, and the pretended tender by them was not valid and not sufficient to entitle them to a conveyance of the property, because they had no right to give the receipt of the church, or to receive the excess of the bid over the amount of the Crittenden debt, and because the pretended tender was not unconditional and valid in law.

Sayles's Civ. Stat. arts. 651, §§ 4, 653, 665, 713; *Olcott v. Gabert*, 86 Tex. 124, 23 S. W. 985; *Threadgill v. Pumphrey*, 87 Tex. 577, 30 S. W. 356; *Gordon v. Preston*, 1 Watts,

NOTE.—As to the power of a church society to withdraw from the general body of the church, see *Fuchs v. Melsel* (Mich.) 82 L. R. A. 92, and *note*.

As to condition in deed to church society, see *note* to *Greene v. O'Connor* (R. I.) 19 L. R. A. 262; also *Mills v. Davison* (N. J. Eq.) 85 L. R. A. 113.
49 L. R. A.

385, 26 Am. Dec. 75; 1 Devlin, Deeds, § 390; *Perre v. Castro*, 14 Cal. 519, 76 Am. Dec. 444; *Nance v. Busby*, 91 Tenn. 303, 15 L. R. A. 801, 18 S. W. 874; *Dwenger v. Geary*, 113 Ind. 106, 14 N. E. 903; *Faulk v. Dashiell*, 62 Tex. 642; 2 Perry, Tr. 602, 602f; *Flake v. Nuse*, 51 Tex. 102; *Renard v. Clink*, 91 Mich. 1, 51 N. W. 692; *McCalley v. Otey*, 99 Ala. 584, 12 So. 406; *Moynahan v. Moore*, 9 Mich. 9, 77 Am. Dec. 476, *note*.

B. F. Fuller and his associates were not the legally elected, qualified, and acting trustees of the First Baptist Church of Paris at the time the property in controversy was sold by Spivy, the trustee in the deed of trust, or at any other time, and they had no authority to represent the church, and the judgment ought to have been for the defendants.

Sayles's Civ. Stat. art. 660; *People ex rel. Blomquist v. Nappa*, 80 Mich. 484, 45 N. W. 355; 20 Am. & Eng. Enc. Law, p. 794, *note* on p. 807; *First African M. E. Zion Church v. Hillery*, 51 Cal. 155; *Den ex dem. American Primitive Soc. v. Pilling*, 24 N. J. L. 653; *Prickett v. Wells*, 117 Mo. 502, 24 S. W. 52; 1 Morawetz, Priv. Corp. § 482; 1 Thomp. Corp. §§ 706-708, 712, 717; *Ehrenfeldt's Appeal*, 101 Pa. 186.

The original trustees who acted under specific direction of the church, before any dissension arose, had the power to borrow the money and execute a valid mortgage with power of sale, and their action in doing so was valid and binding on the church; but if the deed of trust was not legally valid because there was no seal on it, then in equity appellees and the church are estopped to deny its validity, on the grounds that by it Crittenden's money was obtained, and used by the church in the erection of the building in controversy.

Thornburgh v. Tyler, 16 Tex. Civ. App. 439, 43 S. W. 1057; *Bond v. Terrell Cotton & Woolen Mfg. Co.* 82 Tex. 311, 18 S. W. 691; *Texas Western R. Co. v. Gentry*, 69 Tex. 632, 8 S. W. 98; 4 Thomp. Corp. §§ 514, 5052, 5057, 5246, 5247, 5249, 5258, 5291, 5296; 5 Thomp. Corp. §§ 6019, 6024; 1 Jones, Mortg. §§ 124, 126; *Gordon v. Preston*, 1 Watts, 385, 26 Am. Dec. 75; *Bernards Thp. v. Stebbins*, 109 U. S. 349, 27 L. ed. 959, 3 Sup. Ct. Rep. 252.

Mr. Dudley G. Wooten, also for defendants in error:

The finding that plaintiffs were the legally constituted trustees of the church is not only not supported by the testimony, but is contrary thereto, inasmuch as the undisputed evidence demonstrated that they had rebelled against the rules and regular authority of the church, had been expelled from the church, held an illegal meeting in violation of the rules of the church, repudiated the charter and corporate existence of the body, and elected themselves trustees

is not to be rejected because it may prove another crime. *Com. v. Bradford*, 126 Mass. 429, 431; *Com. v. Corkin*, 136 Mass. 429, 431; *Com. v. Robinson*, 146 Mass. 571, 578, 579, 16 N. E. 452. The possibility that the evidence might be manufactured goes to its weight, not to its competency. Such a possibility exists generally after a suit is begun. The plaintiff's testimony imported that the letter was written bona fide in the regular course of business, and the defendant had the chance to cross-examine him. The letter from the plaintiff was not called for, and no objection upon the ground of its not being produced is open.

3. At the end of the charge the court said: "In order to save any misunderstanding, the plaintiff wishes me to state: The fact that there is a debt existing here, or may be a debt here existing, between the plaintiff and defendant, is not to be considered by you as any obstacle to the plaintiff's recovery in this case. You are to follow the rule which I have indicated in the charge." The defendant excepted, and both sides argue the exception on the footing that the judge gave the ruling asked by the plaintiff. No doubt, the words "in order to save misunderstanding" suggested that he was about to do so. But we should have thought from what followed that the judge simply read a request, without adopting it, and then, for his own view of the law, referred the jury to what he had said before. He previously had instructed the jury that, if the statement in the publication was true, it was justified, unless the defendant acted from malevolent motives. But if, as we take it, the ruling asked by the plaintiff was given, the judge showed by the words which he added that he did not mean to modify or revoke what he had said before, and what the whole course of the trial made manifest,—that the existence of a debt, if there was any, was an element to be considered in deciding whether the defense of truth was made out. Even if there was a debt, however, the plaintiff might have recovered upon one of several grounds,—that the publication imported a general habit on the part of the plaintiff of not paying his debts (whether it had that meaning was one question left to the jury), or that, although there was a debt, there was a counterclaim in recoupment, which manifestly justified the plaintiff in not paying until it was adjusted, or that the publication was caused with malicious intention.

4. Several rulings were asked on the question of privilege. As we have said, the case is to be considered solely on the footing of libel. From this point of view, it is perfectly plain that the judge could not find that the communication was a matter of law. The jury found facts that would support such a ruling. They found only that the plaintiff was a man who had been found

defendant to be false. that it was voluntary. tives. They might have organization was a in courts of their jurisd colorable claims of the cott intended to take cess, and that there v. duty about the matte to see how the by-laws of the defendant about afforded him a justifi merely expressed the fit to enter into a volu man cannot justify a he has contracted to li a false statement of a ful to a man in his cr intended to be so, is made in obedience to voluntary association of compelling by a b of its members' claims resort to the courts.

We do not assume this organization was scribed. We only say have found it to be s requests for rulings do ble view of the facts. mean to say that the have been privileged, and if the purpose publication was, and merely to give inform concerning the credi they might deal. By were limited to such difficulty in supposi expressly require the dealings with any pe the list.

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FIRST BAPTIST CHURCH OF PARIS

et al., Plaintiffs.

J. M. FORT, et al.,

(.....) Defendants.

1. An implied trust is created by the tenets and doctrines of religious denominations and the acquisition of property by a religious denomination.
2. There is no presumption as to the use of the building of a church are intended to be used for the teaching of the religion then professed by the members or declared by the religion to which it belongs.
3. A change of belief on the majority of the members of a church by the rules of which a majority will not forfeit their right to the use of the church, entitle the minority to prevent the use of the church for the teaching of the new belief.
4. A judgment for the use of a trust cannot be ordered where the suit has sought a change of belief and there is no pleading to the contrary.

(January 15, 1900)

ERROR to the Court of the Fifth Supreme Court review a judgment rendered by the District Court for the District of Columbia in favor of plaintiffs in a prayer to establish title to certain property.

Affirmed in part.
The facts are stated in *Messrs. W. S. Moore & Dudley* for plaintiffs in *Messrs. Hale & Hale*.

ERROR:

The mortgage was thereunder to defendant passed the title to the property and the prior sale to the plaintiff conveyed no title to the property to the plaintiff.

secure as pastor of said church, and, after he was employed, insisted upon his resignation because of his doctrines; but at the several meetings when these matters came up and were discussed and passed upon the faction which adhered to the doctrines of said Fortune (which faction is hereinafter styled, for convenience, the 'Fortuneites') had a majority of the members present and voting, and refused to request the resignation of said Fortune, and refused to accept his resignation when offered by him, and re-employed him as pastor for an indefinite period of time. That some time in the month of July, 1896, said Fortune tendered his resignation as pastor of the First Baptist Church of Paris, which was accepted by the Fortuneites, and that about the 30th of August, 1896, said Fortune rented a hall in the city of Paris, and delivered therein a series of sermons and lectures in opposition and criticism of the creed of the Baptist Church, which were attended by his adherents. That during this time the Anti-Fortuneites continued to meet and hold services and Sunday school in the First Baptist Church building until Sunday next preceding the 6th day of October, 1896, when the church doors were locked and the windows barred by the Fortuneites.

"7. The court finds that on the 30th of September, 1896, the Anti-Fortuneites, representing and acting as the First Baptist Church of Paris, met in church session at the church building, and elected the following persons, members of said church, to fill vacancies in its board of trustees, to wit, J. C. Hunt, J. B. Johnson, R. M. Miller, and George T. Saunders (which last-named trustee subsequently resigned), and by resolution authorized and directed said trustees to borrow money, and pay off said indebtedness to said S. D. Crittenden, or buy said church property at the sale under the said deed of trust, which was then advertised for October 6, 1896, for the said First Baptist Church of Paris, and to do anything else that, in their judgment, might be necessary for the interest of said church.

"8. That on the 6th of October, 1896, and before the sale under the aforesaid deed of trust, the said trustees of the First Baptist Church of Paris, acting for said church, procured the money, and offered to pay to M. C. Spivey, trustee in the deed of trust, the full amount of the note, principal and interest and commissions, if any, if he would transfer to them the note and mortgage, or deliver to them said note and mortgage without transfer, which offer was refused by the said Spivey, and the church property was put up and offered for sale by the said trustee Spivey under the deed of trust, at public outcry, to the highest bidder for cash; and, the plaintiffs' trustees, the said trustees of the First Baptist Church, for and on behalf of said church, being the highest and best bidder, the property was knocked off to them for the sum of \$10,050 and thereupon said trustees of the First Baptist Church of Paris, for and on behalf of said church, tendered to said trustee Spivey, in cash, the full

in violation of the church charter and the laws of the state.

1 Morawetz, Priv. Corp. § 482; 1 Thomp. Corp. §§ 706-717; *Bernards Twp. v. Stebbins*, 109 U. S. 349, 27 L. ed. 959, 3 Sup. Ct. Rep. 252; 1 Perry, Tr. § 401; 2 Perry, Tr. §§ 602, 602f; *People ex rel. Blomquist v. Nappa*, 80 Mich. 484, 45 N. W. 355; *First African M. E. Zion Church v. Hillery*, 51 Cal. 155; *Den ex dem. American Primitive Soc. v. Pilling*, 24 N. J. L. 653; *Prickett v. Wells*, 117 Mo. 502, 24 S. W. 52.

So far as the church difficulties were concerned, they arose upon the right of the majority to rule in the selection and retention of a pastor, which was a fixed written rule of the Paris church, and is a historic and distinctive rule of Baptist church government; and, so far as the case in court was concerned, it was simply an issue of law between the appellants as valid lien-holders and the appellees as usurping seceders and expelled members from their own church. It was a question of church government, and not one of religious faith or property rights, so far as the church was concerned.

2 Beach, Priv. Corp. § 219, note 5; 1 Waterman, Corp. pp. 80-83; *Bouldin v. Alexander*, 15 Wall. 137, 21 L. ed. 71, 103 U. S. 335, 26 L. ed. 309; *Watson v. Jones*, 13 Wall. 680, 20 L. ed. 666; *Stebbins v. Jennings*, 10 Pick. 161; *Daker v. Fales*, 16 Mass. 503; *McGinnis v. Watson*, 41 Pa. 13; *Fulbright v. Higginbotham*, 133 Mo. 668, 34 S. W. 875; *State, Livingston, Prosecutor, v. Trinity Church*, 45 N. J. L. 230; *First Baptist Church v. Witherell*, 3 Paige, 296, 24 Am. Dec. 223; *Russie v. Brazzell*, 128 Mo. 93, 30 S. W. 526; *Turpin v. Bagby*, 138 Mo. 7, 39 S. W. 455.

A dispute as to whether the pastor's preaching on some points was in accord with the articles of faith did not amount to such a fundamental antagonism of religious principles as to create what is known in law as "a divided congregation," involving the interposition of a court to decide and adjust property rights and trust relations.

Chase v. Cheney, 58 Ill. 509, 11 Am. Rep. 95; *White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends*, 89 Ind. 136; *Lamb v. Cain*, 129 Ind. 486, 14 L. R. A. 518, 29 N. E. 13; *Nance v. Busby*, 91 Tenn. 317, 15 L. R. A. 801, 18 S. W. 874; *Mount Zion Baptist Church v. Whitmore*, 83 Iowa, 138, 13 L. R. A. 198, 49 N. W. 81.

The tender which appellees made to the mortgage trustee, as a compliance with their bid at the first sale, was no tender in law, the sale was not consummated, and appellees took no title, legal or equitable.

1 Devlin, Deeds, § 390; *Flake v. Nuse*, 51 Tex. 98.

Messrs. Denton & Long also for defendants in error.

Brown, J., delivered the opinion of the court:

The First Baptist Church of Paris, joined by B. F. Fuller, Stewart Lee, S. H. Webb, W. F. Edwards, J. C. Hunt, R. M. Miller, 49 L. R. A.

and J. B. Johnson, who sue as trustees of the said church and in their own right as members thereof, instituted this suit in the district court of Lamar county against J. M. Fort, B. W. Lewis, S. B. M. Long, Mrs. M. C. Maxey, F. I. Williams, T. S. Preston, M. C. Spivey, G. M. Fortune, and the executors and heirs of Mrs. Emily Williams, deceased, naming them. Plaintiffs sought to recover the possession of certain church property, consisting of the building and lot, located in the city of Paris, Lamar county, Texas, and to cancel certain conveyances named therein, and to restrain the defendants from interfering with plaintiffs' possession of the church property. The petition sets up the facts with regard to the original organization of the church, the building of the house upon the lot acquired for that purpose, and the facts and circumstances which brought about a division among the members of the said church; charging that the defendants and their adherents, a majority of the members, had departed from the original confession of faith adopted by the church in its organization, and had diverted said property from the purposes to which it was dedicated; and that the plaintiffs, and those represented by them, a minority of the said congregation, had adhered to the original confession of faith, and were, in fact, the First Baptist Church of Paris, and entitled to the possession of the said property. The case was tried before the court without a jury, and the following conclusions of fact were filed, upon which judgment was entered for the plaintiffs below:

"1. The court finds that this church was originally organized in about the year 1854, under the name of the 'United Baptist Church,' and adopted, as its articles of faith and covenant, the articles of faith and covenant introduced in evidence, known as the 'New Hampshire Confession of Faith.'

"2. The court finds that on the 10th day of April, 1861, the lot in controversy, upon which a church building had been erected, was deeded to Lemuel H. Williams, Goodman Tucker, and Hardy Moore, trustees for said church, under and by the name of the Paris Baptist Church, to have and to hold under them and their successors as a place of worship for said Paris Baptist Church, and said church and the members thereof continued to hold religious worship on said lot and in said church building under the name of the Paris Baptist Church, and upon the articles of faith and covenant upon which it was originally organized until it became incorporated on the 21st of March, 1890, under the general incorporation laws of Texas, when it was incorporated under the name of the 'First Baptist Church of Paris,' and afterwards erected upon said lot their present church building, at a cost of about \$20,000; that, in order to complete said building or church, the said First Baptist Church of Paris borrowed of one S. D. Crittenden the sum of \$5,000, and executed by and through some of its trustees a note for said amount, and a deed of trust or mort-

gage on the said church property to secure the payment of the same.

"3. The court finds that the trustees of the said First Baptist Church of Paris named in its charter were U. Hearon, F. I. Williams, B. F. Fuller, Stewart Lee, Samuel H. Webb, T. S. Preston, and Ira Webster; that said mortgage or deed of trust was executed to M. C. Spivey, trustee, by B. F. Fuller, T. S. Preston, Stewart Lee, and W. F. Edwards, as trustees of said First Baptist Church of Paris; that said W. F. Edwards had been elected trustee by said church to fill a vacancy caused by the resignation of U. Hearon.

"4. The court finds that the First Baptist Church of Paris had power to mortgage said property, but that the said deed of trust was invalid, because not executed, as required by the statutes of Texas, under the seal of the corporation, and for the further reason that said deed of trust was executed without having been authorized by a majority of said church, voting in regular session, as provided by its charter; but, however, the court finds that the said First Baptist Church of Paris is estopped from denying the validity of said deed of trust, because it obtained the money and used the same in the completion of its church on the faith of said deed of trust, and afterwards ratified the same, and by bidding the property in at the sale under said deed of trust.

"5. That said church, from its original organization up to about the time of the completion of its church building, in 1895, continued to worship and hold religious services upon the article of faith and church covenant upon which it was organized, when dissensions arose among the members of said church over the teachings and preaching of its then pastor, one G. M. Fortune; that said Fortune, by his preaching and published sermons and articles, denied the full inspiration of the Scriptures, and denied and repudiated the vicarious atonement of Christ for sinners, and denied that Christ died for and instead of sinners and became their substitute, and denied that Christ's righteousness was imputed to the righteous, —all of which was contrary to the doctrines and teachings of the Baptist Church, and contrary to the articles of faith upon which this church was organized and had continued to worship since its organization.

"6. The court finds: That at the time said dissensions arose the membership of the First Baptist Church of Paris was about four hundred. That said dissensions continued to grow until the church was divided into two factions, one faction adhering to the doctrines, teachings, and preaching of the said G. M. Fortune, and the other faction standing by and adhering to the doctrines of the Baptist Church and the articles of faith upon which the church was organized. That the faction which adhered to the original articles of faith and the doctrines and teachings of the Baptist Church (which faction is, for convenience, hereinafter styled the 'Anti-Fortuneites') strenuously opposed the re-employment of said Fortune

as pastor of said church, and, after he was employed, insisted upon his resignation because of his doctrines; but at the several meetings when these matters came up and were discussed and passed upon the faction which adhered to the doctrines of said Fortune (which faction is hereinafter styled, for convenience, the 'Fortuneites') had a majority of the members present and voting, and refused to request the resignation of said Fortune, and refused to accept his resignation when offered by him, and re-employed him as pastor for an indefinite period of time. That some time in the month of July, 1896, said Fortune tendered his resignation as pastor of the First Baptist Church of Paris, which was accepted by the Fortuneites, and that about the 30th of August, 1896, said Fortune rented a hall in the city of Paris, and delivered therein a series of sermons and lectures in opposition and criticism of the creed of the Baptist Church, which were attended by his adherents. That during this time the Anti-Fortuneites continued to meet and hold services and Sunday school in the First Baptist Church building until Sunday next preceding the 6th day of October, 1896, when the church doors were locked and the windows barred by the Fortuneites.

"7. The court finds that on the 30th of September, 1896, the Anti-Fortuneites, representing and acting as the First Baptist Church of Paris, met in church session at the church building, and elected the following persons, members of said church, to fill vacancies in its board of trustees, to wit, J. C. Hunt, J. B. Johnson, R. M. Miller, and George T. Saunders (which last-named trustee subsequently resigned), and by resolution authorized and directed said trustees to borrow money, and pay off said indebtedness to said S. D. Crittenden, or buy said church property at the sale under the said deed of trust, which was then advertised for October 8, 1896, for the said First Baptist Church of Paris, and to do anything else that, in their judgment, might be necessary for the interest of said church.

"8. That on the 6th of October, 1896, and before the sale under the aforesaid deed of trust, the said trustees of the First Baptist Church of Paris, acting for said church, procured the money, and offered to pay to M. C. Spivey, trustee in the deed of trust, the full amount of the note, principal and interest and commissions, if any, if he would transfer to them the note and mortgage, or deliver to them said note and mortgage without transfer, which offer was refused by the said Spivey, and the church property was put up and offered for sale by the said trustee Spivey under the deed of trust, at public outcry, to the highest bidder for cash; and, the plaintiffs' trustees, the said trustees of the First Baptist Church, for and on behalf of said church, being the highest and best bidder, the property was knocked off to them for the sum of \$10,050 and thereupon said trustees of the First Baptist Church of Paris, for and on behalf of said church, tendered to said trustee Spivey, in cash, the full

amount of the Crittenden note, secured by the deed of trust, principal and interest, costs and commissions, if any, amounting to \$5,378, and a receipt, signed by them as trustees of the First Baptist Church of Paris, for the balance of the bid over and above the said note, principal, interest, and commissions; and that thereupon at the instance of and upon demand made by T. S. Preston and F. I. Williams, two of the charter trustees of the First Baptist Church, and adherents of Fortune, that he, the said Spivey, require payment of the whole amount of said bid of \$10,050 in cash, and that, if not so paid, Spivey resell said property, he, the said Spivey, refused the said tender, and proceeded to resell said property, which second sale was forbidden by said trustees of the First Baptist Church of Paris. At said second sale, J. M. Fort, F. I. Williams, B. W. Lewis, S. B. M. Long, Mrs. Emily Williams, and Mrs. M. C. Maxey became the purchasers at the sum of \$5,000, being less than the amount of the Crittenden note, which was credited thereon by the said Spivey, and said Spivey made them a deed to the church property.

"9. The court finds that before the sale of said church property by the said Spivey, and before the Crittenden note became due, the said purchasers under the second sale had bought up the Crittenden note, and the sale by Spivey was directed by them, and the said purchasers were all members of said First Baptist Church (some of them trustees), and adherents of Fortune; that as soon as the aforesaid defendants bought in said church property, and got a deed to it from said trustee Spivey, the said G. M. Fortune was called back to preach in said church by the Fortuneites as a supply and continued to preach in the said church until about the 25th of July, 1897, and the Anti-Fortuneites, or the adherents of the original articles of faith, were thereby excluded from holding services in said church building under the teachings and instructions of a pastor of the original Baptist faith, and since their exclusion have held religious worship as the First Baptist Church of Paris in the Aiken Institute and Meyer's Hall.

"10. The court finds that the faction of the church styled the 'Anti-Fortuneites,' and who adhered to the articles of faith upon which the church was organized, and the doctrines and teachings of the Baptist Church, were and are the First Baptist Church of Paris, and that the plaintiffs' trustees were and are the legal trustees of said First Baptist Church of Paris, and that they acted for the said First Baptist Church of Paris in trying to save the church property and secure it for said church at the trustee's sale; and that the said purchasers of said property at the second sale by Spivey were acting for themselves, and not trying to secure said church property, and were not acting for the said First Baptist Church of Paris."

The case of the plaintiffs in error depends upon the correctness of the following proposition.

submitted as the first assignment of error in this court: "The court of civil appeals erred in holding that the church property in controversy was not trust property, because, when the property was acquired by the church under its then name, 'Paris Baptist Church,' the title was vested in three trustees and their successors for the sole and exclusive use of said church as a place of worship. The property thus acquired by denominational name became a trust for the promulgation of the tenets and doctrines of that particular denomination, without any specific declaration of the particular doctrines and teachings that should be taught or advanced. Moreover, the evidence in the record and the findings of the trial judge show conclusively the fundamental doctrines of the Baptist denomination on the subject of the vicarious atonement of Christ for sinners, and the full inspiration of the Scriptures, and that this church had been organized upon these doctrines, set forth at the time the church property was acquired."

The findings of fact and the undisputed evidence establish that on the 10th day of April, 1861, there was in existence in the city of Paris, Texas, a church known as the "Paris Baptist Church," to which Milton Webb, N. W. Towns, and T. C. Poindexter on that day conveyed the lot, on which the church house in question is situated, by a deed made and delivered to "Lemuel H. Williams, Hardy Moore, and Goodman Tucker, trustees of the Paris Baptist Church, and their successors, for the use of the said Paris Baptist Church." The deed contained the following habendum clause: "To have and to hold unto the said L. H. Williams, Hardy Moore, and Goodman Tucker and their successors, for the sole and exclusive use and benefit of the said Paris Baptist Church." At its organization, and before the making of this deed, the church had adopted what is known as the "New Hampshire Articles of Faith." A church building was erected upon the said lot, and paid for by subscription from the members of the church and others. There is nothing to show that any subscriber attached any conditions to his subscription, or prescribed any terms upon which it should be used. The Paris Baptist Church was an independent body, having no ecclesiastical superior, and might have organized by adopting the Philadelphia confession of faith, or might have had its articles of faith written out to suit the members, or might have organized without adopting a declaration of faith. The Bible is received as the creed of the Baptist Church, whether any be adopted or not. It is claimed by the plaintiffs that, upon the conveyance of the lot to trustees for the use and benefit of the Paris Baptist Church there attached to the property a trust that it should be used for the propagation and support of the faith professed by that church and expressed in the articles of faith adopted by it before the conveyance was made, and then in force; and that the minority, which adhered to the articles of faith adopted by the church at its organization,

constitute the Baptist Church of Paris, for the use of which the lot was conveyed—now the First Baptist Church of Paris. In support of the proposition plaintiffs cite the following cases: *Hale v. Everett*, 53 N. H. 71, 16 Am. Rep. 118; *Blanc v. Alsbury*, 63 Tex. 489, 51 Am. Rep. 666; *Smith v. Pedigo*, 145 Ind. 361, 19 L. R. A. 433, 32 L. R. A. 844, 33 N. E. 777, 44 N. E. 363; *Miller v. Gable*, 2 Denio, 492; *Ferraria v. Vasconcellos*, 31 Ill. 54; *Bowden v. M'Leod*, 1 Edw. Ch. 588; *Morville v. Fowle*, 144 Mass. 109, 10 N. E. 766; *Smith v. Pedigo*, 145 Ind. 361, 19 L. R. A. 433, 32 L. R. A. 844, 33 N. E. 777, 44 N. E. 363; and *Mount Zion Baptist Church v. Whitmore*, 83 Iowa, 138, 13 L. R. A. 198, 49 N. W. 81, sustain the judgment of the trial court in this case. Both cases practically hold that a church, independent of any other organization, may adopt a confession of faith by a majority vote, which will bind them and all members who may unite with them thereafter; and that no change can be made except by the unanimous consent of the entire membership. The reasoning by which this conclusion is reached is not satisfactory to us. In *Hale v. Everett*, 53 N. H. 9, 16 Am. Rep. 82, the court uses language broad enough to cover all that is claimed by the plaintiffs, but the point decided is against them. The learned judge who wrote that opinion took a wide field for discussion, and most of the propositions discussed are irrelevant to the issue before that court. In that case a society had been organized by the name of the "First Unitarian Society of Christians in Dover." The majority had organized another church, and were not in any sense the beneficiaries named in the deed. The court held that the use of the term "Unitarian Christians" necessarily excluded any organization or church that promulgated doctrines which denied the divinity of Christ, and upon the two grounds that the majority were not Christians, and had organized another body, they were denied the right to hold under the deed. The opinion of the court in the case of *Ferraria v. Vasconcellos*, 31 Ill. 25, does not support the proposition to which it is cited. It, in fact, decides nothing except that both factions had the right to do as they did, and decreed a division of the property. Chief Justice Caton, however, delivered a separate opinion, in which he broadly lays down the proposition contended for by plaintiffs in the following terms: "Church property is rarely paid for by those alone who there worship, and those who contribute to its purchase or erection are presumed to do so with reference to a particular form of worship, or to promote the promulgation or teachings of particular doctrines or tenets of religion, which, in their estimation, tend most to the salvation of souls; and to pervert the property to another purpose is an injustice of the same character as the application of other trust property to purposes other than those designed by the donor." We think it is correctly assumed as a matter of common knowledge that in this country houses for religious worship are usually

built by subscription, not confined to the membership of the particular church or denomination, but in fact members or all denominations, as well as those who belong to no church, contribute freely to the erection of such buildings. Upon this fact is based the presumption asserted by Judge Caton that each donor contributes with the distinct purpose that the house shall be dedicated to the propagation of the faith then professed by the congregation for which the structure is to be built. Out of the facts presumed springs the asserted trust relation between the donor and the church. It is not claimed that a congregation of Baptists who organize themselves into an independent church, and adopt articles of faith by a majority vote, thereby bind themselves to adhere to the articles so adopted for all time. If, however, they should afterwards take up a subscription for the purpose of building a house of worship, or receive donation of a lot under the doctrine asserted by plaintiffs, the articles already adopted would become immutable, and the church be deprived of the power to change or modify that declaration, for beneficiaries cannot abolish a trust without consent of the donor, though they be unanimous in the wish. If the proposition be sound, it results that, before buying the lot or building the church for the Paris Baptist Church, a majority of that congregation could have abolished the New Hampshire confession of faith, and could have adopted the Philadelphia confession, or could have substituted a confession drafted by themselves; or they might have abolished all articles of faith, and have relied upon the Bible alone as their creed. But when the deed was made to the lot, and the house built by subscription, the right to change or repeal the articles of faith was taken away from the congregation, and to change it would not only forfeit their rights in the property, but would deprive them absolutely of their membership and good standing in the church, which, to a Christian, is of greater value than houses or lands. The presumption involves the absurdity that a Methodist, who contributed to the building of the house of worship for the Paris Baptist Church, did so for the express purpose of perpetuating and promulgating the doctrine that immersion alone is baptism, and that infants are excluded from the rights of the church. The contributing Jew—they are not few—is presumed to be especially anxious that the Messiahship of Christ should be taught, though the failure to believe it cast down his temple, and broke down the walls of his holy city, making his people wanderers upon the earth. If the majority of such a congregation should be converted to the belief that sprinkling is valid baptism, and so change their teachings and practice, the Methodist brother who aided to build the house could interfere, and say, "No, you must teach immersion as the only valid mode, because my gift was based upon your continuance in teaching that error." Or, if the majority should abandon their faith in Christ as the Messiah, and

change their teaching, as did the Unitarians in *Hale v. Everett*, the Jew contributor could say, "Nay, you must not abandon your doctrine, because my donation binds you to teach the divinity of Christ, although false in fact." If a member of another Baptist church, which adopted the Philadelphia confession, contributed, he might enjoin the church at Paris from abolishing the existing articles, and adopting those which his own church indorsed. The soundness of the teachings is not involved in the proposition. Error is perpetuated the same as truth. Courts cannot decide between conflicting opinions upon theological questions. The fallacy lies in presuming the existence of a purpose of which there is no proof and in binding the minds and consciences of men by the presumed secret intentions of those persons who aid such enterprises.

In the case of *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666, Justice Miller, in a very clear opinion, brought order out of the chaos which reigned among the decisions upon this subject, and expressed the true doctrine in the following manner: "The questions which have come before the civil courts concerning the rights to property held by ecclesiastical bodies may, so far as we have been able to examine them, be profitably classified under three general heads, which, of course, do not include cases governed by considerations applicable to a church established and supported by law as the religion of the state. (1) The first of these is when the property which is the subject of controversy has been, by the deed or will of the donor, or other instrument by which the property is held by the express terms of the instrument devoted to the teaching, support, or spread of some specific form of religious doctrine or belief. (2) The second is when the property is held by a religious congregation, which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority. (3) The third is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power to control more or less complete in some supreme judicatory over the whole membership of that general organization." We believe that this classification fully and fairly presents the result of previous decisions of the courts upon this question. The opinions of learned judges are of great length, and varied in the subjects discussed, but the points at issue and decided in the cases that we have been able to examine are fairly represented by Judge Miller's statement. This case comes distinctly within the second class. As applicable to the question before the court, we quote further from that opinion as follows: "The second class of cases which we have described has reference to the case of a church of a strictly congregational or independent organization, 49 L. R. A

governed solely within itself, either by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government; and to property held by such a church, either by way of purchase or donation, with no other specific trust attached to it in the hands of the church than that it is for the use of that congregation as a religious society. In such cases, where there is a schism which leads to a separation into distinct and conflicting bodies, the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations. If the principle of government in such cases is that the majority rules, then the numerical majority of members must control the right to the use of the property. If there be within the congregation officers in whom are vested the powers of such control, then those who adhere to the acknowledged organism by which the body is governed are entitled to the use of the property. The minority, in choosing to separate themselves into a distinct body, and refusing to recognize the authority of the governing body, can claim no rights in the property from the fact that they had once been members of the church or congregation. This ruling admits of no inquiry into the existing religious opinions of those who comprise the legal or regular organization: for, if such was permitted, a very small minority, without any officers of the church among them, might be found to be the only faithful supporters of the religious dogmas of the founders of the church. There being no such trust imposed upon the property when purchased or given, the court will not imply one for the purpose of expelling from its use those who, by regular succession and order, constitute the church, because they may have changed in some respect their views of religious truth." In support of this position we cite, *Bouldin v. Alexander*, 15 Wall. 131, 21 L. ed. 69; *Osw v. Walker*, 26 Me. 504; *Shannon v. Frost*, 3 B. Mon. 253; *Gibson v. Armstrong*, 7 B. Mon. 481; *Harper v. Straws*, 14 B. Mon. 48; *Presbyterian Congregation v. Johnston*, 1 Watts & S. 1; *McGinnis v. Watson*, 41 Pa. 9; *Harmon v. Dreher*, Speers, Eq. 87; *Miller v. Gable*, 2 Denio, 492; *Hendrickson v. Shotwell*, 1 N. J. Eq. 577; *Bowden v. M'Leod*, 1 Edw. Ch. 588.

The First Baptist Church of Paris is a corporation created under the laws of the state of Texas, and is the successor of the Paris Baptist Church, to the use of which the deed for the property in question was made. Under the rule laid down in the case of *Watson v. Jones*, which we approve, the proper inquiry is, Which of the two factions constitutes the First Baptist Church of Paris? To test this question the courts cannot examine the members of the two parties to ascertain what their beliefs are upon any given theological question, but must decide upon the legal phases of the case. In the case of *Harper v. Straws*, before cited, Chief Justice Marshall, of the

supreme court of Kentucky, said: "The true question is, Which of these congregations is the society which worshipped at Asberry Chapel,—that is, in the house at the corner of Fourth and Green streets,—at and after the date of the deed conveying the property to that society? It is a question of identity, not of individuals, but of the body. And, as the deed makes no reference to the connection of the beneficiaries with any other church organization as essential to their rights, the continuance of the connection which existed at its date cannot be regarded as entering into the question of identity by which it is to be determined who are the beneficiaries. That question is to be determined by reference to the acts and internal organization of the body itself." The facts show that the plaintiffs, as they now claim to be organized, were not a separate body existing at the time the deed was made, nor when the charter of the church was procured, but were members of the congregation which worshipped in the house in question. Upon a question of faith and adherence to the original articles of faith the plaintiffs, a minority of the members, assumed that they alone adhered to the original confession of faith, and organized themselves into a body under the same name as that borne by the church to which they had formerly belonged. In doing so, they did not become the incorporated church, but constituted themselves into an independent voluntary organization. Of a proceeding similar to this, Chief Justice Marshall, in the case of *Harper v. Straws*, said: "When this proceeding took place, the old Asberry Chapel, considered as the place of worship referred to in the deed by which it was conveyed, had ceased to be a place of worship. But the society which had worshipped there until it was taken by the Masons continued to exist as an organized society of Christians, forming a congregation with the same officers, the same pastor, and the same records. The party which felt itself driven to reorganize in the old organization had never before been an organized body or society of Christians, and, notwithstanding the assumption of the old name and the mystery of 'reorganizing in the old organization,' it cannot be that, while that old organization remained complete and distinct and competent to the performance of its proper functions and to the enjoyment of its rights, it could be merged in or superseded by this new organization. The movement indicated by these resolutions was revolutionary. Those who participated in it, if they had, up to that time, been members of the society which had worshipped at Asberry Chapel, acted in this measure of reorganization independently of that society, threw off its authority, and renounced their connection with it. They formed, in fact, a new society, which, whatever name, form, or rights it might assume or claim, had never, as a society, worshipped at Asberry Chapel. . . . By their secession they ceased to be members of it, and being, therefore, no longer within the description of the gran-

tees or beneficiaries of the deed, they ceased to have any interest in the title or the use." It is not claimed that the defendants abandoned their organization as the First Baptist Church of Paris, but the findings of fact establish conclusively that the church organization, as it existed prior to the division, continued, and that plaintiffs entered into a new organization upon the ground that the defendants had abandoned the faith, and thereby forfeited their rights in the church property.

The presumption upon which the supposed trust is based belongs to the class known as "disputable presumptions of law," which are "the result of the general experience of a connection between certain facts or things, the one being usually found to be the companion or the effect of the other." 1 Taylor, Ev. § 109; 1 Greenl. Ev. § 33. Before accepting the presumption as a rule of decision, it is well to examine its foundation, and ascertain if it is well grounded in fact. Is it the general experience of men that persons who subscribe to a fund to build a church have in their minds a condition that the house shall be devoted to the teaching of the peculiar views then professed by the members or declared by the body? If we recur each to his own experience, we will not recall a case in which this was known to be true. If we consult each his own purposes when making like contributions, the result will be the same,—no such intent existed in our minds. In the examination of this question we have not found a case in which the donor of property for church purposes, or a subscriber to such a fund, has sought to enforce the trust, either when it was expressed in some instrument or in those cases where a trust has been presumed by the courts; but in every instance the action has been by a faction of the congregation, which, failing to control the church, sought the interposition of a court to decide their doctrinal differences in order to control the property of the church. The fact that no subscriber to a church fund has sought in the courts of any state to enforce the observance by a church of the faith professed by it at the time his donation was made, and that our own experiences do not attest the existence of such conditions, show that the supposed purpose does not generally exist in the minds of those who subscribe to these enterprises. The presumption of such intent discredits the public spirit and liberality of our people, who, whether Christians or not, when called upon to aid in such enterprises, do not stop to inquire into the particular religious belief of the congregation. Neither does the continuance in a particular doctrine concern them. They are actuated by the more laudable purpose of advancing the cause of Christianity.

It is not within the province of courts to determine which of two factions is right from a biblical or theological point of view, nor which conforms to the faith originally adopted by the church, except when that is, in explicit terms, made a condition of the donation. Granting that the defendants

have abandoned the New Hampshire confession of faith, the rules of that church prescribed that a majority should control. The minority took membership with those rules in force, and must abide the result. In *Miller v. Gable* it is said: "If any class of our citizens are of opinion that spiritual blessings can only flow in a particular channel, if the church or a creed in their minds usurps the place of the revelation upon which they suppose them to be founded, and if such persons found churches, they must declare their opinions explicitly, to have them respected. Such was not the belief of the plain men who established this church. They have left enough upon record to show that they were anxious that the essential truths of Christianity, which were recognized by the great body of the reformers of that day, should be preached to them and to their children. This has been done. If we go further, and bind this church to a particular creed, and compel a reluctant submission to a judicatory whose authority they have renounced, it will, in my opinion, be the act of this court, and not that of the founders of the church. I am of opinion that the decree appealed from should be reversed." And Judge Miller expressed the same thought in *Watson v. Jones*, in the extract before made, of which we repeat this forcible sentence: "There being no such trust imposed upon the property when purchased or given, the court will not imply one for the purpose of expelling from its use those who, by regular succession and order, constitute the church because they may have changed in some respect their views of religious truth."

In support of the judgment of the district court the plaintiffs in error cite the case of *Peace v. First Christian Church*, in which this court refused an application for writ of error from the judgment of the court of civil appeals of the third district. 20 Tex. Civ. App. 85, 48 S. W. 534. The trial court in that case found that the majority of the congregation "permitted only its principles and doctrines to be taught in the church and its customs and usages to be followed, and would not permit those adhering and holding a doctrine with the progressive faction [the minority] to hold religious services or preach their principles and doctrines in the church building" and that "on September 23, 1897, defendants G. A. Trot and R. M. Peace, elders as aforesaid [of the majority], locked the church house, and took possession thereof for themselves and the other defendants, all of whom adhered to the firm foundation faction [the majority], claiming that they are the original Christian Church of McGregor; and defendants now hold exclusive possession of the church property against plaintiff corporation and those composing said corporation." The court also found that the minority organized a corporation in the name of the First Christian

Church of McGregor, which was the plaintiff in that case. It was the opinion of this court, on examining the application for writ of error, that, without regard to the differences of opinion which prevailed between the members of the congregation, the majority had no right to exclude the minority from the use of the building so long as the latter were not dismissed from membership in the church, and that the effect of the judgment in favor of the corporation was to restore the building to the use of the whole church. Upon this ground the application was refused, and not because this court approved of the opinion filed by the trial judge, which was approved by the court of civil appeals, holding that the majority had departed from the faith, and that, therefore, the minority constituted the original church. We may have been in error as to the effect of the judgment in this respect, because it may be true that the action of the minority in that case amounted to an abandonment of their membership in the original church by which they lost their rights in the property which was deeded to the original organization, and that the corporation did not include the majority. If so, the writ of error should have been granted. But the case is not authority upon the questions involved in this.

The plaintiffs in error assign that the court of civil appeals erred in entering a judgment foreclosing the deed of trust upon the church property, and ordering the property to be sold. This assignment is well taken. Neither party to this suit sought a foreclosure of the deed of trust and sale of the property, and there was no pleading to sustain the judgment of the court. Besides, the incorporated First Baptist Church of Paris, which owned the property, was not a party to the suit, and could not be bound by the judgment. The First Baptist Church, which was joined by the plaintiffs in error, was a voluntary association, formed by the minority of the church, which could not, by using the name of the incorporated church, appropriate a charter that had already been granted by the state, and under which there was an existing organization.

The judgment of the Court of Civil Appeals is affirmed in so far as it reverses the judgment of the District Court, and in all other respects it is reversed.

Proceeding to enter such judgment as the court of civil appeals should have entered upon the facts found by the district court, it is ordered that the plaintiffs in error take nothing by this suit, and that the defendants in error go hence without day, and recover of the plaintiffs in error B. F. Fuller, Stewart Lee, S. H. Webb, W. F. Edwards, J. C. Hunt, R. M. Miller, and J. B. Johnson all costs expended in all of the courts.

Rehearing denied.

MINNESOTA SUPREME COURT.

D. O. SWANSON, *Appt.*,
v.
CHICAGO, MILWAUKEE, & ST. PAUL
RAILWAY COMPANY, *Resp.*

(.....Minn.....)

- *1. It is the duty of the landowner, for whose benefit and convenience gates are constructed and placed in a railroad right-of-way fence at a private farm crossing upon the land of such owner, to keep such gates closed.
2. The railroad company owes no duty to the landowner, at whose instance and for whose convenience and upon whose land such gates are put into the railroad fence, or to those in privity with him, to keep such gates closed. Its full duty is performed if the gates are kept in reasonably good repair.

(May 9, 1900.)

*Headnotes by BROWN, J.

NOTE.—Duty to keep gates in railroad fence closed.

- I. Scope of note.
- II. General rules; upon whom duty rests.
 - a. Conflict of authority.
 - b. Rule placing duty on the company.
 - c. Rule placing duty on adjacent owner.
- III. Duty as affected by the question, Who opened the gate?
 - a. Generally.
 - b. Rule when opened by railroad company.
 - c. Rule when opened by adjacent owner.
 - d. Rule when opened by stranger.
 - e. Rule when opened through defective construction or fastenings.
- IV. Duty as affected by ownership of stock.
 - a. Stock of adjacent owner.
 - b. Stock of tenant or licensee.
 - c. Stock of third persons.
- V. Diligence required to keep gates closed.
- VI. Necessity of affirmative proof of negligence.
- VII. What crossings are within the statutory rule.
- VIII. Conclusion.

I. Scope of note.

Liability for injuries occasioned by leaving railway gates open grows out of the duty to close them. Cases with reference to such liability have therefore been included in this note, as well as cases with reference to such duty. But the note is confined strictly to the question of duty and liability with reference to keeping gates closed, and is not intended to include anything with relation to the right to require gates, or to their construction, sufficiency, or repair.

II. General rules; upon whom duty rests.

a. Conflict of authority.

The question as to whether the duty to keep gates or bars closed in the right-of-way fences of railways rests upon the railway company or the adjacent owner for whose accommodation the gates or bars are put in has given rise to two directly contrary rules, both of which are well supported by authority. Each of the two rules grows out of the application of the statute with reference to fencing railway rights

A PPEAL by plaintiff from an order of the District Court for Goodhue County denying a new trial after verdict for defendant in an action brought to recover the value of horses killed on defendant's track through defendant's alleged negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. Albert Johnson, for appellant:

The gate had been left open and this fence had been down for such length of time that the company, which ran trains and kept its section boss going up and down the line daily, knew that the gate was open, or by reasonable care would have known that it was open. It was the duty of the company to shut the gate and repair the fence.

Under such circumstances the case should have been submitted to the jury.

Minn. Gen. Stat. 1894, §§ 2693, 2695; *Green v. St. Paul, M. & M. R. Co.* 60 Minn. 134, 61 N. W. 1130; *Chisholm v. Northern P. R. Co.* 53 Minn. 122, 54 N. W. 1061; *Savage*

of way, which is substantially the same in the different states, the difference of opinion appearing to grow out of the fact that the one class of cases regards the statute as directly imposing the duty upon the railroad companies, while the other class adopts the theory that, as gates are made for the accommodation of the adjacent owner, an exception to the rule with relation to fencing is created.

b. Rule placing duty on the company.

Under the statutes of a number of the states, among which are Missouri, Maine, Florida, Illinois, and Iowa, the theory is adopted that private gates are a part of the railway fence, and that, therefore, keeping them closed is a part of the statutory duty resting on railroad companies to maintain sufficient fences.

Thus, under the Missouri statute requiring railroad companies to construct and maintain lawful fences along their rights of way with farm crossings and gates, the gates are a part of the fence, and it is the statutory duty of the railroad company to keep them in repair, which necessarily includes the duty to keep them safely and securely closed so as to prevent stock from getting upon their roads. *Woods v. Missouri, K. & T. R. Co.* 51 Mo. App. 500; *West v. Missouri P. R. Co.* 26 Mo. App. 344.

The meaning of the Missouri statutory requirement that railroad companies shall erect and maintain fences with gates and bars, etc., is that they shall maintain the gates closed. *West v. Missouri P. R. Co.* 26 Mo. App. 344.

And it is the duty of a railroad company to close a gate in its right-of-way fence after having knowledge that it is open, no matter by whom it was left open. *Nicholson v. Atchison, T. & S. F. R. Co.* 55 Mo. App. 593.

And for a railway company to permit a gate at a private crossing to remain open when it knows, or might by ordinary care know, that it is open, is negligence under the statute, and a failure to erect and maintain the gate. *West v. Missouri P. R. Co.* 26 Mo. App. 344.

So, a railroad company required by the Maine statute to make and maintain a fence, which erects a gate in the line of its fence, whether for its own convenience or that of others, is in duty bound to fasten it securely, and maintain it in good repair. *Estes v. Atlantic & St. L. R. Co.* 63 Me. 309.

v. *Chicago, M. & St. P. R. Co.* 31 Minn. 419, 18 N. W. 272; *Watier v. Chicago, St. P. M. & O. R. Co.* 31 Minn. 91, 16 N. W. 537; *Evans v. St. Paul & S. C. R. Co.* 30 Minn. 489, 16 N. W. 271; 3 Elliott, Railroads, § 1200; 1 Rorer, Railroads, pp. 495, 496.

As a general thing gates are not put in for the benefit of the landowner, but are put in for the benefit of the railroad.

Minn. Gen. Stat. 1894, §§ 2696, 2697; *Schmidt v. Minneapolis, L. & M. R. Co.* 38 Minn. 491, 38 N. W. 487.

An open gate will not turn stock any more than an open fence, and to hold that the company is not bound to use reasonable care in this particular would be to violate the letter and spirit of the statute.

Greeley v. St. Paul, M. & M. R. Co. 33 Minn. 136, 53 Am. Rep. 16, 22 N. W. 179.

Contributory negligence can only be plead-

ed as a defense where the action is based solely upon defendant's negligence. In this case the statute creates the liability, and contributory negligence is no defense.

Shepard v. Buffalo, N. Y. & E. R. Co. 35 N. Y. 641; *Corwin v. New York & E. R. Co.* 13 N. Y. 42; *Jeffersonville, M. & I. R. Co. v. Ross*, 37 Ind. 545; *Louisville, N. A. & C. R. Co. v. Whitesell*, 68 Ind. 297; *Lloyd v. St. Louis, I. M. & S. R. Co.* 128 Mo. 595, 29 S. W. 153, 31 S. W. 110; *Flint & P. M. R. Co. v. Lull*, 28 Mich. 510; *Nashville & C. R. Co. v. Nowlin*, 1 Lea, 523; *Chattanooga R. Co. v. Walker*, 11 Heisk. 383; *Nashville & C. R. Co. v. Carroll*, 6 Heisk. 347; *Chesapeake, O. & S. W. R. Cos. v. Foster*, 88 Tenn. 671, 13 S. W. 694; *Macon & W. R. Co. v. Davis*, 27 Ga. 113; *Macon & W. R. Co. v. Winn*, 26 Ga. 250; *Atlanta & R. Air Line R. Co. v. Ayers*, 53 Ga. 12; *Kain v. Larkin*,

And it is the duty of a railroad company to maintain and replace gates or bars when they have been removed or taken down. *Waldron v. Portland, S. & P. R. Co.* 35 Me. 422.

And under the Florida act with reference to the operation of railroads, requiring substantial fences on both sides which must be sufficient to exclude all live stock from the roads, and making it liable for all damage by its engines or cars to any live stock caused by a failure to erect or maintain such a fence, gaps and bars at farm crossings are to be regarded as part of a fence, so as to impose the duty on the company to keep such gaps and bars closed. *Jacksonville, T. & M. W. R. Co. v. Harris*, 33 Fla. 217, 14 So. 726.

So, in Illinois it is held that where crossing gates in a railroad fence are closed they are a part of the fence, and the railroad company's duty with respect to keeping them closed is included in that of maintaining the fence. *Chicago, B. & Q. R. Co. v. Storer*, 13 Ill. App. 261; *Wabash R. Co. v. Perbex*, 57 Ill. App. 62.

And it is the duty of railroad companies under the Iowa statute to maintain and keep closed gates or bars at private crossings in their right-of-way fences (*Aylesworth v. Chicago, R. I. & F. R. Co.* 30 Iowa, 459; *Walt v. Burlington, C. R. & N. R. Co.* 74 Iowa, 207, 37 N. W. 159), after obtaining knowledge that they are open, whether they are left open by their employees or by others. *Walt v. Burlington, C. R. & N. R. Co.* 74 Iowa, 207, 37 N. W. 159.

But a landowner who permits stock to run in fields adjoining a railroad, and allows the gates of a crossing communicating with such fields to remain open so that the stock frequently stops on the crossing and interferes with the running of trains, causing serious accidents to be threatened and barely avoided, may be required by injunction to keep the gates of the crossing closed at all times when any stock on his farm and subject to his control would otherwise have access to the crossing, except while the crossing is being actually used in good faith by persons who are passing or driving stock over it. *Truesdale v. Jensen*, 91 Iowa, 313, 59 N. W. 47.

So, while an owner of horses which escape through an open gate to a railroad track cannot rely upon the duty of the railroad company to fence its right of way, or, upon the fact that a gate in its right-of-way fence was left open, to hold the company liable for killing his horses, where there is no law requiring the railroad company to fence its right of way, where it appears that the company had erected a fence, but allowed the gates to be down or to be left open, so that the horses came upon the track, it 49 L. R. A.

may be held liable for negligence in leaving the gates open, upon the theory that where stock passes in through such gates, and passes beyond them, it is then fenced in, close to the track, and cannot escape to the open country, so that its danger is thereby rendered greater than it would be if there were no fence. *McMaster v. Montana Union R. Co.* 12 Mont. 163, 29 Pac. 539, 30 Pac. 268.

And evidence of negligence of a railroad company in leaving open gates in a fence along its track is admissible in an action against it for the killing of horses on its track, where it alleged that it had maintained a gate and sufficient fences, though not required by law to do so. *Ibid.*

In the above case, *Louisville, N. A. & C. R. Co. v. Etzler*, 119 Ind. 39, 21 N. E. 466, *infra*, II. c., was distinguished upon the ground that that case was determined under a statute relieving a railroad company having erected fences with gates from all liability in the absence of negligence on its part or on the part of its employees. And *Evansville & T. H. R. Co. v. Mosier*, 114 Ind. 447, 17 N. E. 109, *infra*, II. c., was distinguished upon the ground that in that case the gateways had been put in for the use of the adjoining owner, who was therefore supposed to be fully cognizant of their condition, and bound to see that they were kept closed, while in the present case the plaintiff was in no way responsible for the existence or continuance of the condition of the inclosure.

The duty of a railroad company to use reasonable diligence to keep gates at farm crossings closed is not affected or relaxed because the field into which the gate in question opened was devoted to growing crops, and not to the pasture of stock. *Wabash R. Co. v. Perbex*, 57 Ill. App. 62.

And it is not to be shifted from the company to owners of stock injured, merely because through the neglect of the company such owners have found it necessary to make some temporary repairs thereon. *Peoria, D. & E. R. Co. v. Babbs*, 23 Ill. App. 454.

And a railroad company cannot, as against an adjoining owner, exempt itself from the consequences of a failure to observe a legal duty of keeping a gate in a farm crossing closed, by showing that it supposed a third person might or would perform it. *Wabash R. Co. v. Perbex*, 57 Ill. App. 62.

c. Rule placing duty on adjacent owner.

The rule adopted in Indiana, Massachusetts, Kansas, Ohio, New York, Texas, Minnesota,

56 Hun, 79, 9 N. Y. Supp. 89; *Jones v. Louisville & N. R. Co.* 82 Ky. 610; *Illinois C. R. Co. v. Dick*, 91 Ky. 434, 15 S. W. 665; *Louisville & N. R. Co. v. Coniff*, 16 Ky. L. Rep. 296, 27 S. W. 865; *Chesapeake & O. R. Co. v. Yost*, 16 Ky. L. Rep. 834, 29 S. W. 326; *Cutlett v. Young*, 143 Ill. 74, 32 N. E. 447; *Quackenbush v. Wisconsin & M. R. Co.* 71 Wis. 472, 37 N. W. 834; *Queen v. Dayton Coal & I. Co.* 95 Tenn. 458, 30 L. R. A. 82, 32 S. W. 460; *Rowell v. Railroad Co.* 57 N. H. 132, 24 Am. Rep. 59; *Mathews v. St. Louis & S. F. R. Co.* 121 Mo. 298, 25 L. R. A. 161, 24 S. W. 591.

Turning out cattle, with knowledge of defects in the fence, is not, as a matter of law, contributory negligence.

Schubert v. Minneapolis & St. L. R. Co. 27 Minn. 360, 7 N. W. 366; *Johnson v. Chicago, M. & St. P. R. Co.* 29 Minn. 425, 13 N. W.

Mississippi, and perhaps other states, is that, though railway companies are required by law to maintain sufficient fences along their rights of way, persons for whose convenience railroad companies erect and maintain gates at private crossings assume the risk of all increased danger to their property which may result from having gates instead of fences, and that therefore the duty to keep them closed, as well as the responsibility for failure to do so, rests on them.

Thus, a landowner for whose benefit a private crossing is maintained in Indiana, and who is supposed to be fully cognizant of the condition of the gates and of the use to which they are put, must, as between himself and the company, see that they are in a proper condition, and kept closed. *Evansville & T. H. R. Co. v. Mosler*, 114 Ind. 447, 17 N. E. 109; *Indianapolis & C. R. Co. v. Adkins*, 23 Ind. 840, 845; *Louisville, N. A. & C. R. Co. v. Goodbar*, 102 Ind. 596, 2 N. E. 337, 3 N. E. 162.

And if by neglect of that duty such private way is left open, and the stock of the owner of the land passes upon the road and is injured or killed without negligence on the part of the employees of the company, it is exonerated from liability. *Indianapolis & C. R. Co. v. Adkins*, 23 Ind. 840, 845.

And under Indiana act of April 8, 1885, authorizing persons owning tracts of land separated by the right of way of a railroad company to construct and maintain driveways across such right of way, and exempting the railroad companies from liability for damages for animals killed or injured if such animals entered the track at such private way, a railroad company is not liable unless it shall be proved that the killing or injury was caused by the negligence of its servants or employees. *Louisville, N. A. & C. R. Co. v. Etzler*, 119 Ind. 39, 21 N. E. 466.

And the rule is the same whether the crossings were constructed prior to that act or under the power given by the 1st section of the act of April 8, 1885, or since the passage of those acts. *Hunt v. Lake Shore & M. S. R. Co.* 112 Ind. 69, 13 N. E. 263.

So, under Mass. Gen. Stat. chap. 63, § 43, requiring railroad companies to maintain fences along their rights of way with convenient bars, gates, or openings therein, at such places as may reasonably be required, the duty of closing the bars placed by a company in its fence after using them for the benefit of an adjoining owner devolves upon such owner; and where they are left down, and his cow passes from the pasture through them upon the track, the bur-

673; *Watier v. Chicago, St. P. M. & O. R. Co.* 31 Minn. 91, 16 N. W. 537; *Green v. St. Paul, M. & M. R. Co.* 55 Minn. 192, 56 N. W. 752; *Ericson v. Duluth & I. R. Co.* 57 Minn. 26, 58 N. W. 822; *Evans v. St. Paul & S. C. R. Co.* 30 Minn. 489, 16 N. W. 271.

Contributory negligence is an affirmative defense, and must be proved by the party relying on it.

Hocum v. Weatherick, 22 Minn. 152.

Messrs. F. W. Root and F. M. Wilson for respondent.

Brown, J., delivered the opinion of the court:

This is an appeal from an order of the district court of Goodhue county denying plaintiff's motion for a new trial after verdict for defendant. The action is to recover the value of certain horses heretofore owned

den is on him to show that they are open without his fault. *Eames v. Boston & W. R. Corp.* 14 Allen, 151.

And a landowner whose farm is divided by a railroad is entitled, under the Kansas statutes, to necessary crossings; and where the railroad company fences its tracks through a farm, and constructs gates in the fence at crossings for his accommodation or that of his tenant, the duty rests upon him to keep the gates closed, and if he neglects to do so, and his animals pass through them upon the track and are killed without the negligence of those operating the trains, the railroad company is not liable. *Adams v. Atchison, T. & S. F. R. Co.* 46 Kan. 161, 26 Pac. 439; *Rouse v. Osborne*, 3 Kan. App. 139, 42 Pac. 843.

And an instruction that it is the duty of a railway company to keep shut a gate at a private crossing is prejudicially erroneous. *Rouse v. Osborne*, 3 Kan. App. 139, 42 Pac. 843.

So, in Ohio, where bars or gates are constructed at a farm crossing, the duty of keeping them closed save when in use primarily devolves upon the landowner, and not upon the railroad company. *Megrue v. Lennox*, 59 Ohio St. 479, 52 N. E. 1022.

And in New York a gate at a farm crossing is a private gate to be kept in repair by the railroad company, but to be used solely by the proprietor of the land, and the proprietor is bound to keep it shut when not open for use in passing over the railroad. *Diamond Brick Co. v. New York C. & H. R. R. Co.* 28 N. Y. S. R. 95, 7 N. Y. Supp. 868, 58 Hun, 396, 12 N. Y. Supp. 22.

And it is the duty of an owner of land adjoining a railroad to use a crossing gate with reasonable care, and to use reasonable care in shutting and fastening it when the occasion for having it open is ended. *Magilton v. New York C. & H. R. R. Co.* 11 App. Div. 373, 42 N. Y. Supp. 231.

And refusal to instruct, in an action brought by him for the loss of a horse which passed through an open gate, that if the plaintiff could easily have changed the position of the staple so that the hook could be put into it, the jury might take that into consideration in determining whether he was negligent, and an instruction that the law did not require him to fix the fastenings in any way, made on request of the plaintiff, are erroneous. *Ibid.*

In the above case *Connolly v. Central Vermont R. Co.* 4 App. Div. 221, 88 N. Y. Supp. 587. *infra*, IV. c. was distinguished upon the ground that there the plaintiff's horse came upon the railroad tracks through the open bars of

by plaintiff, alleged to have strayed upon defendant's railroad track through a defective fence along defendant's right of way, and killed by one of its locomotives. At the time the horses were killed, plaintiff was in possession of the land described in the complaint, and had been in the possession thereof, as tenant of the owner, for fifteen years prior thereto. During the year 1897 he used said land as a pasture for his horses and cattle. The railroad track of defendant extends across the southeast corner of this pasture, running in a northeasterly direction, leaving a very small portion of land in the southeast corner of the track. In compliance with the statute of the state, defendant constructed a fence on each side of its right of way as it extends across said land, and, at the instance and for the convenience of the owner of the land, put into such fence

gates on each side of the track at a private wood road leading from plaintiff's land "onto the lowlands south of the track." These gates were in the fence during all the time of plaintiff's occupancy of the land. Soon after the horses were killed, plaintiff examined the railroad fence, and discovered that the gate leading from the pasture into the right of way was open, and also that at a short distance from such gate the fence was partly down, and considerably out of repair. Plaintiff turned his horses into the pasture the day of the accident. They made their way into the right of way, either through the open gate or at the point where the fence was out of repair, and were killed. There is no evidence showing at which point they passed through the fence. Plaintiff's counsel contends that it is immaterial whether they passed through the gate or at the

another's land upon which the horse had strayed.

So, in Texas, where a railroad company has provided substantial gates in its right-of-way fence for the convenience of an adjoining landowner, it is the duty of the owner of the farm, and not of the company, to keep such gates closed; and if the company exercises ordinary care in the operation of its trains it cannot be held liable for the killing of stock of such adjoining owner passing through such gates, in the absence of anything to show negligence in leaving such gates open. *Texas & P. R. Co. v. Glenn*, 8 Tex. Civ. App. 301, 30 S. W. 845; *San Antonio & A. P. R. Co. v. Robinson*, 17 Tex. Civ. App. 400, 43 S. W. 76; *Missouri, K. & T. R. Co. v. Hanacek* (Tex.) 55 S. W. 1117, (Tex. Civ. App.) 56 S. W. 938.

And protection in the way of cattle guards is not required. *Missouri, K. & T. R. Co. v. Hanacek* (Tex.) 55 S. W. 1117.

And it devolves upon an adjoining owner, in an action against the company for killing stock, to show that the stock entered upon the railroad track through the fence, and not through the gate, as the company would not be responsible for leaving the gate open. *San Antonio & A. P. R. Co. v. Robinson*, 17 Tex. Civ. App. 400, 43 S. W. 76.

This is also the rule in *SWANSON v. CHICAGO, M. & ST. P. R. Co.*

But in Minnesota, as between the railroad company and other parties interested in maintaining a farm-crossing gate in a railroad fence, the obligation to keep the same properly closed is mutual, and demands the exercise of proper care from each. *Mooers v. Northern P. R. Co.* (Minn.) 82 N. W. 1085.

In the above case *SWANSON v. CHICAGO, M. & ST. P. R. Co.* was distinguished upon the ground that the gates in the former case were not wholly upon the private property of the plaintiff.

Minnesota Laws 1877, chap. 98, § 4, however, providing that whenever any gate shall be erected by any railroad company at any farm crossing for the exclusive use of any owner of land, it may provide a lock for the same, and deliver the key to such owner or the tenant or occupant, and if such gate shall thereafter be opened, whereby cattle or other animals shall go upon the track and be injured or killed, unless maliciously or wantonly done by the company or its employees, the company shall not be liable to the owner for such injury, if complied with, eliminates the question of negligence on the part of the defendant with respect to any such gate being left open or unfastened, in an action for an injury resulting therefrom. *Sather v. 49 L. R. A.*

Chicago, M. & St. P. R. Co. 40 Minn. 91, 41 N. W. 458.

But the liability of a railroad company in consequence of its farm gate being left open or unfastened remains unaffected by that act where the company omits to comply with its provisions. *Ibid.*

So, in Canada, where a gate is left in a right-of-way fence for the accommodation and convenience of an adjoining landowner, which as a part of the fence is sufficient, and the whole control and use of the gate is given by the railroad company to such adjacent owner, it is for him, rather than for the railroad company, to attend to the opening and closing thereof. *Great Western R. Co. v. Vilalre*, 11 U. C. C. P. 509.

And in Illinois *C. R. Co. v. Weathersby*, 63 Mich. 581, which was an action against a railroad company for permitting a gate to be left open, by reason of which the plaintiff's horse strayed upon the track, and then negligently so frightening her that she ran into a trestle and was killed, it was held that the sole question was whether or not the company was guilty of negligence in not stopping its train when the dangerous situation of the animal was discovered.

No contract on the part of a railroad company to repair and keep closed gates in its right-of-way fence can be inferred from the fact that it erected the gates some fifteen years before, where they were used exclusively by the owners of the land from that time. *Evansville & T. H. R. Co. v. Mosler*, 114 Ind. 447, 17 N. E. 109.

And evidence that a railroad company had built and kept in repair bars across a reserved road on each side of the railroad, and that the road master of the railroad had been accustomed to put the bars in their place whenever they were seen down, does not warrant the court in inferring the existence of a contract by which the railroad company agreed at all times to put up the bars when found down. *Waldron v. Portland, S. & P. R. Co.* 35 Me. 422.

So, though an act providing that railroad companies shall not be liable for injuries to live stock caused by moving trains when they have inclosed their tracks with a proper fence does not relieve the company from responsibility for gross negligence or a wilful or intentional wrongful act, such wilful or intentional act is not shown by the fact that the engineer, running the train by which stock passing in through an open gate is killed, could have seen it, if on the lookout, and avoided killing it, so as to hold the railroad company responsible. *Greer v. Nashville, C. & St. L. R. Co.* (Tenn.) 56 S. W. 850.

point where the fence was out of repair. His contention in this respect is correct if it be held that the railroad company was in duty bound to keep the gate closed. There is no evidence showing by whom the gate was left open. Whether by plaintiff's servants or by some third person does not appear. The gate was not used by defendant, and the evidence furnishes no suggestion that its servants had left it open. If it be held that the defendant was under no duty or obligation to keep the gate closed, the order appealed from must be sustained, because there is no evidence to justify a finding that the horses entered the right of way at the point where the fence was out of repair. If such is the law, it was incumbent on plaintiff to show a failure of duty on the part of defendant with respect to keeping its fence in good repair, and that such failure of duty was the direct and

proximate cause of the injury sustained; in other words, that the horses entered upon the right of way at the point where the fence was defective, and not at the gate. It is not claimed that the gate was not in reasonably good repair. So, we are confronted with the question whether it was the duty of the defendant to keep the gate closed. The question is of more than passing importance, and we have given it a thorough and careful consideration. Our statutes provide that all railroad companies in this state shall build or cause to be built good and sufficient cattle guards at all wagon crossings, and good and substantial fences on each side of such road and maintain the same. Section 2696, Gen. Stat. 1894, provides "that whenever a railroad shall hereafter be laid out, opened, and fenced through the farm lands of any owner of such lands in this state,

III. Duty as affected by the question, Who opened the gate?

a. Generally.

The question as to who opened a gate in a railway right-of-way fence, or as to how it came to be open, may affect the rule as to whose duty it is to close it. Thus, it is obvious that if it was opened by the railroad company itself, or by its permission, the company should see that it was closed when the purpose for which it was opened was accomplished, without reference to the question as to whose duty it might be under general rules; and, on the same principle, if the adjacent owner opened it for his own purposes, it would, as a general rule, rest with him to close it, when his purposes were accomplished. And a still different rule might apply where it was opened by a stranger, or the opening was caused by circumstances over which neither party had control.

b. Rule when opened by railroad company.

A railroad company which uses a farm-crossing gate for its own purposes, or permits such use, assumes the responsibility of seeing that the gate is kept properly closed.

Thus, a gateway at a farm crossing which is made subservient to the business of a railroad company, and devoted to its use, is not to be regarded as a farm gate, but is a panel in the fence taken down by the company, and if left open it is as a panel left down; and if it permits, invites, and shares in such a use of the gateway, it falls in its statutory duty to build and keep in good repair fences along the side of the track. *Spinner v. New York C. & H. R. Co.* 67 N. Y. 153, Affirming 6 Hun, 600.

A railway company should be held to the same liability for injury to stock coming upon its tracks from a gate left open by it, as if it had got upon the tracks through an opening in, or a defective fence at, any other place on its right of way. *Missouri, K. & T. R. Co. v. Bellows* (Tex. Civ. App.) 39 S. W. 1000.

And if a railroad company permits a panel to be cut out of its fence and made into the form of a gate, which is left insecurely closed by persons using it with the company's consent, it cannot be said that the road is securely fenced, so that it will not be liable, under the statute requiring it to securely fence its track, for animals killed which have passed through such opening without proof of negligence on its part. *Cleveland, C. C. & I. R. Co. v. Swift*, 42 Ind. 119.

And contributory negligence cannot be im-

puted to the owner of stock merely from the fact that his beasts have escaped from his well-fenced field, and passed to a railroad track through gates left open for the purposes of the railway company. *Spinner v. New York C. & H. R. Co.* 67 N. Y. 153, Affirming 6 Hun, 600.

Thus, if a farm-crossing gate was open or left open through the negligence of the railroad company or its servants, so that sheep were permitted to enter upon the right of way, where they were run over, the company would be liable for the injury resulting therefrom. *Lemou v. Chicago & G. T. R. Co.* 59 Mich. 618, 26 N. W. 791.

And it would be liable for an injury to stock of an innocent person straying to its track through a gap which was left open in the evening, when the stock was killed in the night. *Spinner v. New York C. & H. R. Co.* 67 N. Y. 153, Affirming 6 Hun, 600.

And where, after having erected a sufficient fence, a railroad company for its own convenience opens a gap and fails to close it, and afterwards a cow passes through the gap, and is killed while attempting to get back to the gap and escape from the roadway, it is a question for the jury, in an action for such injury, as to whether or not the company has been guilty of negligence. *Tyler v. Illinois C. R. Co.* 61 Miss. 445.

So, in *Savage v. Chicago, M. & St. P. R. Co.* 31 Minn. 419, 18 N. W. 272, it was held that the question of the liability of a railroad company is properly left to the jury upon evidence that the railroad company had enclosed its line of road with a barbed-wire fence, except a gateway into the plaintiff's field, which had been negligently left open, and through which plaintiff's horses passed to the right of way, where they were frightened by an approaching train, and were thereby caused to run against the barbed-wire fence, seriously injuring them, as the negligence of the company. In leaving the gateway open might, under the circumstances, be deemed the proximate cause of the injury.

This rule applies to acts of agents and servants of the railroad company, and also to the acts of all persons acting with its sanction or permission.

Thus, where a railroad company was accustomed to use a gate at a farm crossing for its own accommodation, or for the accommodation or convenience of persons doing business with it at its depot at that point on its railroad, and at the time in question the gate was left unclosed through the carelessness of its agent, such negligence would be its negligence for which it is held duly responsible. *Spinner v.*

leaving parts of such lands on both sides of such railroad, the said railroad . . . shall construct a necessary crossing or crossings under, over, or across such railroad, for the passage of stock to and from such parts of such lands." We deem the evidence sufficient to justify the conclusion reached by the trial court that the gates were placed in the fence by the railroad company at the instance and for the convenience of the owner of the land. The evidence furnishes no intimation that they were for the use of the railroad company. They were evidently not constructed or intended as a compliance with § 2696, above quoted; at least there is no evidence that the very small tract of land south of the railroad track was used in connection with that portion north of the track, or used at all. The gates were constructed at the wood road leading from plaintiff's

land north of the track to the lowlands on the south, which road was used by the plaintiff and others in the neighborhood, with his apparent permission, principally in the winter season. Plaintiff and his neighbors were the only persons using such road, and the only persons passing through the gates. It cannot be presumed that the defendant's employees left the gates open. Indeed, inasmuch as the gates were upon the premises of plaintiff, and under his control, the natural presumption would be that he, or those representing him, left them open. But this is not important. The plaintiff rests his case upon the square proposition that it was the duty of defendant to keep the gates closed as a part of its duty to "maintain" the fence. In this we cannot concur. No case involving the precise point has ever been before this court, and we are confronted with the question for

New York C. & H. R. R. Co. 2 Hun, 421, 4 Thomp. & C. 595.

And a railroad company is liable for the act of its servant in leaving down the bars in a fence along the right of way whereby horses passed to the track and were killed by a passing train, where it was his duty after his day's labor was over, if he saw anything amiss, to give it necessary attention, though he was employed as a day laborer, and his act was done in the night, and not in the business of the company. *Chapman v. New York C. R. Co.* 33 N. Y. 369, 88 Am. Dec. 392.

So, the leaving down of bars in a gap in a railroad fence by persons furnishing wood to the railroad, and hauling it through the gap and depositing it close to the track under contract with the company for its use while engaged in hauling the wood is not the act of a mere stranger to the company which would exonerate it from liability for injury to stock passing in through the gap. *Jacksonville, T. & K. W. R. Co. v. Harris*, 33 Fla. 217, 14 So. 726.

Leaving a gate open in a fence along a railway near a station, however, erected for the express purpose of shutting out the public and enabling a railway company to operate its trains at a high rate of speed, through which a practical railroad man passed and was killed, is not negligence on the part of the company which will render it liable, where the opposite gate was closed, and, if the deceased had looked, he would have seen that the open gate led nowhere except upon the tracks, and it was obvious to any person that the object of the fence was to keep the tracks clear. *Kent v. New York, N. H. & H. R. Co.* 64 N. Y. Supp. 623.

c. Rule when opened by adjacent owner.

An adjacent owner using his farm crossing, as a general rule, is bound to see that the gates are closed when he is through using them, whether the general and original duty to close them rests with him or with the railroad company.

Thus, an owner of lands adjacent to a railroad must exercise his rights with reference to his farm crossing with due regard to the rights of the railroad company, and where he himself opens the gates or bars he must replace them. *Waldron v. Portland, S. & P. R. Co.* 35 Me. 422.

As the railroad company is not bound to have a servant at all times ready to close them. *Ibid.*; *Evansville & T. H. R. Co. v. Mosler*, 101 Ind. 597.

And a railroad company is not liable for an injury to stock which passed upon its track 49 L. R. A.

through an open gate or bars where the adjacent proprietor left the gate open without its consent. *Harrington v. Chicago, R. I. & P. R. Co.* 71 Mo. 384; *Perry v. Dubuque S. W. R. Co.* 36 Iowa, 102; *Lemon v. Chicago & G. T. R. Co.* 59 Mich. 618, 26 N. W. 791; *Hook v. Worcester & N. R. Co.* 58 N. H. 251; *Illinois C. R. Co. v. McKee*, 43 Ill. 119.

And see *Henderson v. Chicago, R. I. & P. R. Co.* 43 Iowa, 820, 39 Iowa, 220, *infra*, IV. c.

Unless such bars had been down for such a length of time, or under such circumstances, as to justify the inference of negligence on the part of the railroad company in not seeing that they were down, and putting them up. *Perry v. Dubuque S. W. R. Co.* 36 Iowa, 102.

And, railway companies being required under the Iowa statute to fence crossings for proprietors where the road runs through their land, the proprietors are held to a due degree of care in looking to the gateways and bars, and should not be allowed wilfully to leave them open; and where they do so in the absence of gross negligence on the part of the company, they must stand the consequences of their wilful acts whether they fall upon them or others. *Russell v. Hanley*, 20 Iowa, 219, 89 Am. Dec. 535.

And where a railroad company has securely fenced its road, and an adjacent owner himself lets down bars in the fence whereby his stock gets on the track and is killed, he cannot recover therefor. *Toledo & W. R. Co. v. Fowler*, 22 Ind. 316; *Koutz v. Toledo, W. & W. R. Co.* 54 Ind. 515; *Russell v. Hanley*, 20 Iowa, 219, 89 Am. Dec. 535, *dictum*.

Or hold the railroad company liable for injury to the animals, upon the ground that the railroad was not securely fenced. *Bond v. Evansville & T. H. R. Co.* 100 Ind. 301.

Unless such damage might have been avoided by a proper management of its trains. *Hook v. Worcester & N. R. Co.* 58 N. H. 251.

If the owner leaves the gates open in his use thereof, without any notice or knowledge on the part of the railroad company, he is so far a substantial contributor to the escape of his stock that he is without redress if his stock passes through and is injured on the railroad track. *Great Western R. Co. v. Villaire*, 11 U. C. C. P. 509.

And where, under a valid contract by which a railroad company agrees, in consideration of a right of way, to construct and maintain a safe private crossing, and animals get upon the track because of the gates having been left open by the landowner, the fact that they so get upon the track would be a matter of defense.

the first time. It has been before the court of last resort in other states, and the trend of the later decisions relieves the company of the responsibility as to the landowner for whose benefit the gates are placed in the fence, and casts the duty of keeping the gates shut upon the latter. The company's duty is fully performed if it constructs a suitable gate, and keeps and maintains it in reasonably good repair. *Adams v. Atchison T. & S. F. R. Co.* 46 Kan. 161, 26 Pac. 439; *Texas & P. R. Co. v. Glenn*, 8 Tex. Civ. App. 301, 30 S. W. 845; *Bond v. Evansville & T. H. R. Co.* 100 Ind. 301; *Eames v. Boston & W. R. Co.* 14 Allen. 151; *Diamond Brick Co. v. New York C. & H. R. R. Co.* 58 Hun, 396, 12 N. Y. Supp. 22; *Megruer v. Lennox*, 59 Ohio St. 479, 52 N. E. 1022; *San Antonio & A. P. R. Co. v. Robinson*, 17 Tex. Civ. App. 400, 43 S. W. 76; *Box v. Atchison*, T. & S. F. R. Co. 58 Mo. App. 359. We

believe this rule to be consistent and in accord with the plainest principles of equity and justice, and we adopt it as the law of this state. It can work no hardship to the landowner. He and his servants can, without the least inconvenience, keep the gates closed, and the railroad company should not be burdened with responsibility for their neglect to do so. To impose the duty upon the company, at least as respects the landowner, for whose benefit the gates are erected, and those in privity with him, would be, it seems to us, extremely unreasonable and unjust. It would be impracticable for the company to perform the duty, if imposed upon it, without keeping an employee constantly on the watch to guard and protect the landowner from his own neglect. And a construction of the law in harmony with ap-

Chicago & A. R. Co. v. Barnes, 116 Ind. 126, 18 N. E. 459.

Where a railroad company maintains a fence at all requisite places, permission to the landowner to pass and repass on a private way through such fence is sufficient ground upon which to exonerate the company from any liability for damage to his animals which might pass upon the track along such private way in consequence of his neglect to properly maintain inclosures or fastenings, where such way passes through the railroad fences. *Indianapolis, P. & C. R. Co. v. Shimer*, 17 Ind. 295.

An adjoining proprietor has a right to open and close crossing gates at his convenience and as often as his necessity demands, and where a foreman upon the railroad sees a gate open by permission of the adjoining owner it is not his duty to close it, and he is not required to stop and wait to see whether the gate will be closed by the persons using it, and close it himself if they fail to do so; and the company is not liable for an injury resulting from such failure. *Box v. Atchison, T. & S. F. R. Co.* 58 Mo. App. 359.

As to duty to close in case of use of gates by adjacent owner, see also *Harding v. Chicago, M. & St. P. R. Co.* 100 Iowa, 877, 69 N. W. 1019; *Grand Rapids & I. R. Co. v. Jones*, 81 Ind. 523, *infra*, V.

A railroad company cannot control the use of a gate built for an adjoining owner, in its fence, in accordance with law, and is not bound, as against the landowner, to close the gate upon notice that the owner has left it open. *Diamond Brick Co. v. New York C. & H. R. R. Co.* 58 Hun, 396, 12 N. Y. Supp. 22.

And where an adjacent owner takes down bars at his reserved road across a railroad track, and leaves them down for his cow to pass, or had taken them down at some previous time and left them down for the more convenient passage of his stock to and fro, he will be deemed to have assumed the risk thus incurred, and cannot hold the railroad company liable for an injury received by the stock while passing over the track. *Waldron v. Portland, S. & P. R. Co.* 35 Me. 422.

And where a railroad company shut a gate after mid-day, and it was afterwards left open by the proprietor, it will not be held liable for the killing of a horse at about 5 o'clock of the same day, which had passed through such gate. *Diamond Brick Co. v. New York C. & H. R. R. Co.* 58 Hun, 396, 12 N. Y. Supp. 22.

And in such a case a direction that the proprietor was not bound to shut the gate after using it is improper, as putting a duty upon the railroad company which was not required by 49 L. R. A.

law. Diamond Brick Co. v. New York C. & H. R. R. Co. 28 N. Y. S. R. 95, 7 N. Y. Supp. 868.

In the above case, and in same case on appeal (28 N. Y. S. R. 95, 7 N. Y. Supp. 868), *Spinner v. New York C. & H. R. Co.* 67 N. Y. 153, *supra*, III. b, was distinguished upon the ground that in that case the defendant had adopted a private crossing, and was accustomed to shut the gate at night early or late as its business necessities required, and that the company therefore, having left the gate open, was responsible for an accident to the owner's cattle.

So, a railroad company is not liable for stock killed on its track, which passed in through an open gate, where the gate was opened by third persons with the assent of the owner, and was being used by them at 5:30 P. M. on the previous day to the knowledge of the defendant's foreman, whether the persons thus using the gate left it open or closed it, and it was afterwards opened by another, as in neither case could the company be declared guilty of negligence as a matter of law. *Box v. Atchison, T. & S. F. R. Co.* 58 Mo. App. 359.

And an adjoining owner, who, upon discovering that the gate at his farm crossing had been negligently permitted to get out of repair so that it would not stay shut, fastened it with a chain, and afterwards his son, after putting stock through it, omitted to fasten it with the chain, so that it came open and stock got on the track and was killed, cannot recover against the railroad company therefor, as the negligence of his son is his own. *Richardson v. Chicago & N. W. R. Co.* 56 Wis. 347, 14 N. W. 176.

So, the act of 47 Vict. chap. 11, § 9 d, does not cast upon the adjacent owner the duty of seeing to the sufficiency of the fastenings of a gate in the railroad fence at his farm crossing, or impose any greater responsibility upon the landowner to keep the gate closed than in respect to his own user of it. *McMichael v. Grand Trunk R. Co.* 12 Ont. Rep. 547.

But the obligation of a railroad company to put up a sufficient fence along its right of way, such as the statute requires, is not suspended or affected by the act of the adjacent owner in the absence of such a fence, of putting up on his own land some kind of an inclosure between him and the track; and his claim to compensation for the killing of his stock is not, therefore, affected by the fact that the inclosure proved insufficient to hold it, or by his leaving open the bars of the inclosure so that the stock passed out upon the track, as he was not bound to maintain any such inclosure. *Wilson v. Ontario, S. & H. R. Union Co.* 12 U. C. Q. B. 465.

pellant's contention would result in relieving the landowner of all responsibility with respect to keeping the gates closed, and cast the entire burden on the company. We cannot concur in this view of the law, or adopt the theory of appellant's counsel. Our statutes not only require the railroad company to construct a fence, but to maintain the same after it has been constructed; and counsel insists that a failure to keep such gates closed is a failure to maintain the fence. The contention is untenable. If the gates are kept in a reasonably good condition of repair, they are sufficiently "maintained," within the meaning of the statutes. We do not wish to be understood as holding that this rule is applicable to any person or

persons other than the landowner for whose convenience and benefit the gates are placed in the fence, and those in privity with him. The question of liability of the company as to third persons who suffer damage by reason of such gates being left open is not decided. Perhaps, if the company furnished the landowner a lock and key for such gates, it would be relieved from liability even as to such third persons, within the meaning of § 6889, Gen. Stat. 1894. But this statute cannot be construed as casting the burden of keeping the gates closed upon the company, at least not as to the landowner.

Our conclusion is that the learned trial judge properly dismissed the action, and the order appealed from is affirmed.

Under the Iowa statute concerning fencing railroads, however, providing that railroad companies failing to fence their roads against live stock where they have the right to fence shall be absolutely liable to the owner for any live stock killed or injured unless the injury complained of is occasioned by the wilful act of the owner or his agent, the fact that bars at a farm crossing were left down by the proprietor himself would not absolve the company from the duty of putting them up, though in such case the company might escape liability if a requisite amount of care had been used on its part to keep them up. *Bartlett v. Dubuque & S. City R. Co.* 20 Iowa, 188.

In the above case *Indianapolis, P. & C. R. Co. v. Shimer*, 17 Ind. 205, *infra*, IV. b, was distinguished upon the ground that in that case the stock belonged to the tenant of the landowner, which passed on the track by reason of his own negligence in maintaining bars erected by the owner for his own convenience.

And the correctness of the rule in *Indianapolis & C. R. Co. v. Adkins*, 23 Ind. 340, *infra*, IV. c, with reference to the property of third persons, was doubted; but the case was distinguished upon the ground that the statute of Indiana did not require the company to grant or construct a private way through its fences, and that the plaintiff's stock was trespassing when it went on the land through which the road was constructed, and that the owner knew the bars were down.

So, where a panel is cut out of a railroad fence and made into the form of a gate, but is not hung on hinges, the fact that the owner of hogs which got upon the track by passing in at the side of the gate, and were killed, had rented his ground adjoining the road to one, who had rented to another who hauled wood through the opening in the fence, does not show such negligence upon the part of the owner of the hogs as will prevent his recovery therefor from the railroad company. *Cleveland, C. C. & I. R. Co. v. Swift*, 42 Ind. 119.

And the question of contributory negligence in an action against a railroad company for killing stock is for the jury under evidence that the gate was in such a condition that it would tumble down when used, and that it fell when used by plaintiff's servant, that he was unable to replace it, that defendant's servants were near by but failed to replace it, and that for greater security plaintiff's cattle had been shut up in his barn-yard on account thereof, but that they escaped to the track where they were injured. *Estes v. Atlantic & St. L. R. Co.* 63 Me. 309.

d. Rule when opened by stranger.

Where a stranger opens gates in a railway 49 L. R. A.

fence at crossings, the rule is the same as that applicable where the adjacent owner opens them. If the railroad company is not chargeable with notice or knowledge of the fact that they are open. When the knowledge of the fact that they are open comes to them, or when by the use of ordinary care and diligence it should have come to them, it becomes their duty to close such gates, and they will thereafter be held liable for injury to stock passing through them in case of their failure to do so.

Thus, a railroad company is not liable to the owner of stock which passed through an open gate to the railroad track and was injured, where the gate was left open by a third person without the consent of the company. *Harrington v. Chicago, R. I. & P. R. Co.* 71 Mo. 384; *West v. Missouri P. R. Co.* 26 Mo. App. 344; *Russell v. Hanley*, 20 Iowa, 219, 89 Am. Dec. 535, *dictum*; *Lemon v. Chicago & G. T. R. Co.* 59 Mich. 618, 28 N. W. 791; *Chicago & A. R. Co. v. Barnes*, 116 Ind. 126, 18 N. E. 459.

Unless it had notice of the fact that the gate was open, or could have known it by the use of ordinary care and diligence. *West v. Missouri P. R. Co.* 26 Mo. App. 344.

Railroad companies are only required to use reasonable care and diligence to keep gates closed at farm crossings, and if opened by strangers and left so they are only liable when chargeable with notice, actual or constructive, of the fact that they are open. *Peoria, D. & E. R. Co. v. Babbs*, 23 Ill. App. 454.

But where an adjacent owner takes all reasonable precautions to confine his stock, placed in a field inclosed by a secure and safe fence, and, without any fault on his part, the gate is left open by some unknown person in the night-time, and the stock wanders to the railroad track, where it is injured, the company is liable for ordinary negligence, as under such circumstances it is bound to use ordinary care to prevent the injury. *Atchison, T. & S. F. R. Co. v. Davis*, 31 Kan. 645, 3 Pac. 801.

And where a third person left a farm-crossing gate open and stock of an adjacent owner entered through it, the railroad company would be responsible for injury thereto, if it knew or by the exercise of ordinary care could have known that the gate was open; but it would not be responsible if it did not have, or by the exercise of ordinary care should not have had, such knowledge. *Mobile & O. R. Co. v. Tiernan*, 102 Tenn. 704, 52 S. W. 179.

And when gates at a private crossing are properly constructed the act of a third person without the fault of the railroad company in leaving them open would be a good defense in an action for injury to stock going onto the track through such gate. *Russell v. Hanley*, 20 Iowa, 219, 89 Am. Dec. 535, *dictum*.

And where a gate at a private crossing over a railway is propped open by third parties, and cattle enter while it is thus open, the railway company cannot be held responsible for such injury though the gate has a defective fastening, as the injury cannot be deemed the result of such fastening. *Binlicker v. Hannibal & St. J. R. Co.* 83 Mo. 660.

So, evidence in an action against a railroad company for killing stock that the stock had run in the same pasture for years, and had never been known to work open the gate in question, and at 7:30 P. M. the night before the killing the gate was properly closed and fastened, and that on the morning of the killing the gate was found wide open, and that to so open the gate it must have been unhooked, pushed back 2 or 3 feet, and then carried around into the pasture, is not sufficient to show negligence of the defendant causing the escape of the animals onto the right of way, though there was evidence tending to show that the fastenings were not proper. *Koenigs v. Chicago, M. & St. P. R. Co.* 98 Iowa, 569, 65 N. W. 314, 67 N. W. 399.

And if a gate in a railroad right-of-way fence was closed about 6 o'clock in the evening, and during the night some person not in the employ of the railroad company went through, leaving it open, and during that night horses escaped through it and were injured, the railroad company is not liable. *Nicholson v. Atchison, T. & S. F. R. Co.* 55 Mo. App. 593.

Nor will a railroad company be held liable in Iowa for killing a colt which passed through bars at a private crossing to its tracks, where a third person left the bars down, and for aught that appears in the case the colt may have entered and been injured directly after the bars were opened. *Aylesworth v. Chicago, R. I. & P. R. Co.* 30 Iowa, 459.

And evidence that the sheep of an adjacent owner, which were in an adjoining pasture, entered the right of way through a gate at a private crossing, and that the gate was left open by a boy passing through a short time before, will not sustain a recovery where the gate was put up for his accommodation. *Louisville, N. A. & C. R. Co. v. Goodbar*, 102 Ind. 596, 2 N. E. 337, 3 N. E. 162.

So, evidence that stock went upon a railroad track at a place where an opening was frequently made by neighbors by the removal of boards so as to render the fence insufficient until it was repaired, and was injured thereon, does not warrant a recovery in the absence of anything to show that the fence was in that condition at that time, or that the company had had reasonable time within which to repair it. *Illinois C. R. Co. v. Swearingen*, 47 Ill. 206.

Where a railroad company had made a lawful fence at a farm crossing which someone had left down or open without the fault of the company, whereby the stock of the landowner got in and was killed, that is a matter of defense for the company, and need not be negated by the plaintiff in his declaration. *Great Western R. Co. v. Helm*, 27 Ill. 198, 81 Am. Dec. 226.

Under Mo. Rev. Stat. § 809, however, providing that railroad companies shall erect and maintain lawful fences with openings and gates therein, the gates are a part of the fence, and a fence must be made with a gate and so maintained; and where stock was injured from passing upon the railroad track through a gate the post of which was rotted off at the ground so that the gate could be opened and shut only by being lifted up and carried into place, and it had been in that condition for two or three months, the railway company is liable therefor, though 49 L. R. A.

the gate was probably left open in the night by some third person passing through it, and there was no proof that the company had notice that it was open. *Morrison v. Kansas City, St. J. & C. B. R. Co.* 27 Mo. App. 418.

The wilful omission of duty on the part of a railroad company in permitting a gate to remain in that condition, which led directly to the act of leaving the gate open, so that leaving the gate open had become habitual in consequence of such condition, and so that the railroad company should have reasonably anticipated the result, is the proximate cause of an injury to stock passing through such gate to the railroad track, though the gate was apparently opened and left by a third person passing through it in the night previous to the injury. *Ibid.*

So, a railroad company may recover of a person who wilfully removed a farm gate and enabled the adjacent owner's horse to pass upon the railroad track, where it was killed, for which the owner recovered of the railroad company on the ground that it was guilty of a wrong in permitting the gate to remain down for a long period, notwithstanding the rule that there can be no contribution between joint wrongdoers for as between themselves they would not be joint wrongdoers. *Chicago & N. W. R. Co. v. Dunn*, 59 Iowa, 619, 13 N. W. 722.

As to what constitutes reasonable care and diligence to keep gates closed, see *infra*, V.

e. Rule when opened through defective construction of fastenings..

Where railroad gates are opened, or come open, because of defective construction or fastenings, it would appear that the railroad company would be liable for injury to stock passing through them to the railroad track as for a failure to construct and maintain fences, as required in most states by statute.

That a railroad gate is a part of a railroad fence, and that where a railroad gate is so constructed or fastened that it will not turn stock there is a failure to fence within the meaning of the statute, was held in *Payne v. Kansas City, St. J. & C. B. R. Co.* 72 Iowa, 214, 33 N. W. 633; *Mackie v. Central R. Co.* 54 Iowa, 540, 6 N. W. 723; *McKinley v. Chicago, R. I. & P. R. Co.* 47 Iowa, 76; *Estes v. Atlantic & St. L. R. Co.* 63 Mo. 309; *Fremont, E. & M. Valley R. Co. v. Pounder*, 36 Neb. 247, 54 N. W. 509,—and in numerous other cases.

And in *Hammond v. Chicago & N. W. R. Co.* 48 Iowa, 168, it was held that the rule that a gate erected in a line of railroad fence for the convenience of the owner places the responsibility of keeping the gate closed upon the owner, and relieves the company from liability for injury to animals caused by its remaining unclosed, does not apply where the gate was not so constructed that when closed it would stay so.

In the above case, *Eames v. Boston & W. R. Corp.* 14 Allen, 153, *supra*, II. c, was distinguished upon the ground that in that case bars were placed in the opening, which would remain up or down as they were left, while in the present case the gate might be blown open by the wind.

This, however, is a question of the construction and repair of railroad gates, rather than one of keeping them closed, and the cases have been included in this note only so far as they refer directly to the opening or closing of the gates.

IV. Duty as affected by ownership of stock.

a. Stock of adjacent owner.

For the rule as to stock belonging to the ad-

jacent owner for whose accommodation gates at farm crossings are put in, see the previous subdivisions of this note.

b. Stock of tenant or licensee.

The duty to close gates in a railway fence, and the liability for failure to close them, with reference to stock belonging to a tenant or licensee, seems to be the same as that in case of stock belonging to the person for whose accommodation the gates or bars are put in a railway fence.

Thus, a landowner who persistently keeps open a gate at a farm crossing may, by his conduct, release the railway company from liability for its failure to maintain the gate; and a tenant who acquires a right to occupy and use the land jointly with the owner with knowledge of such release would acquire no greater right than that of his lessor, and could not hold the company liable for horses injured by escaping through such gate. *Manwell v. Burlington, C. R. & N. R. Co.* 80 Iowa, 662, 45 N. W. 568.

The tenant cannot be held to a greater degree of care than could the owner with reference to keeping a gate in the railroad fence on the leased premises closed, on the theory that the crossing was made for the owner's benefit, and not for that of the tenant, though at the time the tenant's stock was injured the company did not have the gate open. *Greer v. Nashville, C. & St. L. R. Co. (Tenn.)* 56 S. W. 850.

And where a railroad company maintains a fence along its tracks, and gives permission to the landowner to pass and repass on a private way across its tracks, and a tenant of the landowner opens such way, he is subject to the same obligations, and entitled to the same rights, as the landowner; and if he uses the private way for his ordinary business purposes the company is exonerated from any liability for damage to his animals which might pass upon the track along such private way in consequence of his neglect to properly maintain inclosures or fastenings, where such way passes through the railway fences. *Indianapolis, P. & C. R. Co. v. Shimer*, 17 Ind. 295.

So, the fact that an owner of stock was not the owner of the land upon which it was running, having a license therefor only, makes no difference as to the liability of the railroad company to the stockowner due to the fact that the stock passed through a gate at a private crossing having a defective fastening upon the track, and were run over. *Missouri P. R. Co. v. Pfrang*, 7 Kan. App. 1, 51 Pac. 91f.

c. Stock of third persons.

The rule has been laid down that the duty of a railroad company to keep gates in its fence closed exists with reference to the stock of the adjacent owner or his tenants or licensees only, and that there is no such duty with reference to trespassing stock.

Thus, the cattle of a stranger, which are on the premises of an adjoining proprietor without right, are not within the protection of the statute requiring railroad corporations to erect and maintain fences on the sides of their roads of a designated height and strength with openings or gates or bars therein for the use of proprietors of adjoining land. *Brooks v. New York & E. R. Co.* 13 Barb. 594. But see later New York cases set forth *infra* in this subdivision.

And where stock breaks through a lawful fence upon the premises adjoining the railroad and passes through such premises to the railroad track and is killed, the company is not liable though it passes through an open gate 49 L. R. A.

to the right of way. *Harrington v. Chicago, R. I. & P. R. Co.* 71 Mo. 384.

As a general rule, however, the duty to close gates in railroad fences is regarded as being the same whether the stock affected is that of the adjacent owner or of a third person.

Thus the fact that stock passed from the owner's field to the field of another, and passed thence upon the railroad track through an open gate, does not affect the stockowner's right to recovery. *Chicago & N. W. R. Co. v. Harris*, 54 Ill. 528; *Dayton v. New York, L. E. & W. R. Co.* 81 Hun, 284, 30 N. Y. Supp. 783.

Though it does not appear how the cattle escaped from his pasture. *Dayton v. New York, L. E. & W. R. Co.* 81 Hun, 284, 30 N. Y. Supp. 783.

And under the rule that the duty to keep gates closed rests with the railroad company, where a railroad company erects gates at private crossings for the accommodation of the adjoining proprietor, it is as much its duty to third persons to keep the gates closed as it is to erect them; and it is liable to such third persons for injury to stock going on the track through such gates when left open. *Russell v. Hanley*, 20 Iowa, 219, 89 Am. Dec. 535, *dictum*.

But where an adjacent proprietor is satisfied with a sliding panel as a gate at his farm crossing, instead of a gate hung upon hinges and fastened with a latch or hook as prescribed by law, a third person whose stock break into his premises and pass to the railroad track through such gate when open and are injured, cannot object to it as insufficient. *Harrington v. Chicago, R. I. & P. R. Co.* 71 Mo. 384.

So, upon the other hand, the rule that a person whose animals are trespassing in the inclosure of another is entitled to no greater right than the landowner, applies in Kansas to cattle killed after passing from the inclosure of a third party upon a railroad through an open gate, though it is the duty of the landowner to keep the gate shut. *Rouse v. Osborne*, 3 Kan. App. 139, 42 Pac. 843.

And if the animals of a third person jump into the inclosure of another, and are wrongfully upon his premises, and pass therefrom through an open gate, and are killed without the negligence of those in charge of the train, the owner of such animals is entitled to no greater rights than the landowner, and cannot recover. *Adams v. Atchison, T. & S. F. R. Co.* 46 Kan. 161, 26 Pac. 439.

So, Indiana acts of 1885, providing for private crossings across railways, and imposing upon the landowners the duty of keeping the gates at such crossing closed, and relieving the railroad company from liability for injury to or killing of animals passing upon its track through such gates, imposes upon the landowner the duty of keeping the gates closed, not only as between himself and the railroad company, but also as to third parties, so as to relieve the railroad company from liability in case of neglect in either event. *Hunt v. Lake Shore & M. S. R. Co.* 112 Ind. 69, 13 N. E. 263.

And where a gate is erected at a farm crossing by a railroad company for the convenience of an adjoining landowner, or by the adjoining landowner with the consent of the company, the company is not liable for stock passing through such gate and injured upon its track, whether the stock injured belongs to the adjacent landowner or whether it belongs to other persons, finding its way upon the lands of the adjacent landowner, and thence through such gate. *Louisville, N. A. & C. R. Co. v. Thomas*, 1 Ind. App. 131, 27 N. E. 302; *Pennsylvania Co. v. Spaulding*, 112 Ind. 47, 13 N. E. 269.

So, if a railroad company has securely fenced

its road, and bars in the fence are thrown and left down against the consent of the company, and the employees of the company passing over the road daily to repair it and watch such bars as closely as possible do not discover it in the exercise of due diligence, and the stock of a third person pass through to the track and are killed, such third person is not entitled to recover. Toledo & W. R. Co. v. Fowler, 22 Ind. 316; Indianapolis & C. R. Co. v. Adkins, 23 Ind. 340, 23 Ind. 345.

And this rule is especially applicable where the stock owner knows of the neglect of the owner to perform his obligation to maintain the bars and keep them up. Indianapolis & C. R. Co. v. Adkins, 23 Ind. 340, 23 Ind. 345.

But a railroad company is liable for killing stock which had strayed to the pasture of an adjoining owner and from the pasture through an open bar-way to the railroad track, where the bar-way had been open for a long time preceding the accident, though it does not appear who left it open. Connolly v. Central Vermont R. Co. 4 App. Div. 221, 38 N. Y. Supp. 587.

In the above case Diamond Brick Co. v. New York C. & H. R. R. Co. 58 Hun, 396, 12 N. Y. Supp. 22, *supra*, III. c, was distinguished on the ground that in this case the plaintiff was not the owner of the pasture in question, and it was not shown that the owner for whose accommodation the bar-way was made ever opened it or left it open.

But this rule has been modified in some jurisdictions to the extent of not holding the person injured responsible for the act of the adjacent owner in himself leaving open the gates.

Thus, while it might be the duty of one for whose convenience a farm crossing was made to keep it in repair and keep the gate closed, and if he failed in this respect and his stock entered there on the track, he might have no ground for complaint, this rule would not apply to a third person who had no control over the gate, and was under no duty with reference to it. Missouri, K. & T. R. Co. v. Bellows (Tex. Civ. App.) 39 S. W. 1000.

In the above case, Texas & P. R. Co. v. Glenn, 8 Tex. Civ. App. 301, 30 S. W. 845, *supra*, II. c, was distinguished upon the ground that in the present case the person whose stock was injured was under no duty to keep the gate closed, and did not consent that it should be placed there.

Where a gate is placed as part of a fence at a private railway crossing not required or used for any public purpose, the railway is securely fenced as to the person for whose convenience it is placed there, and he assumes the risk of any increased danger resulting therefrom; but as to all other persons the company is required, at its peril, to keep the gate closed. Wabash R. Co. v. Williamson, 104 Ind. 154, 3 N. E. 814.

Previous to the Indiana act of 1885, while railroad companies were not liable for injury or the killing of animals of adjoining landowners for whose convenience farm crossings and gates were constructed, where the animals passed to the track through such gates which such landowner failed to keep closed, they were liable to other persons whose animals might pass through such open gates. Louisville, N. A. & C. R. Co. v. Thomas, 1 Ind. App. 131, 27 N. E. 302, *dictum*.

And the fact that a gate was erected for the benefit of the landowner adjoining the track does not relieve a railroad company from liability for leaving open gates in its right-of-way fence through which animals of a third person pass to the track, though such gates are left open by the landowner. Galveston, H. & S. A. R. Co. v. Wessendorf (Tex. Civ. 49 L. R. A.

App.) 39 S. W. 132; Baltimore, O. & C. R. Co. v. Kreiger, 90 Ind. 380.

In Baltimore, O. & C. R. Co. v. Kreiger, 90 Ind. 380, *supra*, it was said that Indianapolis & C. R. Co. v. Adkins, 23 Ind. 340, *supra*, was doubted in Cincinnati, H. & I. R. Co. v. Ridge, 54 Ind. 39, which was a fence case, and must be regarded as overruled by the doctrine enunciated in Indianapolis, P. & C. R. Co. v. Thomas, 84 Ind. 194, *infra*.

In Iowa, however, the rule is that a railroad is not responsible for any injury sustained by a third person which is occasioned by the negligence of him for whose benefit the crossing is provided. Henderson v. Chicago, R. I. & P. R. Co. 43 Iowa, 620, 39 Iowa, 220.

So a railroad company is liable for horses of a third person which got upon the railroad track through a farm gate connecting the fields owned by another with the railway right of way, which gate was placed there for the convenience of the owner of the farm over which the owner of the stock had no control. It appearing that the section foreman exercised control over such gate to the extent of usually keeping it closed. Missouri, K. & T. R. Co. v. Bellows (Tex. Civ. App.) 39 S. W. 1000.

And the owner of stock which passed through a defective fence to the lands of an adjoining owner, and from there passed through a gate in a private way to the railway track, and was killed, is not chargeable with contributory negligence so as to relieve the railroad company from liability for negligently leaving the gate unclosed, unless it also appears that the natural and probable consequences of permitting the stock to stray was that it would go upon the railroad track. Lake Erie & W. R. Co. v. Beam, 60 Ill. App. 68.

Under the Iowa rule where cattle of a third person go upon the lands of another because of the carelessness of the owner in leaving open a gate leading from the common to his inclosure and then wilfully leaves open a gate leading from his inclosure to a line of railway, and the cattle pass through his gate and are injured without the fault of the owner or of the railroad company, the party guilty of the act of wilfully opening such gate would be liable therefor. Russell v. Hanley, 20 Iowa, 219, 89 Am. Dec. 535.

But one who negligently suffers his cattle to escape from his own premises to the farm of another cannot recover against the person to whose farm they escape, under Wis. Laws 1872, chap. 119, § 32, providing that any person who shall open bars or gates in a railroad farm crossing, and not immediately close the same, shall be liable to the party injured for all damages resulting therefrom, though such person negligently leaves such bars or gate open. Pitzner v. Shinnick, 39 Wis. 129.

A statute prohibiting domestic animals from running at large does not relieve a railroad company from a statutory duty to erect and maintain fences along the sides of its right of way, and to use reasonable diligence to keep gates at farm crossings closed, or from liability for stock killed or injured in consequence of its failure to observe such duty. Wabash R. Co. v. Perbex, 57 Ill. App. 62; Chicago & N. W. R. Co. v. Harris, 54 Ill. 528.

Especially where the owner of such animals made reasonable efforts to reclaim them soon after their escape, but was unsuccessful and continued his search for them up to and during the day on which they were killed. Chicago & N. W. R. Co. v. Harris, 54 Ill. 528.

So, where a railroad company permits or contracts with an individual to put gates in its right-of-way fence, or to make openings therein,

when it cannot be compelled to do so under the law, it is liable for damages resulting to all except the contracting parties. *Wabash R. Co. v. Williamson*, 3 Ind. App. 190, 29 N. E. 455.

And a railroad company bound by statute to fence its tracks where a private way crosses them cannot escape liability for killing stock passing through an opening at such crossing by showing a contract with the adjacent landowner to maintain a fence at that place, the owner of the stock not being a party to such contract. *Indianapolis, P. & C. R. Co. v. Thomas*, 84 Ind. 194.

But evidence, in an action against a railroad company for killing stock at a farm crossing, that the stock passed through the premises of a third person and through a gate on such third person's premises which was not at a farm crossing, will not warrant a verdict for the plaintiff upon the theory that gates are more liable to be left open than are fences to be left down or out of repair, and that therefore a fence with gates not at farm crossings is not a sufficient statutory fence, where it appears that the owner of the premises was accustomed to look every night to make sure that the gate was closed, and had done so and found it closed the evening of the night on which the stock was killed, and it does not appear how it afterwards came open. *Detroit, G. H. & M. R. Co. v. Hayt*, 55 Mich. 347, 21 N. W. 367, 911. See also *Spinner v. New York C. & H. R. R. Co.* 67 N. Y. 153, *supra*, III. b; *Harding v. Chicago, M. & St. P. R. Co.* 100 Iowa, 677, 69 N. W. 1019; *Grand Rapids & I. R. Co. v. Jones*, 81 Ind. 523, *infra*, V.

V. Diligence required to keep gates closed.

Ordinary and reasonable care and diligence seem to be all that is required of a railroad company to keep gates in its fences closed, and this rule appears to apply to repairing gates which are so constructed or out of repair as to come open by themselves, as well as to closing gates which have been opened by someone.

Thus, when a railroad company has provided a private crossing, and supplied the necessary gates, it is held only to the exercise of reasonable and ordinary care and diligence to keep them closed. *Henderson v. Chicago, R. I. & P. R. Co.* 43 Iowa, 620, 39 Iowa, 220; *Perry v. Dubuque S. W. R. Co.* 36 Iowa, 102; *Galveston, H. & S. A. R. Co. v. Wessendorf* (Tex. Civ. App.) 39 S. W. 132; *Mobile & O. R. Co. v. Tiernan*, 102 Tenn. 704, 52 S. W. 179; *Wabash R. Co. v. Perbex*, 57 Ill. App. 62; *Chicago, B. & Q. R. Co. v. Slerer*, 13 Ill. App. 261; and see also *West v. Missouri P. R. Co.* 26 Mo. App. 344, *supra*, II. a.

But it is liable for injury to stock caused by its failure to use such care in keeping gates or bars closed. *Perry v. Dubuque S. W. R. Co.* 36 Iowa, 102. See also *West v. Missouri P. R. Co.* 26 Mo. App. 344, *supra*, II. b.

A railroad company is not liable, however, for injuries to stock passing to its tracks through a gate or bars in the right-of-way fence, where no negligence or want of care appears upon its part. *Grand Rapids & I. R. Co. v. Monroe*, 47 Mich. 152, 10 N. W. 179.

And it cannot be held to have been guilty of negligence in an action for killing stock at a reserved crossing, the bars of which have been left down, where the evidence does not show how long the bars had been left down, nor by whom. *Waldron v. Portland, S. & P. R. Co.* 35 Me. 422.

Nor is a railroad company liable for damages to stock which went upon its tracks through an open gate, unless it had either ac-

tual or constructive notice of the fact that the gate was open. *Chicago & A. R. Co. v. Patterson*, 72 Ill. App. 428; *Chicago, B. & Q. R. Co. v. Magee*, 60 Ill. 529; *Hungerford v. Syracuse, B. & N. Y. R. Co.* 46 Hun, 339; *Ridenore v. Wabash, St. L. & P. R. Co.* 81 Mo. 227.

Before liability will attach in the absence of wrong on the part of a railroad company it must have knowledge, actual or constructive, that the bars or gates are open or out of repair, and a reasonable time thereafter to put them in repair. *Aylesworth v. Chicago, R. I. & P. R. Co.* 30 Iowa, 459.

But a railroad company is required to exercise due care to keep its gates at farm crossings closed, and to obtain knowledge of their condition as to whether they are open or closed, and if it fails to exercise such care, and through its negligence remains ignorant of the fact that a gate is open, it will be held liable for injury to stock passing through it. *Wait v. Burlington, C. R. & N. R. Co.* 74 Iowa, 207, 37 N. W. 159.

And if a gate in a right-of-way fence was left standing open for such length of time directly previous to an accident to stock passing through it that the railroad company knew, or could by the exercise of ordinary care have discovered, the fact in time to have closed it before the accident, the railroad company is liable. *Nicholson v. Atchison, T. & S. F. R. Co.* 55 Mo. App. 593; *Hammond v. Chicago & N. W. R. Co.* 43 Iowa, 168.

And see *Wait v. Burlington, C. R. & N. R. Co.* 74 Iowa, 207, 37 N. W. 159, *supra*, II. b.

And the fact that the owner of stock which passed upon a railroad through an open gate was a section hand in the employ of the railroad company, and that he had passed the gate daily, and knew that it had been open for weeks, will not relieve the railroad company from liability for leaving the gate open, in the absence of evidence tending to show that it was a part of his duty to close or repair gates or fences without direction so to do. *May v. Chicago & N. W. R. Co.* 102 Wis. 673, 79 N. W. 31.

And an instruction in an action against a railroad company for injury to an animal passing through a gate at a private way, making the company liable if it knew the gate was open, or might have known it by the exercise of ordinary diligence, is not subject to objection that under it the company might be held liable whether it knew it long enough before to have closed the gate or not, where it appears that the gate had been left open almost constantly for two or three months. *Lake Erie & W. R. Co. v. Beam*, 60 Ill. App. 68.

That a railroad company knew that bars at a private crossing were open, so as to hold it liable for failure to close them, may be shown either by direct or circumstantial evidence, or by the lapse of such time that the company should by ordinary diligence have obtained such knowledge. *Aylesworth v. Chicago, R. I. & P. R. Co.* 30 Iowa, 459.

But a railroad company is not required to patrol the line of its road to see if the gates at farm crossings have been left open, nor to keep guard upon it sufficient to discover and counteract such carelessness immediately upon its occasion; it can only be held negligent with reference thereto when it has had reasonable time to discover it, or been notified and failed to take proper action. *Chicago, B. & Q. R. Co. v. Slerer*, 13 Ill. App. 261; *Illinois C. R. Co. v. McKee*, 43 Ill. 119.

And see *Waldron v. Portland, S. & P. R. Co.* 35 Me. 422; *Evansville & T. H. R. Co. v. Mosler*, 101 Ind. 597, *supra*, III. c.

Nor is it required to station a guard at such a crossing to keep the gates closed. *Moore v. Northern P. R. Co.* (Minn.) 82 N. W. 1085.

And it is therefore the duty of the adjoining proprietor to give notice to the company when a defect has come to his knowledge. *Poler v. New York C. R. Co.* 16 N. Y. 476.

And section men who passed a farm crossing on a railroad, and closed the gate at 4 o'clock, and passed on to their work at a culvert a short distance beyond, where they were engaged until 6 o'clock, and at which they were obliged to look out for passing trains, their entire attention being demanded, are not guilty of negligence in failing to observe that the landowner passed through shortly afterwards and left the gate open, so as to hold the railroad company liable for an injury to the stock of a third person which passed through such open gate and onto the track. *Harding v. Chicago, M. & St. P. R. Co.* 100 Iowa, 677, 69 N. Y. 1019.

So, a railroad company is not responsible for animals killed, which came upon the track through a gate at a farm crossing early in the morning before its employees could reasonably get out over the line to examine the gates, where the gates were closed the evening before, though the gates had been so frequently and for so long a time open that the defendant, in the exercise of ordinary care, must have known that in all probability they would be left open during the night, if it used reasonable care to keep them closed, as it would not be required to station a watchman at the gates to see that they were kept closed. *Henderson v. Chicago, R. I. & P. R. Co.* 43 Iowa, 620.

And a railroad company is not chargeable with notice that a gate at its farm crossing in the right-of-way fence was open by the fact that it remained so from 11 A. M. until some time in the following night, when stock passing through it was injured so as to hold it liable therefor. *Greer v. Nashville, C. & St. L. R. Co.* (Tenn.) 56 S. W. 850.

And a landowner has the right to leave gates in his farm crossing through a right-of-way fence open temporarily, and section men who see such landowner leave gates open have the right to assume that he will soon return and close them, and will be guilty of no negligence in failing to close gates which they see the landowner leave open, so as to hold the company liable for injury to stock of a third person passing in through such gates by collision of a train with them within an hour or so afterwards. *Harding v. Chicago, M. & St. P. R. Co.* 100 Iowa, 677, 69 N. W. 1019.

And persons using a railway gate with the permission of a proprietor, with the knowledge of the railroad company, should shut the gate each evening when they are through using it, and the company has the right to assume that such duty has been performed; and in such cases, where the gate is left open and stock of the proprietor is injured, an instruction that if the gate was open for such length of time previous to the accident that the defendant knew, or could by the exercise of ordinary care have discovered, the fact in time to have closed it, there is liability, is inapplicable. *Box v. Atchison, T. & S. F. R. Co.* 58 Mo. App. 359.

But while a railroad company is not required to keep such a guard on its road as would see an open gate the instant it is left open and close it, it must keep such a force as may discover such breaches and openings in its fence, and close them in a reasonable time. *Chicago & N. W. R. Co. v. Harris*, 54 Ill. 525; *West v. Missouri P. R. Co.* 26 Mo. App. 344.

And a railroad company which has made 49 L. R. A.

gates in its fence to enable a farmer, whose lands lie on both sides, to pass and repass, but without protecting the crossing by cattle pits, is liable in Indiana for an injury to the stock of a third person at such crossing, though the foreman, whose duty it is to keep all gaps in the fence closed, passed the gate the day before the injury, and saw the owner going through the gate with a sled, and afterwards saw him in the adjoining field loading his sled, where he thereafter passed the gate without closing it. *Grand Rapids & I. R. Co. v. Jones*, 81 Ind. 523.

Whether bars at a private crossing in a railroad fence through which stock passed and was killed had been down for such a length of time as to require the railroad company, in the exercise of reasonable care, to have knowledge of such condition, is a question of fact for the jury to be determined under all the circumstances proved. *Perry v. Dubuque S. W. R. Co.* 36 Iowa, 102; *Wait v. Burlington, C. R. & N. R. Co.* 74 Iowa, 207, 37 N. W. 159; *Box v. Atchison, T. & S. F. R. Co.* 58 Mo. App. 359; *Poler v. New York C. R. Co.* 16 N. Y. 476; *Evans v. St. Paul & S. C. R. Co.* 30 Minn. 489, 16 N. W. 271.

It cannot be said, as a matter of law, that it is enough for a railroad company to have its section men pass over its road once or more daily, or once every two days, to observe the condition of its fences, and see that its gates are closed. *Evans v. St. Paul & S. C. R. Co.* 30 Minn. 489, 16 N. W. 271.

Though there may be cases in which the time intervening between that of leaving the gate open and the escaping of the stock through it is so short that the court may declare, as a matter of law, that no negligence is imputable to the railroad company for its failure to discover the fact. *Box v. Atchison, T. & S. F. R. Co.* 58 Mo. App. 359.

And the fact that a railroad gate of the general kind, in good repair and fastened in the manner that such gates were usually fastened, was casually left open during the night so that horses escaped to the right of way and were killed during that night, does not show negligence upon the part of the railroad company which will authorize a recovery by the owner of the horses. *Peoria, D. & E. R. Co. v. Aten*, 43 Ill. App. 68.

And evidence in an action against a railroad company for killing a colt, that it escaped to the field of an adjoining proprietor and from there through a gate in the railroad fence, and that the gate slides between the two posts which is the only method of closing and fastening it, and at the time of the injury it was swung up hill and wide open, showing that it had been opened and left open by some person, and that it was firmly closed at 6 P. M. the night before the injury, and found open at 7 o'clock the next morning, does not show that the injury was the result of negligence on the part of the company, though the owner testified that the gate was closed at 6 A. M. and that he left it open intending to return soon. *Sather v. Chicago, M. & St. P. R. Co.* 40 Minn. 91, 41 N. W. 458.

But a railroad company required by statute to maintain a fence so as to prevent animals from straying on its tracks will be held negligent in not closing an open bar-way where it was shown to have remained open for a long period preceding the accident in question. *Connolly v. Central Vermont R. Co.* 4 App. Div. 221, 38 N. Y. Supp. 587.

And the fact that a gate in a railroad fence at a farm crossing had stood open about a week before an accident at such crossing ordinarily establishes negligence on the part of the

railroad company. Chicago & N. W. R. Co. v. Harris, 54 Ill. 528; West v. Missouri P. R. Co. 26 Mo. App. 344.

And while usually, if bars in a railroad fence at a farm crossing had been taken down by the owner or occupant of a farm, and he had neglected to replace them, he could not recover for injury to stock passing through them upon the railroad track, the company would be liable for killing stock at a crossing, without reference to who left them down, where it permitted them to remain down for three months. Illinois C. R. Co. v. Arnold, 47 Ill. 173.

So, whether the fact that a gate in a railroad fence was left open during two weeks by persons using it with permission of the adjoining owner, or for a shorter time, raises a presumption of negligence against the railroad company, and charges it with knowledge that the gate was open, is a matter for the jury to decide, in an action for damage to stock passing through it. Nicholson v. Atchison, T. & S. F. R. Co. 55 Mo. App. 593.

And the testimony of a witness in an action for injury to stock by a railroad company, that he passed through the gates in question the night of the accident, and that he did not open them, is sufficient, in connection with evidence that the stock went in through them, to justify the submission of the question of negligence as to gates being opened to the jury, though it does not clearly appear whether he opened the gates or found them open. Henderson v. Chicago, R. I. & P. R. Co. 48 Iowa, 216.

And evidence in an action by an adjoining owner against a railroad company for damages to an animal which had passed through a gate to a railroad track, that the gate had been broken down some two or three months before, and was defective and insufficient, and found standing open on the morning it was discovered that the animal had been injured, and that it had been open almost constantly for two or three months, warrants the jury in finding negligence on the part of the company with respect to the gate. Lake Erie & W. R. Co. v. Beam, 60 Ill. App. 68.

So, evidence in an action against a railroad company for killing cattle that the cattle guards were so constructed that horses and cattle could pass over them, and that the fence was not kept in repair so as to turn stock, and that the gates were constantly left open, and that the horses killed would not jump a fence, is sufficient to sustain a verdict for the plaintiff. International & G. N. R. Co. v. Barton (Tex. Civ. App.) 54 S. W. 797.

In the above case San Antonio & A. P. R. Co. v. Robinson, 17 Tex. Civ. App. 400, 43 S. W. 76, *supra*, II. c, was distinguished upon the ground that in that case the railroad ran through an inclosure and a crossing, and gates were erected for the benefit of the owner of land on both sides of the track, while in the present case the road was not shown to run through an inclosure, but the gates opened into the woods or commons on one side.

So, in McDowell v. New York C. R. Co. 37 Barb. 196, it was said that railroad fences which are open with or without the consent of the corporation or its agents, and are allowed to remain open for weeks or months, cannot be said to have been maintained within the meaning of a statute requiring railroad companies to maintain right-of-way fences.

As to effect of the use to which the adjoining field is put upon duty to exercise reasonable diligence, see Wabash R. Co. v. Perbex, 57 Ill. App. 62, *supra*, II. b.

As to the duty of the adjacent owner to use reasonable care to keep gates closed in juris-

dictions in which the duty rests on him, see Magilton v. New York C. & H. R. R. Co. 11 App. Div. 373, 42 N. Y. Supp. 231, *supra*, II. c.

As to reasonable care and diligence where gates are opened by third persons, see also *supra*, III. d.

As to due care and diligence to keep gates closed with reference to stock of third persons, see also *supra*, IV. c.

As to the mutual exercise of ordinary care and diligence required in Minnesota, see Mooers v. Northern P. R. Co. (Minn.) 82 N. W. 1055, *supra*, II. c.

VI. Necessity of affirmative proof of negligence.

The mere fact that a private gate in a railway right-of-way fence is found open does not impute negligence to the railroad company. Megrue v. Leenox, 59 Ohio St. 479, 32 N. E. 1022.

And see, Texas & P. R. Co. v. Glenn, 8 Tex. Civ. App. 301, 30 S. W. 845; and San Antonio & A. P. R. Co. v. Robinson, 17 Tex. Civ. App. 400, 43 S. W. 76, *supra*, II. c.

And a railroad company will not be held liable for killing stock merely upon the ground that a gate leading from the plaintiff's premises to the railroad was open at the time, in the absence of anything to show who opened it or when it was opened. Simmons v. Poughkeepsie & E. R. Co. 2 App. Div. 117, 37 N. Y. Supp. 532.

The burden rests with the owner of stock killed at a farm crossing to show that the gate through which it passed came open by reason of the railroad company's fault. Butler v. Chicago & N. W. R. Co. 71 Iowa, 206, 32 N. W. 262.

And the burden of proving the issue in an action for killing stock which had passed upon a railway track at a private crossing, the gate post of which was broken off and had been carried around taking the gate and a panel of fence with it, leaving an opening, rests with the plaintiff, and where there is a total lack of evidence as to whose duty it is to keep and maintain the post in its place, no recovery can be had, and the jury should be instructed to render a verdict for the defendant. Rouse v. Osborne, 8 Kan. App. 139, 42 Pac. 843.

And the court will not presume, in an action against a railroad company for killing stock that the injury occurred through the company's negligence, and affirm a judgment based upon such presumption, when it does not appear whether the company allowed the fence to be out of repair, thus allowing the stock to reach the railroad track, or whether the gate which it was the owner's duty to close was left open. When it would be equally as reasonable to presume that the stock entered through the open gate. Missouri, K. & T. R. Co. v. Johnson (Tex. Civ. App.) 39 S. W. 323.

And where a cow is killed while crossing a railroad upon the reserved road of the owner, where she could not be seen by the engineer in season to reverse the engine, the neglect, if any, which must entitle the owner of the cow to recover of the railroad company, consists in not keeping up the bars across the reserved road, and this must be affirmatively shown. Waldron v. Portland, S. & P. R. Co. 35 Me. 422.

So, the burden of proof of facts justifying an inference that a railroad company by whose train stock which has passed through open bars at a private crossing is injured, had knowledge that the bars were open, or that they had continued open for such a time, or under such circumstances, as to justify the inference of negligence in not putting them up, rests with the owner of

the stock. *Perry v. Dubuque S. W. R. Co.* 36 Iowa, 102.

And where a gate in a railroad fence at a private crossing was seen closed July 15, and there is no evidence showing it was open until July 25, when horses went on the track and were killed, the presumption obtains on the question as to whether or not the railway company was guilty of negligence on account of the gate being open when the horses went on the right of way and were killed, that it continued closed during all that time. *Chicago, & A. R. Co. v. Patterson*, 72 Ill. App. 428.

VII. *What crossings are within the statutory rule.*

The statutes with relation to fencing railroad tracks and erecting gates at private farm crossings out of which the rules with reference to closing gates have grown, apply to crossings put in for the benefit and accommodation of the owners of farms cut into two parts by a railroad, but do not apply to crossings over roads running along the side of a farm or to gates or openings made for other purposes than to permit the owner to go from one portion of his land to another.

Thus, a gate in a fence between a railroad and an adjoining parallel highway, both running through a farm, does not constitute a private farm crossing within the meaning of Ind. Rev. Stat. 1894, §§ 5320, 5321, so as to relieve it of the duty to maintain such gate and keep it closed, or of liability for damages to stock passing in at such gate. *Louisville, N. A. & C. R. Co. v. McAfee*, 15 Ind. App. 442, 43 N. E. 38; *Louisville, N. A. & C. R. Co. v. Hughes*, 2 Ind. App. 68, 28 N. E. 158.

And gates put into a railway fence to enable an adjoining owner to go from his land to a private side track on a railroad right of way do not constitute a private farm crossing within the meaning of Ind. acts April 8, 13, 1885, so as to relieve the railroad company of liability for killing stock belonging to third persons entering on its right of way through such gate. *Wabash R. Co. v. Williamson*, 3 Ind. App. 190, 29 N. E. 455.

So, in *Moore v. Northern P. R. Co.* (Minn.) 82 N. W. 1085, it was held that where a farm crossing over a railroad leads from a highway to private lands on the opposite side of the track, and the railroad company had closed and latched the gates from the highway a short time before injury to stock by one of its trains, it cannot be held liable for such injury.

Likewise, where a railroad fence passes along a coal field, and includes it with the right of way, and the coal company erects a gate in such fence about 60 yards from the railroad track for its own use, it is not a part of the duty of the railroad company to keep the coal company's gate closed, and one whose stock passes through it while open, and is injured upon the railroad track, cannot predicate a right of recovery against the railroad company upon its failure to keep such gate closed. *Davis v. Wabash R. Co.* 46 Mo. App. 477.

And if stock be killed on a railroad at a mere private crossing which the company might legally fence but has failed to do so, the company is liable under the Indiana statute; but this rule is not applicable to a case where one has a private way over the lands of another, established in accordance with the statute providing therefor. *Indianapolis & C. R. Co. v. Lowe*, 29 Ind. 545; *Indiana C. R. Co. v. Leamon*, 18 Ind. 173.

And a crossing left by a railroad company for the owner from one portion of a field to another in fencing its right of way, closing the same with gates, is not a private way within the meaning of Tenn. Acts 1879, chap. 183, § 49 L. R. A.

1. making it a misdemeanor for any person to obstruct public highways or private ways, or within the meaning of Tenn. Code, § 4913, subsec. 4, making the obstruction of a private way an indictable nuisance, so as to relieve the railroad company from liability for negligently killing stock which had gone upon its track through such gates. *Greer v. Nashville, C. & St. L. R. Co.* (Tenn.) 56 S. W. 850.

But a finding of facts in an action for injury to stock, that it entered upon the track at a point where the railroad crosses a cart way or private way known as "M——'s Crossing," should be construed as meaning a private farm crossing authorized by the statute, so as to exonerate the company in the absence of a showing of negligence. *Louisville, N. A. & C. R. Co. v. Etzler*, 119 Ind. 39, 21 N. E. 466. See also *International & G. N. R. Co. v. Barton* (Tex. Civ. App.) 54 S. W. 797, *supra*, V.

VIII. *Conclusion.*

The duty to keep gates in a railway fence closed, though in a few instances expressly provided for by statute, arises generally from provisions with reference to fencing railway tracks. The question as to whom the duty rests upon has given rise to two opposing theories. By the one the duty to keep gates closed is regarded as a part of the duty to fence, and therefore as resting upon the railroad company. By the other, gates being made for the accommodation of the adjacent owner, and for his exclusive use, are regarded as creating an exception to the statutory duty to maintain fences so far as such gates are concerned, so that the duty to manage them, so as to protect his own interests would rest with the owner.

These duties are somewhat varied, however, by the question as to who left the gate open, and as to whose stock is injured. Thus, a railroad company using a gate for its own purposes would be bound to see that it was securely closed when such use was finished, and ordinarily, under either of the theories above stated, an adjacent owner would be bound to close his gates after he himself had used them, and could not recover of the railroad company in case of his failure to do so; and the rule would be the same if a stranger opened them, unless they had remained open so long that the railroad company would be chargeable with notice of the fact, actual or constructive, in which case it would be its duty to close them, for a violation of which it would be responsible.

Stock of a tenant or licensee would stand upon the same footing as that of the adjacent owner. And many of the cases apply the same rules whether the stock is that of the landowner or of a stranger. But some of the cases hold that the duty rests upon a railroad company to maintain a sufficient fence which would include closed gates as to all persons other than the adjacent owner for whose accommodation the gates were put in, and under that rule the railroad company can be held for injuries to stock though the adjacent owner himself left the gates open. When gates are required to be kept closed by the railroad company, ordinary and reasonable care and diligence are all that is required, and notice, actual or constructive, that they are open, and reasonable opportunity to close them, must precede liability for injury to stock passing through them, and affirmative proof of negligence is necessary to establish liability.

These rules apply only to gates at crossings over a railroad which divides a farm or tract. They do not apply where the railroad runs along the side of a farm, or merely separates it from a highway.

F. H. B.

Ralph JONES, Appt.,

CHICAGO, ST. PAUL, MINNEAPOLIS, &
OMAHA RAILWAY COMPANY, Respt.

(.....Minn.....)

- *1. **The law of evidence is the lex fori.** Whether a witness is competent or not, whether certain matters require to be proved by writing or not, whether certain evidence proves a certain fact or not, are to be determined by the law of the country where the question arises, where the remedy is sought to be enforced, and where the court sits to enforce it. It was therefore error for the court below to hold at the trial of this case that a Wisconsin statute which established nothing more than a rule of evidence as to the burden of proof was of force and effect in the courts of this state.
2. **Held, under the rules of evidence and proof as laid down and established in the courts of this state, that plaintiff failed to make a case for the jury.**
3. **Held, further, that the court was in error when it ordered judgment for defendant notwithstanding the verdict. A new trial should have been ordered instead.**

(July 19, 1900.)

A PPEAL by plaintiff from an order of the District Court for Ramsey County overruling a motion for new trial after verdict in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. D. J. Keefe and Humphrey Barton, for appellant:

The stake was a part of the car, and an instrumentality provided by the defendant for the transportation of the wood, and it mattered not who put the stake there, whether the defendant or the shipper.

Bushby v. New York, L. E. & W. R. Co. 107 N. Y. 374, 14 N. E. 407; *Ford v. Lake Shore & M. S. R. Co.* 117 N. Y. 638, 22 N. E. 946; *McIntyre v. Boston & M. R. Co.* 163 Mass. 189, 39 N. E. 1012.

Having proved a defect which caused the injury, we had established a prima facie case, which required rebuttal evidence on the part of the defendant, and shifted the burden on the defendant to show that it could not have discovered the defect by proper and reasonable tests and inspection.

Indiana, I. & I. R. Co. v. Snyder, 140 Ind. 647, 39 N. E. 912.

The use by the defendant of a defective stake was negligence.

Cummings v. National Furnace Co. 60 Wis. 603, 18 N. W. 742, 20 N. W. 665; *Mul-*

cairns v. Janesville, 67 Wis. 24, 29 N. W. 565.

The Wisconsin statute is applicable; it is not merely a rule of evidence.

Mr. Thomas Wilson, with Mr. Pierce Butler, for respondent:

The Wisconsin statutory rule of evidence—that proof of such defect shall be presumptive evidence of knowledge thereof on the part of the company—is of no effect in the courts of Minnesota.

The law of evidence relates to the remedy, and is the law of the forum.

Story, Conf. L. p. 827; 2 *Parsons, Notes & Bills*, p. 375; *Bain v. Whitehaven & F. Junction R. Co.* 3 H. L. Cas. 1; *Downer v. Chesebrough*, 36 Conn. 39, 4 Am. Rep. 29; *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245; *Lewis v. Bush*, 30 Minn. 244, 15 N. W. 113; 3 *Am. & Eng. Enc. Law*, 1st ed. pp. 545, 576, 678, and notes; *Rorer, Interstate Law*, pp. 69, 70.

The burden was on plaintiff to establish negligence on the part of the defendant; i. e., he must prove (1) that the injury resulted from a defect, and (2) that defendant had notice of it, or, in the exercise of ordinary care, would have known of it.

Defendant is not liable for injuries caused by a latent defect of which it had no knowledge, and which it would not have discovered by the exercise of ordinary care.

Wood, Mast. & S. p. 742; 1 *Bailey, Personal Injuries Relating to Master & Servant*, §§ 360, 363, 392; *Thompson v. Great Northern R. Co.* (Minn.) 82 N. W. 637; *Wright v. New York C. R. Co.* 25 N. Y. 562; *Johnson v. Chesapeake & O. R. Co.* 36 W. Va. 73, 14 S. E. 432; *Ballou v. Chicago, M. & St. P. R. Co.* 54 Wis. 257, 41 Am. Rep. 31, 11 N. W. 559; *Hobbs v. Stauer*, 62 Wis. 108, 22 N. W. 153; *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311; *Atchison, T. & S. F. R. Co. v. Wagner*, 33 Kan. 667, 7 Pac. 204; *Hayden v. Smithville Mfg. Co.* 29 Conn. 548; *Sheedy v. Chicago, M. & St. P. R. Co.* 55 Minn. 357, 57 N. W. 60; *Indiana, I. & I. R. Co. v. Snyder*, 140 Ind. 647, 39 N. E. 912; *Columbus, C. & I. C. R. Co. v. Troesch*, 68 Ill. 545, 18 Am. Rep. 578.

The mere fact that the stake gave way by reason of a defect therein, and caused plaintiff's injury, is not evidence of negligence.

McAvoy v. Pennsylvania Woolen Co. 140 Pa. 1, 21 Atl. 246; *De Graff v. New York C. & H. R. R. Co.* 76 N. Y. 125; *Sack v. Dolese*, 137 Ill. 129, 27 N. E. 62; *Brymer v. Southern P. R. Co.* 90 Cal. 496, 27 Pac. 371; *Morrison v. Phillips & C. Constr. Co.* 44 Wis. 405, 28 Am. Rep. 599; *Murphy v. Great Northern R. Co.* 68 Minn. 526, 71 N. W. 662; *Thompson v. Great Northern R. Co.* (Minn.) 82 N. W. 637; *Philadelphia & R. R.*

*Headnotes by COLLINS, J.

NOTE.—As to action for personal injuries sustained in another state, see *Alabama G. S. R. Co. v. Carroll* (Ala.) 18 L. R. A. 433; *Mexican Nat. R. Co. v. Jackson* (Tex.) 31 L. R. A. 276; *Illinois C. R. Co. v. Ihlenberg* (C. C. A. 6th C.) 34 L. R. A. 393; *Eingartner v. Illinois Steel Co.* (Wis.) 34 L. R. A. 503; *Turner v. St. Clair Tunnel Co.* (Mich.) 36 L. R. A. 134; 49 L. R. A.

Evey v. Mexican C. R. Co. (C. C. A. 5th C.) 38 L. R. A. 387; and *Chicago & E. I. R. Co. v. Rouse* (Ill.) 44 L. R. A. 410.

For rights of action for causing death, accruing under foreign statutes, see *Nelson v. Chesapeake & O. R. Co.* (Va.) 15 L. R. A. 583, and note.

Co. v. Hughes, 119 Pa. 301, 13 Atl. 286; *Mensch v. Pennsylvania R. Co.* 150 Pa. 598, 17 L. R. A. 450, 25 Atl. 31; *Sloan v. The Flowergate*, 31 Fed. Rep. 762.

Defendant was not required to remove the stake from the car, or apply any physical force in making an inspection thereof.

Thompson v. Great Northern R. Co. (Minn.) 82 N. W. 637; *Philadelphia & R. R. Co. v. Hughes*, 119 Pa. 301, 13 Atl. 286.

A mere scintilla is not sufficient to require the case to be submitted to the jury, or to sustain a verdict; conjecture or speculation is not permissible.

Baulec v. New York & H. R. Co. 59 N. Y. 356, 17 Am. Rep. 325; *Orth v. St. Paul, M. & M. R. Co.* 47 Minn. 384, 50 N. W. 363; *Linkauf v. Lombard*, 137 N. Y. 417, 20 L. R. A. 48, 33 N. E. 472; *Schuykill & D. Improv. & R. Co. v. Munson*, 14 Wall. 442, 20 L. ed. 867; *Hyer v. Janesville*, 101 Wis. 371, 77 N. W. 729; *Bowditch v. Boston*, 101 U. S. 16, 25 L. ed. 980; *Pleasants v. Fant*, 22 Wall. 116, 22 L. ed. 780; *Marion County Comrs. v. Clark*, 94 U. S. 284, 24 L. ed. 61; *Herbert v. Butler*, 97 U. S. 319, 24 L. ed. 958; *Arthur v. Jacoby*, 103 U. S. 677, 26 L. ed. 454; *Oscanyon v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539.

Collins, J., delivered the opinion of the court:

Plaintiff was a brakeman in defendant's employ upon a train in which were several flat cars, loaded with cord wood, piled in two rows, lengthwise, on each car. At each end of these rows were two upright stakes, which served to keep the wood in place. The lower end of these stakes rested in iron sockets fastened on a level with the car floor, 4 by 5 inches in diameter. It was the usual custom of brakemen, when ascending to or descending from the top of these piles or rows as they made their way from one car to another, to seize and rely upon these stakes, which were always put in place by the shippers of the wood, but which at once became car appliances. While the train was in motion, plaintiff walked along on top of the wood, and then, for the purpose of setting a brake, attempted to descend to the car floor. He seized one of these upright stakes, and it broke off near the floor, and he was thrown down, receiving the injuries complained of. It was shown that the stake was somewhat rotten at its center, just where it gave way. There was no proof that it was rotten or defective at any other point; nor was there any evidence in the case from which it could be held that the defendant had notice of this defect in the stake, or, in the exercise of ordinary care, should have discovered or have known of it. No one saw that it was rotten until plaintiff and other trainmen attempted to sharpen it at the point where it broke, with an ax, for the purpose of again inserting it in the iron socket provided therefor. Upon cutting into it, the rotten part was discovered. There was no evidence whatever of its being rotten elsewhere, or that this defect could have been discovered in any other

manner than by splitting the stake at this exact point. It was conclusively shown that it was round and covered with bark. It was of live maple, originally 5 or 6 inches in diameter. To fit it for the iron socket, it had been trimmed down to the proper size, 4 by 5 inches, as before stated. On the argument, plaintiff's counsel claimed that from the evidence it fairly appeared that this particular stake was a split stick, instead of being round. We think not, but it is wholly immaterial whether the stake was round or split; for there was no evidence upon which could be based a finding that the defect was visible, except as it was discovered in an attempt to sharpen after the accident. Ordinary care would not require of defendant that it cut into each stake for the purpose of ascertaining whether or not there was a latent defect. The plaintiff himself testified that there was nothing about the stake, as it stood, to indicate that it was not perfectly sound and strong. It is obvious that under the rules laid down in this state there was a total absence of evidence from which the jury could have found that defendant by the exercise of ordinary care could have detected that it was rotten to some extent, or could have discovered that it was unsafe.

The accident happened in the state of Wisconsin, and a statute of that state was set out in the complaint, and stood admitted by the answer. This statute was as follows: "Every railroad company . . . shall be liable for all damages sustained . . . by any of its employees, without contributory negligence on his part, . . . when such injury is caused by a defect in any locomotive, engine, car, rail, track, machinery, or appliance required by said company to be used by its employees in and about the business of their employment, if such defect could have been discovered by such company by reasonable and proper care, tests, or inspection; and proof of such defect shall be presumptive evidence of knowledge thereof on the part of the company." *Sanborn & Berryman (Wis.) Anno. Stat. 1898, § 1816.* In charging the jury the court below instructed that, under that portion of this statute which makes proof of a defective appliance presumptive evidence of knowledge, the plaintiff could recover without regard to the rule prevailing in this state. This was error, and the court below seems to have so concluded when making the order appealed from. This statute was nothing more than a rule of evidence, which could not be given extraterritorial effect, and the trial court should have so held. It is a general rule that the admission of evidence and the rules of evidence are rather matters of procedure, than matters attaching to the rights of parties. Therefore they are governed by the laws of the country where the court sits. *Story, Conf. L. 827.* The law of evidence is the *lex fori*. Whether a witness is competent or not, whether certain matters require to be proved by writing or not, whether certain evidence proves a certain fact or not, are

to be determined by the law of the country where the question arises, where the remedy is sought to be enforced, and where the court sits to enforce it. *Bain v. Whitehaven & F. Junction R. Co.* 3 H. L. Cas. 1; *Downer v. Chesebrough*, 36 Conn. 39, 4 Am. Rep. 29; *Soudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245. In *Lewis v. Bush*, 30 Minn. 244, 15 N. W. 113, it was said, when speaking of the question of priority between a creditor attaching property under the laws of Minnesota and an assignee claiming under an assignment executed in the state of Illinois, that "this is a question of remedy rather than of contract, which we think must be determined by the laws of the forum."

When a party comes into this state and invokes the aid of our garnishee or attachment laws, it is they, and not the laws of some other state, which must determine whether the property which he seeks to reach is liable to its process. We cannot permit the laws of another state to be imported and override the settled policy of our own laws. In such a case comity must yield to policy; otherwise, we would have no established rule to govern our own courts." The burden of proof was therefore upon the plaintiff to establish the defendant's negligence, and the Wisconsin statute was of no force or effect. To obtain the advantage of that enactment, plaintiff should have brought his action in that state.

At the close of the testimony, defendant's counsel moved that the court direct a verdict for their client, which motion was denied; and, upon a bill of exceptions, counsel subsequently made the blended motion provided for by Laws 1895, chap. 320. The court below then ordered judgment for defendant notwithstanding the verdict in plaintiff's favor. Under the circumstances, we think this was error, for at the trial counsel for plaintiff had a right to rely upon the ruling as to the force and effect of the Wisconsin statute. With this ruling, it was unnecessary for them to show that defendant knew of the defect in the stake, or in the exercise of ordinary care should have known of it. For this reason the order appealed from must be set aside, and a new trial granted. On appeal this particular point was not very clearly made, although covered by the first assignment of error, and we suspect that it was not made at all in the court below. It was not specially pointed out in the brief, and for that reason we are of the opinion that the plaintiff should not be allowed statutory costs.

A new trial is granted, but no statutory costs will be taxed against defendant.

Brown, J., absent, took no part.

Petition for rehearing denied August 1, 1900.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Maggie McCULLEN, *Plff. in Err.*,

CHICAGO & NORTHWESTERN RAILWAY COMPANY.

(101 Fed. Rep. 66.)

1. The question whether a mill was set on fire by sparks from a passing locomotive should be submitted to the jury where the evidence tends to show that the passing of the train and the starting of the fire were nearly related in point of time, that the fire caught on the outside of the ventilator slats, that there was no fire on the inside underneath the ventilator, that the direction of the wind would naturally carry sparks to the mill, that the locomotive was laboring on an upgrade, and was observed, only a short distance from the fire, to be emitting sparks which floated for some distance, that it was not impossible for sparks to have been carried to the mill, and that there was no other adequate cause for the fire.
2. A presumption of negligence on the part of the railroad company arises from the fact that sparks have issued from a passing locomotive of such size and in such volume as to kindle a fire and destroy adjacent property.

3. It is for the jury to say whether or not the presumption of negligence raised against a railroad company by setting fire to adjacent property by sparks from a passing locomotive has been overcome by proof on the part of the company that the locomotive was properly equipped and handled.

4. When the evidence offered by plaintiff to make out his cause of action to recover the value of a mill destroyed by sparks from defendant's locomotive creates a presumption of negligence on the part of defendant, the case should be submitted to the jury unless the rebutting evidence is so clear and circumstantial that no reasonable person could doubt its verity.

(March 26, 1900.)

ERROR to the Circuit Court of the United States for the District of South Dakota to review a judgment in favor of defendant in an action brought to recover damages for the alleged negligent destruction of plaintiff's property by fire. *Reversed.*

The facts are stated in the opinion.

Before *Caldwell*, *Sandborn*, and *Thayer*, Circuit Judges.

NOTE.—For presumption as to negligence in case of railroad fires, see note to *Barnowski v. Helson* (Mich.) 15 L. R. A. on page 40.

For constitutionality of statute making railroad company absolutely liable for fires, see *Matthews v. St. Louis & S. F. R. Co.* (Mo.) 25 49 L. R. A.

L. R. A. 161, and note; *Campbell v. Missouri P. R. Co.* (Mo.) 25 L. R. A. 175.

See also, in contrast with the present decision, that of *Garrett v. Southern R. Co.* (C. C. A. 6th C.) post, 645.

Mr. George C. Cooper for plaintiff in error.

Meers, C. I. Crawford and A. W. Burr for defendant in error.

Thayer, Circuit Judge, delivered the opinion of the court:

This action was brought by Maggie McCullen, the plaintiff in error, against the Chicago & Northwestern Railway Company, the defendant in error, to recover the value of a steam flouring mill located in the town of St. Lawrence, county of Hand, state of South Dakota, which was destroyed, as she claimed, on December 2, 1895, by being set on fire by sparks that were negligently suffered to escape from one of the defendant company's locomotives, which was at the time in charge of its employees, and was hauling one of its freight trains. The action was brought originally in a state court, but was removed to the Federal court. After the case had been under consideration for about thirty-one hours by the jury which was impeached to try the same, and the jurors had failed to agree upon a verdict, they were recalled and directed to return a verdict in favor of the defendant, upon which verdict, so returned by direction of the court, a judgment was subsequently entered. The plaintiff below excepted to such action on the part of the trial court, and brought the case here for review.

We are advised by the record, and also by the statements of counsel, that there had been three previous trials of the case upon substantially the same evidence which is contained in the present record, and that in each instance the jury had failed to agree. It has been repeatedly held since the decision in *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679, that when the facts proved are such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of that issue is for the jury; and inasmuch as forty-eight men, who have at various times listened to the evidence in this case, have differed in opinion as to whether the defendant was or was not negligent, we would perhaps be justified in regarding that test as conclusive, and in remitting the case to the lower court to be retried. In view of the numerous trials that have taken place, we have thought it best, however, to consider the testimony attentively, and decide as to its sufficiency to sustain a verdict for the plaintiff, as it would have been our duty to do if the trial court, at the conclusion of the first trial, had of its own motion directed a verdict for the defendant.

The point at issue necessitates a statement somewhat in detail of the facts which were developed at the trial. The defendant's railroad track passes through the town of St. Lawrence from east to west. The plaintiff's mill that was destroyed was situated on the south side thereof, and 302 feet distant therefrom in a direct line. Between the mill and the track were an elevator, close to the track, which was 57 feet high, and on the south side thereof a lower wooden ware-

house. The plaintiff's mill was three stories in height. A considerable space of vacant ground intervened between the buildings last described, and the territory south of the railroad track was generally open and unoccupied. On the roof of the mill, at its northeast corner, was a small ventilator which extended above the top of the roof a few feet. The four sides thereof consisted of thin wooden slats similar to those which are usually employed in constructing window blinds or shades. Directly underneath the ventilator on the third floor was a cyclone dust collector which, when in operation, blew some dust through the slats of the ventilator into the open air. The mill was closed down on Friday previous to the fire which occurred about 10:30 A. M., on Monday, December 2, 1895, and there were no fires in or about the premises save in a small cannon stove which was located in a one-story office building at the northwest corner of the mill. This office building was not a part of the mill proper, but was connected therewith. In this stove there was a small fire on the morning of December 2, 1895, but the pipe leading therefrom extended above the roof of the mill, and such smoke as escaped from this pipe on that morning drifted in a direction which did not bring it within 20 feet of the ventilator heretofore mentioned. The wind was blowing from the north or from the northwest or from an intermediate point at a rate which was variously estimated by the witnesses at from 10 to 15 miles per hour. About 10:30 A. M. on the morning of the fire a freight train of the defendant company, containing about thirty cars and drawn by two engines, passed through the town of St. Lawrence from east to west without stopping. As this train moved through the town opposite to the mill, and for some distance west thereof, it was climbing an upgrade, and the engines were seen by several witnesses to emit considerable smoke, which was described by some of them as being dense and black. Shortly after the passage of the train, and within a period variously estimated at from ten to twenty minutes, the mill was discovered to be on fire. Two witnesses located the fire when it was first seen as being on the slats on the outside of the ventilator heretofore described, and all agree that the fire was first observed from the outside on or around this ventilator. The plaintiff's husband testified, in substance, that on the first alarm of fire he stepped out of the small office building, and from that point saw a small blaze on the outside of the ventilator; that he entered the mill, and went immediately to the third story or floor, and found no fire on that floor on the inside of the mill underneath the ventilator, nor anywhere else, but that the fire at that time was wholly confined to the slats of the ventilator.

With respect to the issue whether the fire in question was occasioned by a spark from one of its locomotives, the defendant offered much expert testimony to the effect that a spark could not have been emitted by either of its locomotives, and carried a distance of 302 feet from its track, which would have re-

tained sufficient vitality to have set fire to the slats of the ventilator under the conditions which existed at the time the fire took place. On the other hand, a railroad engineer who was called by the plaintiff testified, in substance, that under such conditions as prevailed on the day of the fire,—with the wind from the north, blowing about 10 miles an hour, and the train moving on an upgrade,—a spark might have been carried 302 feet, and might have set fire to such slats as were in the ventilator, although the ventilator was at a height of 35 feet above the ground, provided the spark arrester of either engine was at the time in a defective condition. Another witness, who met the train in question on the day of the fire a few miles east of the town of St. Lawrence, also testified that the leading or head locomotive was then emitting large sparks, which floated 264 feet from the track, as ascertained by a subsequent measurement. Another witness testified in substance, that he had, on one occasion previous to the fire, seen sparks emitted by locomotives which were in use by the defendant company that rose to a considerable height, and floated as much as 600 feet from the track, before they expired.

It is hardly necessary to observe that it is not the province of this court to say in which way the issue as to the origin of the fire ought to have been determined. Our sole function is to decide whether, in view of all the testimony, reasonable men, listening to the evidence as it was adduced, might have concluded that the fire was occasioned by a spark from one of the locomotives; and this question must be determined under and subject to the rule that it is the special province of a jury to determine to what extent witnesses are credible, and how far, if at all, their evidence is trustworthy, or is influenced by prejudice, self-interest, or other causes. We have reached the conclusion that there was substantial testimony enough, as we think, to sustain a finding that the mill was set on fire by a spark from one of the defendant's locomotives, provided the jury credited the statements of the plaintiff's witnesses. The considerations which lead us to hold that such a conclusion might have been formed by reasonable men are the following: First, the near relation in point of time between the passage of the defendant's train and the outbreak of the fire; second, the evidence tending to show that the fire caught on the outside of the ventilator, in the slats; third, the positive testimony of one witness that, when it was so discovered, there was no fire on the inside of the mill, underneath the ventilator; fourth, the direction and strength of the wind, which would naturally carry the sparks to the mill; fifth, the testimony tending to show that, as the train passed through the town of St. Lawrence, one or both of the locomotives were emitting volumes of smoke, and were laboring to some extent on an upgrade; sixth, the testimony that the same locomotives were emitting sparks of considerable size, which floated for some distance, when they were only a few miles distant from the town of St.

40 L. R. A.

Lawrence on the day of the fire; seventh, the evidence which tended to show that it was by no means impossible for sparks issuing from a locomotive to be carried as far as 302 feet; and, lastly, the lack of evidence as to any other adequate cause for the fire, if the testimony of the plaintiff's witnesses is credible. These facts and circumstances, which the evidence tended to establish, rendered it necessary, in our judgment, to take the opinion of the jury as to the origin of the fire, and would have warranted them in finding that it was kindled by a spark from one of the locomotives.

It is contended, however, by counsel for the railroad company, that even if it be true that there was substantial testimony which tended to show that the fire was occasioned by sparks which were emitted by the passing locomotives, and that even if the jury had so found, yet the fact so established would not have created a presumption that the defendant company or its employees were in any respect negligent. On this ground it is urged that the case was properly withdrawn from the jury, inasmuch as the defendant offered considerable testimony which tended to show that its engines were properly handled, and were provided with spark arresters, which were in a good state of repair on the day of the fire; whereas, the plaintiff produced no direct evidence to the contrary. It is true that there are some cases which hold that the mere fact that sparks have escaped from a locomotive and set fire to adjoining property creates no presumption of negligence on the part of the railway company, either in constructing or handling its locomotive; but the weight of judicial opinion is the other way, and it is now comparatively well settled that a presumption of negligence does arise from the fact that sparks have issued from a passing locomotive of such size or in such volume as to kindle a fire and destroy adjacent property. This doctrine is supported by the consideration that it is the duty of railroad companies, in constructing their locomotive engines, to adopt suitable appliances and safeguards, such as experience has shown will best serve to prevent them from emitting sparks and destroying property, and by the further consideration that such companies or their employees either know or should know whether such a degree of care has been exercised, and what appliances, if any, are actually in use on its engines, and whether they are in a good state of repair; whereas, third persons whose property is destroyed have no such knowledge or means of knowledge, and as a rule can neither prove nor disprove the aforesaid facts without great inconvenience and expense. These reasons have led most courts to hold—and the doctrine, as we think should be adhered to—that proof that property has been destroyed by sparks emitted by a passing locomotive creates a presumption that, through a want of proper care on the part of the owner thereof or its employees, the locomotive in question was not provided with a proper spark arrester, or that it was not at the time in a good state of repair, or

that its locomotive was carelessly handled. *Spaulding v. Chicago & N. W. R. Co.* 30 Wis. 110, 121, 11 Am. Rep. 550; *Ellis v. Portsmouth & R. R. Co.* 24 N. C. (2 Ired. L.) 138, 141; *Burke v. Louisville & N. R. Co.* 7 Heisk. 451, 462, 19 Am. Rep. 618; *Louisville & N. R. Co. v. Reese*, 85 Ala. 497, 5 So. 283; *Galveston, H. & S. A. R. Co. v. Horne*, 69 Tex. 643, 9 S. W. 440; *Coates v. Missouri, K. & T. R. Co.* 61 Mo. 38; *Atchison, T. & S. F. R. Co. v. Stanford*, 12 Kan. 379, 15 Am. Rep. 362; *Pittsburgh, C. & St. L. R. Co. v. Campbell*, 86 Ill. 443. See also *Burroughs v. Housatonic R. Co.* 38 Am. Dec. 71, and cases cited in note, 15 Conn. 124; *Eddy v. Lafayette*, 4 U. S. App. 247, 256, 49 Fed. Rep. 807, 812, 1 C. C. A. 441; *Frankford & B. Turnp. Co. v. Philadelphia & T. R. Co.* 54 Pa. 350; *Steinweg v. Erie R. Co.* 43 N. Y. 123, 3 Am. Rep. 673; *Gibson v. South Eastern R. Co.* 1 Fost. & F. 23; *Greenfield v. Chicago & N. W. R. Co.* 83 Iowa, 270, 49 N. W. 95; *Dean v. Chicago, M. & St. P. R. Co.* 39 Minn. 413, 40 N. W. 270; *Karsen v. Milwaukee & St. P. R. Co.* 29 Minn. 12, 11 N. W. 122.

It is urged, finally, by the defendant company, that even if its last position is untenable, and if it be conceded that the evidence was sufficient to raise against it a presumption of negligence, yet, as it offered direct proof that its locomotives were provided with proper spark arresters, which were in good condition, and that they were properly handled on the morning of the fire, it thereby fully rebutted the presumption of negligence which the plaintiff's proof had raised, and that on the latter ground the verdict below should be sustained. We cannot assent to that view of the case. When the plaintiff offered evidence which was sufficient to raise a presumption of negligence, it was the prov-

ince of the jury to decide whether the defendant's rebutting proof was adequate to overcome that presumption. As was said, in substance, by the supreme court of Minnesota, in *Karsen v. Milwaukee & St. P. R. Co.*, 11 N. W. 122, a jury is not necessarily bound to accept as conclusive the statement of a witness that an engine was in good order, or carefully and skilfully operated, although there is no direct evidence contradicting the statement. They have a right to consider all the evidence and circumstances bearing upon the condition and mode of operating the engine, as well as the circumstances under which the fire took place. Moreover, if the jury were satisfied, and so found, that the mill was ignited by a spark which came from one of the defendant's locomotives, it may well be that this fact alone would have led them to discredit the statements of the defendant's witnesses concerning the condition of the locomotives and how they were handled, and the right of the jury to discredit them for that reason cannot be denied. *Greenfield v. Chicago & N. R. Co.* 83 Iowa, 270, 276, 49 N. W. 95. We are of opinion that the correct view is that, when the evidence which is offered by a plaintiff to make out his cause of action creates a presumption of negligence, the case should be submitted to the jury, unless the rebutting evidence is so clear and circumstantial that no reasonable person could doubt its verity. We are not prepared to hold that the presumption of negligence in the case at bar was rebutted by the kind of proof last described, and, not being able to so decide, the case should have gone to the jury.

It is accordingly ordered that the judgment below be reversed, and the cause remanded for a new trial.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

G. W. GARRETT *et al.*, *Plffs. in Err.*,
v.
SOUTHERN RAILWAY COMPANY.

(101 Fed. Rep. 102.)

1. The presumption of negligence on the part of a railroad company is not raised, as matter of law, by mere proof that sparks from its locomotive set fire to adjacent property.
2. The rules of evidence in the Federal courts are questions of general law, not controlled by state decisions.
3. The court does not judicially know that the art of burning coal in a locomotive, and of providing preventives for the emission of sparks, has reached that stage of perfection that it is improbable that a fire could be communicated except through the negligence of the railroad company either in the construction or operation of the locomotive.

(March 15, 1900.)

NOTE.—For presumption as to negligence in starting railroad fires, see note to preceding case.

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ERROR to the Circuit Court of the United States for the Western District of Tennessee to review a judgment in favor of defendant in an action brought to recover damages for the alleged negligent destruction of plaintiffs' property by fire. *Affirmed.*

The facts are stated in the opinion. Before *Taft*, *Lurton*, and *Day*, Circuit Judges.

Messrs. C. G. Bond and J. M. Boone for plaintiffs in error.

Messrs. W. J. Lamb and F. P. Poston for defendant in error.

Taft, Circuit Judge, delivered the opinion of the court:

This is a writ of error brought to review a judgment for the defendant, the Southern Railway Company, in a suit filed against the company by G. W. Garrett and H. E. Ray for \$20,000 damages for alleged negligence of the company resulting in the burning and destruction of the planing-mill plant and stock of lumber of the plaintiffs at Pocahton, Tennessee, on December 27, 1898. The

declaration alleged that the fire which destroyed the property was caused by sparks emitted from an engine negligently constructed and operated by the defendant company on its switch track in front of the plaintiff's mill. The cause was originally brought in the circuit court of McNairy county, Tennessee, and was removed to the court below by the railway company on the ground of diverse citizenship of the parties. The defendant denied that sparks from its engine caused the accident, and further denied any negligence in the construction or operation of its locomotives. The case was heard, and the jury returned a verdict for the defendant.

The sole question presented by the record for our consideration is whether the rule which the court laid down as to the burden of proof was correct. There is not in Tennessee, as there is in many other states, a statute defining the rule to be enforced as to the burden of proof in such cases. The question presented to the court below and presented here is one of common law. The court below, in effect, instructed the jury that, as the plaintiffs charged the defendant with negligence, the burden was on the plaintiffs to show the defendant's negligence by a preponderance of the evidence; that, when the plaintiffs established by such preponderance the mere fact that the fire was caused by sparks from an engine of the defendant, it still remained for them to prove that the emitting of such sparks was due to defendant's negligence: that, if the jury found as a fact that under the present approved methods of constructing and operating locomotives it was improbable that fire could be communicated by sparks from an engine without negligence, then the jury would be justified in inferring as a fact, from the mere circumstances of the fire and its origin in the emission of sparks, that the fire was caused by the negligence of the defendant. The court declined to charge the jury, as matter of law, that mere proof that the fire was caused by sparks from an engine was prima facie evidence of the negligence of the defendant. There is great contrariety of opinion in the cases upon the question whether the mere communication of fire by sparks of an engine is prima facie evidence of negligence in a railway company. The question is further complicated by the fact that in many states statutes have been passed which make such evidence prima facie evidence of negligence. Without examining the cases, we think we may say that nearly all the earlier cases hold that the burden is upon the plaintiffs, not only to show that the fire was caused by the sparks, but that the sparks were emitted through the negligence of the defendant. In later cases the effect of the state statutes, and the difficulty attending the proof of negligence, arising from the fact that the condition of the engine is a matter wholly within the knowledge and control of the defendant company, have led courts into making this an exception to the ordinary rule in cases of negligence.

The real point in controversy here is
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whether the art of burning coal in a locomotive, and of providing the preventives for the emission of sparks, is judicially known to the court to have reached that stage of perfection that it is improbable that a fire could be communicated except through the negligence of the railroad company either in the construction or operation of the locomotive. It is urged upon us that in the state of Tennessee, in *Burke v. Louisville & N. R. Co.* 7 Heisk. 451, 19 Am. Rep. 618, and *Simpson v. East Tennessee, V. & G. R. Co.* 5 Lea, 456, the law of Tennessee has been settled in favor of the contention of the plaintiffs in error here that proof of fire from sparks is prima facie evidence of negligence. As we have said, this question is not controlled by any statute in Tennessee, and the rules of evidence in the Federal court are questions of general law, not controlled by state decisions. We think we must take as our guide in this action the intimation of the Supreme Court of the United States in *The Nitro-Glycerine Case*, 15 Wall. 524, *sub nom. Parrott v. Wells*, 21 L. ed. 206. In that case a lessor attempted to hold a lessee for damages for injuries to the building leased by the explosion of nitro-glycerine while in charge of the defendants. Upon this point the court, speaking by Mr. Justice Field, held as follows: "This action is not brought upon the covenants of the lease. It is in trespass for injuries to the buildings of the plaintiff, and the gist of the action is the negligence of the defendants. Unless that be established, they are not liable. The mere fact that injury has been caused is not sufficient to hold them. No one is responsible for injuries resulting from unavoidable accident while engaged in a lawful business. A party charging negligence as a ground of action must prove it. He must show that the defendant by his act, or by his omission, has violated some duty incumbent upon him, which has caused the injury complained of. The cases between passengers and carriers for injuries stand upon a different footing. The contract of the carrier being to carry safely, the proof of the injury usually establishes a prima facie case, which the carrier must overcome. His contract is shown, prima facie, at least, to have been violated by the injury. Outside of these cases, in which a positive obligation is cast upon the carrier to perform safely a special service, the presumption is that the party has exercised such care as men of ordinary prudence and caution would exercise under similar circumstances, and, if he has not, the plaintiff must prove it. Here no such proof was made, and the case stands as one of unavoidable accident, for the consequences of which the defendants are not responsible. The consequences of all such accidents must be borne by the sufferer as his misfortune. This principle is recognized and affirmed in a great variety of cases,—in cases where fire originating in one man's building has extended to and destroyed the property of others; in cases where injuries have been caused by fire ignited by sparks from steamboats or locomotives, or caused by horses running

away, or by blasting rocks; and in numerous other cases which will readily occur to everyone."

We think that this language indicates that the Supreme Court of the United States would adhere to the older and more conservative view that the mere ignition by sparks is not prima facie evidence of negligence of the railroad company as a matter of law. It may be that evidence as to the approved methods for preventing emission of dangerous sparks may justify an inference of fact that the fire could not have been thus communicated without negligence. This was

the charge of the court. The jury were given permission, from the mere fact of the ignition by sparks, to infer, if they could as a matter of fact, that it was caused by negligence; but the court declined to charge them, as a matter of law, that it raised a presumption of negligence. The course of the court, we think, was well within the rule, as we understand the cases, which the Supreme Court of the United States has followed, and that no prejudice was done to the plaintiffs in the charge which was given.

The judgment is affirmed.

CALIFORNIA SUPREME COURT.

WELLS, FARGO & COMPANY, *Respt.*,
v.
Joseph ENRIGHT *et al.*,
and
COMMERCIAL AND SAVINGS BANK of
San José, *Appt.*

(127 Cal. 669.)

1. A waiver of the right to plead the statute of limitations to an action to enforce the liability of a bank as a stockholder in a corporation, in consideration of extension of time, is binding on the bank when signed for its best interests by its president, who was its general manager, allowed to act for it according to his judgment, under a by-law giving him general supervision of the business of the corporation and power to perform all duties which its interests may require, although the directors never knew of its execution.
2. That the president, who is also manager of a corporation, in which capacity he has authority to execute a contract, signs as president, and not also as manager, is immaterial.
3. Forbearance to bring suit on a claim is a sufficient consideration for an agreement not to plead the statute of limitations thereto.
4. An agreement not to plead the statute of limitations is not void as against public policy.
5. A delay of fourteen months after an agreement not to bring suit in six months in consideration of a promise not to plead the statute of limitations to the action is not too long to make the promise still operative.
6. A stockholder of a corporation is liable for interest on obligations which bear interest, under a statute making him liable for his proportion of the debts of the corporation.

(February 28, 1900.)

NOTE.—For agreement to waive defense of statute of limitations, see also *Kellogg v. Dickinson* (Mass.) 1 L. R. A. 346.

For power of president of a corporation, see *Walt v. Nashua Armory Asso.* (N. H.) 14 L. R. A. 356, and note; also *City Electric Street R. Co. v. First Nat. Exch. Bank* (Ark.) 31 L. R. A. 535, and *Oakes v. Cattaraugus Water Co.* (N. Y.) 26 L. R. A. 544.
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APPEAL by the defendant bank from a judgment of the Superior Court for the City and County of San Francisco in favor of plaintiff in an action brought to enforce the statutory liability of defendants as stockholders of an insolvent corporation. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. Jackson Hatch and Jesse W. Lillenthal for appellants.

Messrs. E. S. Pillsbury and F. D. Madison, for respondent:

The agreement is not void for want of consideration.

In this state every written contract imports a consideration.

Civil Code, § 1614; *Peasley v. McFadden*, 68 Cal. 611, 10 Pac. 179; *Williams v. Hall*, 79 Cal. 606, 21 Pac. 965; *Henke v. Eureka Endowment Asso.* 100 Cal. 429, 34 Pac. 1089.

Appellant, not having pleaded want of consideration, cannot raise that defense.

Civil Code, § 1615; *Winters v. Rush*, 34 Cal. 136; *Peasley v. McFadden*, 68 Cal. 611, 10 Pac. 179.

A forbearance to sue is a sufficient consideration to support a contract.

Bello v. Davis, 38 Cal. 256; *Payne v. Bensley*, 8 Cal. 260, 68 Am. Dec. 318; *Naglee v. Lyman*, 14 Cal. 455; *Frey v. Clifford*, 44 Cal. 335.

The agreement is not opposed to public policy.

Re Garcelon, 104 Cal. 570, 32 L. R. A. 595, 38 Pac. 414.

The statute of limitations is a mere privilege or shield with which one may prevent the legal enforcement of a claim. It does not in any manner or way extinguish the claim or indebtedness (*McCormick v. Brown*, 36 Cal. 180, 95 Am. Dec. 170; *Sichel v. Carrillo*, 42 Cal. 493; *Whitmore v. San Francisco Sav. Union*, 50 Cal. 145); and there is no obligation or duty resting upon a defendant, either towards the state or towards third persons, to plead the statute.

Lord v. Morris, 18 Cal. 490; *Ward v. Waterman*, 85 Cal. 505, 24 Pac. 930.

The law favors a waiver by conclusively presuming it from mere silence (*Grattan v. Wiggins*, 23 Cal. 25; *Reagan v. San Francisco*).

oo *City & County Justice's Ct.* 75 Cal. 253, 17 Pac. 195), and when the defendant has filed his answer, and failed to plead the statute, the courts may properly refuse to permit an amendment for the purpose of setting it up.

Cooke v. Spears, 2 Cal. 409, 56 Am. Dec. 348; *Stuart v. Lander*, 16 Cal. 372, 76 Am. Dec. 538; *San Joaquin Valley Bank v. Dodge*, 125 Cal. 77, 57 Pac. 687; *Bank of Woodland v. Heron*, 122 Cal. 107, 54 Pac. 537.

The public policy of the government is to be found in the Constitution and the laws and the course of administration and decision.

Licence Tax Cases, 5 Wall. 462, 18 L. ed. 497; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 340, 41 L. ed. 1027, 17 Sup. Ct. Rep. 540; *St. Louis Min. & Mill. Co. v. Montana Min. Co.* 171 U. S. 650, 43 L. ed. 320, 19 Sup. Ct. Rep. 61; *Wood v. Goodfellow*, 43 Cal. 185; *Smith v. Laurence*, 38 Cal. 24, 99 Am. Dec. 344.

The supreme courts of other states have in many instances upheld the validity of such contracts, and declared them to be in no manner opposed to public policy.

State Trust Co. v. Sheldon, 68 Vt. 259, 35 Atl. 177; *Quick v. Corlies*, 39 N. J. L. 11; *Jordan v. Jordan*, 85 Tenn. 561, 3 S. W. 896; *Randon v. Toby*, 11 How. 493, 13 L. ed. 784; *Mann v. Cooper*, 2 App. D. C. 226; *Warren v. Walker*, 23 Me. 453; *Loutry v. Dubose*, 2 Bail. L. 425; *Burton v. Stevens*, 24 Vt. 132, 58 Am. Dec. 153; *Stearns v. Stearns*, 32 Vt. 678; *Green v. Seymour*, 59 Vt. 459; *Paddock v. Colly*, 18 Vt. 485; *Yaus v. Jones* (Tex.) 19 S. W. 443; *Boiomar v. Peine*, 64 Miss. 99, 8 So. 166; *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652; *Gaylord v. Van Loan*, 15 Wend. 308.

The agreement in this case does not specify any time for its performance, and it is a general rule that, when no definite time is specified in the agreement, it must be presumed that the parties intended a reasonable time; and this the law will imply.

Luckhart v. Ogden, 30 Cal. 547; *Hannan v. McNickle*, 82 Cal. 122, 23 Pac. 271.

The president of a bank has power, by virtue of his office alone, "to prosecute and defend the ordinary litigation of the corporation, and appoint attorneys to that end . . . to make such an acknowledgment of a debt due by the corporation, it being a bank, as will take it out of the statute of limitations."

4 *Thomp. Corp.* § 4621; *McKiernan v. Lenzen*, 56 Cal. 61; *Greig v. Riordan*, 99 Cal. 316, 322, 33 Pac. 913; *Waterman, Corp.* § 30; *Seeley v. San José Independent Mill & Lumber Co.* 59 Cal. 22; *Crouley v. Genesee Min. Co.* 55 Cal. 273; *Streeten v. Robinson*, 102 Cal. 542, 36 Pac. 946; *Los Angeles Lighting Co. v. Los Angeles*, 106 Cal. 156, 39 Pac. 535.

Chipman, C., filed the following opinion:

Action to enforce the liability of the defendant Commercial & Savings Bank and others as stockholders in the Shasta Lumber Company. All the defendants except appellant paid their proportionate shares of the debt before the trial, and as to them the ac-

tion was dismissed. Defendants pleaded the statute of limitations. Plaintiff had judgment, from which, and from an order denying a motion for a new trial, this appeal is prosecuted.

Appellant states in its brief that the only question arising on the appeal involves its plea of the statute of limitations, except a question also raised as to the liability to pay interest. The questions presented all revolve around a certain agreement in writing alleged by plaintiff to be a waiver of the statute of limitations. A fair summary, together with a verbatim copy of certain parts of this agreement, is as follows:

"This agreement, made this 27th day of January, A. D. 1896, by the undersigned with Wells, Fargo & Company, a banking corporation, having an office in the city and county of San Francisco, state of California, witnesseth [recites that the undersigned were, on January 30, 1893, stockholders in the Shasta Lumber Company, in the number of shares stated; recites the indebtedness of the lumber company to plaintiff on that day; recites a still further indebtedness contracted April 21, 1893, and still other indebtedness at later dates in that year, not necessary to state here]. Whereas, said Wells, Fargo & Company are about to commence suit against the undersigned to recover the *pro rata* amount due from each of them to said company on account of said indebtedness as stockholder of said Shasta Lumber Company, and the undersigned desire to delay such suit: Now, therefore, to the end that said Wells, Fargo & Company do refrain for six months from date hereof from instituting suit against the undersigned on account of their liability as stockholders in said Shasta Lumber Company for the indebtedness hereinbefore stated, the undersigned, and each of us, promise and agree with said Wells, Fargo & Company, in consideration that it will forbear the enforcement of the collection of said sums by suit against us for said period of six months from date, that, in the event of any action being commenced thereafter to recover our proportionate shares of such indebtedness, we, and each of us, will not plead the statute of limitations to such action. Witness our hands the day and year aforesaid."

Then follow the signatures of several stockholders, defendants, and number of shares of each stated opposite each name, and immediately thereafter the document continues as follows:

The Commercial and Savings Bank does not admit that it is a stockholder in said Shasta Lumber Company, but simply held the stock as collateral security. It waives the statute of limitations as to any stock that may be proved to belong to said bank.

The Commercial and Savings Bank, San José.

By B. D. Murphy, President.

An extension of six months is granted pursuant to the foregoing agreement.

Homer S. King, Manager Wells, Fargo & Co.

The complaint was filed March 27, 1897,—fourteen months after the agreement was made. The oldest liability accrued January 30, 1893, and the agreement was made January 27, 1896,—three days before the statute would have barred the remedy. It is admitted that appellant was a stockholder as alleged in the complaint.

Appellant relies upon the bar of § 350, Code Civ. Proc., and claims that the agreement in question is not such a one as to take the case out of the operation of the statute, and as is referred to in § 360, Id. It is further claimed that the defendant bank did not sign the agreement; that it is without consideration, and, whether it be considered as executed by appellant or not, it indefinitely suspends a right to plead the statute, and is therefore void because contrary to public policy. Some other points are made by appellant, but they depend upon the foregoing,—for example, that a mere waiver to plead the statute is not a waiver under all circumstances that may afterwards arise, and that the agreement does not operate as an estoppel.

1. Did appellant execute the agreement? The evidence tended to show that Murphy, who signed for appellant, was the president and manager of appellant at the time, and had been for many years previously; that during this time the entire management of the bank was left to Murphy and to the vice president, Findlay, in the president's absence; and that the directors had allowed them to act upon their own judgment, and as they thought best for the interests of the bank, and that it was not customary to report their actions to the directors, nor to ask ratification thereof, nor to first obtain special authority before performing particular acts relating to general business, and that this had been the course of business permitted by the directors since 1889; that the acts of the president had never been questioned by the directors. In short, the evidence tended to show that Murphy, as president and manager, had been allowed to do pretty much as he pleased in managing the affairs of the bank. There was a by-law of the bank reading as follows: "The manager shall be the general agent of the corporation and of the board of directors, and, as such agent, shall have a general supervision of the business of the corporation. . . . He shall have power to cancel all mortgages or other instruments under seal, taken as security for indebtedness due the bank, and perform all other duties which the interests of the corporation may require, limited only by the by-laws and the express instructions of the board of directors." The evidence was that both Murphy and Findlay thought the agreement was in the best interest of the bank, but that the directors were never called upon to authorize or ratify it, nor does it appear that they knew of its execution. The evidence justified the finding of the court that the agreement was entered into by appellant. *McKiernan v. Lenzen*, 56 Cal. 61; *Greig v. Riordan*, 99 Cal. 316, 33 Pac. 613; *Los Angeles Lighting Co. v. Los Angeles*, 106 Cal. 156, 39 Pac. 535. The fact that Murphy signed the agreement as president, and not also as manager, is immaterial.

Los Angeles Lighting Co. v. Los Angeles, 106 Cal. 156, 39 Pac. 535.

2. Appellant contends that the agreement was without consideration; citing *Shapley v. Abbott*, 42 N. Y. 447, 1 Am. Rep. 548; *Andrae v. Redfield*, 98 U. S. 225, 25 L. ed. 158, and *Kellogg v. Dickinson*, 147 Mass. 432, 1 L. R. A. 346, 18 N. E. 223, in the last of which cases there was indorsed on a promissory note the following: "Paid on the within note ten dollars, and agree that I will not take any advantage of the statute of limitations;" and the agreement was held invalid for want of consideration. In the first two cases cited the promise was verbal, and there was no agreement on the part of the creditor; and in the last case the creditor made no promise to delay action. Here the agreement was in writing, and expressly states a consideration. Plaintiff promised to, and did, forbear suit for six months. As was stated in *Belloc v. Davis*, 38 Cal. 256: "It is well settled that a forbearance to sue is a sufficient consideration to support a contract." What may constitute a valuable consideration "may be the surrender, suspension, or forbearance of a legal right to process for the enforcement of the collection of the debt." *Frey v. Clifford*, 44 Cal. 335, at page 341.

3. Was the agreement such as can be said to be opposed to public policy? Judge Story said in *Vidal v. Philadelphia*, 2 How. 127, 11 L. ed. 205, at page 197, 2 How., and page 234, 11 L. ed.: "What is the public policy of a state, and what is contrary to it, if inquired into beyond these limits [what its Constitution, laws, and judicial decisions make known] will be found to be . . . [matter] of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions, and upon which men may and will complexly differ." This court sustained an agreement entered into between the nephews and the testator in her lifetime not to contest her will, in *Re Garcelon*, 104 Cal. 570, 32 L. R. A. 595, 38 Pac. 414, as against the plea that the contract was opposed to public policy. It was pointed out in that case that a contract is not to be arbitrarily set aside as void as being against public policy. The right to plead the statute of limitations is but a privilege, and in no manner extinguishes the debt; and no debtor is under any obligation to the state or towards third persons to plead it, except as in the case of administrators and executors, trustees, and perhaps some others acting in representative capacities, where the law imposes the duty. This court has shown by its decisions that it attaches no great sanctity to this privilege, for where the party failed to plead the statute, and afterwards sought to do so by amendment of its answer, and the trial court refused to allow the amendment, the ruling was upheld as a power properly exercised, for the reason that the amendment could not be said to be

in furtherance of justice. *Bank of Woodland v. Heron*, 122 Cal. 107, 54 Pac. 537, and cases there cited. There is not wanting a legislative expression as to the wisdom of withholding the privilege altogether in certain cases,—for example, depositors in savings banks to recover a deposit (Code Civ. Proc. § 348); an action against a director of a corporation for misfeasance in office (Civil Code, § 309). Nor are judicial opinions lacking as to the right, as between the parties, to waive or prolong the statute of limitations. *Smith v. Lawrence*, 38 Cal. 24, 99 Am. Dec. 344; *Wood v. Goodfellow*, 43 Cal. Cal. 185. The direct question has not been answered by this court, so far as we have been able to discover. We have no hesitation, however, in holding that the agreement before us violated no principle of public policy, but, on the contrary, was one which every consideration of sound morals requires us to enforce. It was said in *State Trust Co. v. Sheldon*, 68 Vt. 259, 35 Atl. 178: "The question presented by the pleadings is whether the defendants are estopped by the agreement from pleading the statute of limitations in bar of plaintiff's action. It is urged that the agreement to waive the statute is void because, by private agreement, it seeks to avoid a statute, and is against public policy. The general rule is that no contract or agreement can modify a law, but the exception is that, where no principle of public policy is violated, parties are at liberty to forego the protection of the law. Statutory provisions designed for the benefit of individuals may be waived, but, where the enactment is to secure general objects of policy or morals, no consent will render a non-compliance with the statute effectual. The statute limiting the time within which action shall be brought is for the benefit and repose of individuals, and not to secure general objects of policy or morals. Its protection may therefore be waived, in legal form, by those who are entitled to it; and such waiver, when acted upon, becomes an estoppel to plead the statute,"—citing numerous cases to the same effect. We think this a correct statement of the law. The Supreme Court of the United States regarded such an agreement as operating by way of estoppel *in pais* to a defense under the statute of limitations. *Randon v. Toby*, 11 How. 493, 13 L. ed. 784. Respondent cites cases from the District of Columbia, Maine, South Carolina, Vermont, Texas, Mississippi, New Jer-

sey, Tennessee, and New York. We find that they support its position. See also *Wood, Limitation of Actions*, § 76, where it is stated that if the promise be made before the debt is barred, and in consideration of forbearance to sue, and the creditor forbears, "it is binding upon the debtor, and at least has the effect to keep the debt on foot until the statutory period, dating from such promise, expires, either by way of estoppel, or as a conditional promise to pay the debt in case the plaintiff proves it." Conceding that some of the cases cited by appellant tend to support its contention, they do not convince us that there is any rule or principle of public policy violated by an agreement to waive the statute of limitations under the circumstances here disclosed. It is probably true that after an agreement to waive the statute has been entered into, in consideration of forbearance to sue, the courts would place some limit of time beyond which the statute would not be suspended. In the case of *Kellogg v. Dickinson*, 147 Mass. 432, 1 L. R. A. 346, 18 N. E. 223, cited by appellant, the action was brought after forty years. Some of the cases, as Mr. Wood does, place this limit within the statutory period, dating from the agreement, and this seems to be a reasonable limitation. But we are not called upon to decide, and do not decide, any further than that in our opinion the present action was brought in time.

4. Appellant is liable for interest. Section 322, Civil Code, makes the stockholders liable for their proportion of the debt of the corporation. Interest was as much a part of the debt as the principal of the notes, which constituted most of the indebtedness. *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047. And as to the sums loaned by plaintiff to the lumber company, as money had and received, there is a presumption that it was upon interest, "unless it is otherwise expressly stipulated at the time in writing." Civil Code, § 1914.

The judgment and order should be affirmed.

We concur: **Haynes, C.; Britt, C.**

Per Curiam:

For the reasons given in the foregoing opinion, the judgment and order are affirmed.

ILLINOIS SUPREME COURT.

PEOPLE of the State of Illinois *ex rel.*
Thomas M. JACKSON
v.

SUBURBAN RAILROAD COMPANY.

(178 Ill. 594.)

1. A performance of conditions benefi-

cial to a municipality, on which a street-railway company is expressly required to accept from municipal authorities the privilege of using the streets, is not the performance of a mere private contract, but is the performance of a duty to the public which may be compelled by mandamus.

2. Ample consideration is furnished

NOTE.—As to legislative power to fix tolls, rates, and prices, see *note to Winchester & L. Turnp. Road Co. v. Croxton* (Ky.) 33 L. R. A. 49 L. R. A.

177; also *Nebraska Teleph. Co. v. State ex rel. Yelser* (Neb.) 45 L. R. A. 113; and *Purdy v. Erie R. Co.* (N. Y.) 48 L. R. A. 669.

for contract obligations of a street-railway company to perform the conditions of a contract with a city, by the grant of the privilege of using the streets for an electric railway.

3. An electric street-railway company which takes and retains all the advantages and benefits of an ordinance under which it is permitted to operate its road in the streets cannot escape the performance of duties to the public imposed upon it by the ordinance, on the ground that the ordinance and the duties imposed by it are *ultra vires* both the municipality and the railway company.
4. The interest of a citizen in having the right of the public enforced under an ordinance limiting the rates of fare to be charged by a street-railway company is sufficient to enable him to be a relator in a petition for mandamus to enforce it.
5. Final judgment on an issue of law on which both parties have been fully heard should be rendered on overruling a demurrer to the petition in a mandamus proceeding, notwithstanding an application for permission to raise an issue of fact, where it is substantially admitted that the averments of the petition were true at the time they were made, and the entire argument on behalf of the respondent is as to the legal right to do what the petition complains of.

(February 17, 1899.)

PETITION for a writ of mandamus to compel defendant to refrain from discrimination in charges for passenger transportation in violation of an ordinance under which it was operating. *Granted.*

Statement by **Boggs, J.:**

This is a petition filed in this court by the relator for a writ of mandamus against the respondent, the Suburban Railroad Company. The petition avers that the relator is a citizen of the United States, and a resident of the village of River Forest, and that the respondent, the Suburban Railroad Company, is a corporation organized under the laws of this state relating to the organization of railroad companies, and is, and since before March 17, 1897, has been, engaged in the business of extending, constructing, and operating an electric railroad through parts of the town of Cicero, the village of Harlem, and the village of River Forest, in Cook county, Illinois; that said village of River Forest is, and on and before March 17, 1897, was, a municipal corporation organized under general statutes of the state of Illinois providing for the incorporation of cities and villages; that on the said 17th day of March, 1897, said Suburban Railroad Company made legal application to the president and board of trustees of the village of River Forest for certain privileges and licenses set out in an ordinance hereinafter set forth; and that said president and trustees on March 17, aforesaid, in consideration of said application, adopted an ordinance, which is set out in full in the petition. Section 1 of said ordinance authorizes and permits the respondent company to operate its line of railroad, by electrical power only, over and along the lines of the railroads of the Chicago,

Harlem, & Batavia Railroad Company and of the Chicago & Wisconsin Railroad Company, from the point of connection with the first-named railroad to the northern limits of the said village, and to construct and maintain over, along, and upon any and all intervening streets, alleys, parks, and public places along said route, all poles, wires, and appurtenances, including feed wires, necessary or convenient for the purposes, in consideration of the undertaking of the respondent company to comply with the certain conditions contained in other sections of the ordinance. Section 2 provides that no part of the respondent railroad shall be operated in the village until its entire line to the northern limits of the village is completed and in operation. Section 3 specifies the height the wires shall be strung above the tracks, describes the poles to be used, where such poles shall be set, the method or manner of setting the poles, and commits the same to the supervision of the village authorities. Section 4 relates to the character of the cars to be used, and restricts the traffic of the road to passengers, their baggage, and express matter, and requires cars to be supplied with heat during certain designated months. Section 5 requires that cars shall be stopped, and passengers received and allowed to alight, at all intersections of streets, and at the middle of all blocks of more than 500 feet in length, at Hawthorn avenue, and such other points as the village authorities may afterwards designate. Section 6 is as follows: "Sec. 6. The permission and authority granted in § 1 hereof is upon the express condition that the said Suburban Railroad Company shall afford its passengers a continuous trip between any and all points along the line of railroad herein authorized to be operated in the village of River Forest, to the northern limits of said village and any station on the loop line in the city of Chicago, and all intermediate points; or in case the loop line is not operated or ceases to be operated, then between said points in the village of River Forest and some point in the city of Chicago east of the south branch of the Chicago river and north of Harrison street, and all intermediate points; provided, that said passengers shall not be obliged to be transferred during said trip, except at the point of connection between the said Suburban Railroad and any elevated railroad running to and over said loop line or said point in the city of Chicago east of the South Branch of the Chicago river as aforesaid; and in consideration thereof the Chicago, Harlem, & Batavia Railway Company and the Chicago & Northern Pacific Railroad Company, and the said Suburban Railroad Company, or the successors or assigns of either of said companies, shall not be required to run any car to the station of the Chicago & Great Western Railroad Company in said city of Chicago." Section 7 requires cars to be run between certain specified hours. Section 8 is as follows: "Sec. 8. The rate of fare shall not exceed ten cents for one continuous ride of one trip from any

point on said railroad in River Forest to any station on the loop line or some point in the city of Chicago east of the South Branch of the Chicago river and north of Harrison street, as provided in § 6 hereof, or return, or to any intermediate point in said city of Chicago or return; and the rate of fare shall not exceed five cents for one continuous ride of one trip from any point on said railroad in River Forest to the point of connection of the said railroad with any elevated railroad, as provided in § 6, or any intermediate point or return; provided, that the fare between any point on said railroad in the village of River Forest and any of the said points in the city of Chicago, or the said point of connection of said railroad with any elevated railroad, as aforesaid, and intermediate points, shall not exceed the fare charged at any point in the town of Cicero west of the east line of Central avenue or in the village of Harlem or in either of them, to the same points or return, either for single trip or at commutation rates, or otherwise: provided, further, that the said company shall provide and furnish, free of charge to passengers who have paid fare upon said line, transfer tickets at and to any points upon all the lines operated and controlled by the said company east of the Desplaines river." The other sections of the ordinance are not involved, save § 11, which is as follows: "Sec. 11. That the privileges should be binding upon successors and assigns, and that a violation of any of the conditions and provisions herein to be observed by the said company, its successors or assigns, shall render this ordinance absolutely null and void."

The petitioner avers that the board of directors of the respondent company adopted a resolution accepting the ordinance, together with, and subject to, all the conditions in said ordinance contained, and sets out a certified copy of said resolutions, which he avers that the respondent company filed in the office of the clerk of the village; that after the passage of the ordinance the railroad company entered into the possession and enjoyment of the rights and privileges granted in the ordinance, constructed its railroad, and operated its passenger cars thereon, and that it has ever since been, and is now, in the possession and enjoyment of all the franchises and privileges, and has since March 2, 1898, operated its passenger cars by electrical power, "under and in pursuance of the provisions of said ordinance," through the village of River Forest, over the line of railroad known as the Chicago, Harlem, & Batavia Railroad, and over the line of railroad known as the Chicago & Wisconsin Railroad, to the northern limits of the village, and has constructed and maintained the same over and upon the intervening streets along said route, and that it has placed its poles, wires, and appurtenances, including necessary and convenient feed wires, for the purpose of operating said railroad, and still continues to operate its railroad and cars in the village of River Forest; that at the time of the passage of the ordinance the railroad line of the 49 L. R. A.

Suburban Railroad Company connected with the railroad line of the Metropolitan Elevated Railroad Company at its crossing over West Fortieth street, in the city of Chicago; that passenger cars were operated frequently over the Metropolitan road from West Fortieth street to the central business portion of the city of Chicago; that the Suburban Railroad Company did before March 2, 1898, afford its passengers a continuous trip between all points along the line of its railroad so operated in the village of River Forest, from the northern limits of the village to the stations along the line described as the "Union Loop," in the city of Chicago, and all intermediate points, and that the Suburban Railroad Company did before March 2, 1898, extend its electric road north on Fifty-Second street, in the town of Cicero, to Lake street, and operated its passenger cars thereon, and connected it with the line of railroad of the Lake Street Elevated Railroad Company, which was a corporation organized under the laws of the state of Illinois relating to railroads; that the Lake Street Company operated its cars to and around the loop line from Fifty-Second street on Lake street; that the village of River Forest lies west of the city of Chicago, and west of the east line of Central avenue, in the town of Cicero, so that passengers on the Suburban Railroad from any point in the village of River Forest towards the city of Chicago have to pass through the village of Harlem and through the town of Cicero, west of Central avenue, in said town; that the rate of fare for a continuous ride charged by the Suburban Railroad Company "and said connecting elevated railroad lines from the village of River Forest to any point on said loop line, in the city of Chicago, is now, and has ever since the operation of said railroad by said Suburban Railroad Company in the village of River Forest been, ten cents, and the same price for return or intermediate points, being the highest rate of fare provided for by said ordinance;" that on or about March 2, 1898, the Suburban Railroad Company offered for sale, and sold, passenger tickets of twelve rides for \$1, "good for one continuous ride over its said railroad line in the town of Cicero only, and the said Lake Street Elevated Railroad, and around said loop line, and has ever since, and is now offering said tickets for sale, and selling the same" (giving the form of ticket); that notwithstanding the provisions of said ordinance, and especially the provisions of "§ 8 thereof, the said Suburban Railroad Company has neglected and refused, and still neglects and refuses, to sell tickets of twelve rides for \$1 good for one continuous ride from any point in River Forest over the line of the Suburban Railroad Company and the Lake Street Elevated Railroad around said loop line (also called 'Union Loop') in the city of Chicago, or any equivalent tickets or fare therefor, but continues to and does charge cash fare of ten cents therefor, although said Suburban Railroad Company has since said March 2, 1898, and still does sell tickets

for \$1, good for said twelve rides, west of said Central avenue, in the town of Cicero, to the east line of the village of Harlem, and no further, and refuses to accept said tickets for rides entering into or from the village of River Forest."

The petitioner then further represents "that he has often requested said railroad company to comply with the provisions of said ordinance in regard to said fare, and especially the provisions contained in said § 8 of said ordinance, that provides as follows: 'That the fare between any point on said railroad in the village of River Forest and any of the said points in the city of Chicago, or the said point of connection of said railroad with any elevated railroad as aforesaid, and any intermediate points, shall not exceed the fare charged at any point in the town of Cicero west of the east line of Central avenue, or in the village of Harlem, or in either of them, to the same point or return, either for single trip or at commutation rates, or otherwise.'" Thereupon the petitioner prays for issuing of writ of mandamus, directed to the company, its officers and agents, "that so long and at such times as said Suburban Railroad Company shall sell or cause to be sold tickets of twelve rides for \$1, good for one continuous ride from any stopping place in the town of Cicero west of the east line of Central avenue over the railroad lines of said Suburban Railroad Company and the said Lake Street Elevated Railroad Company to and from any point on the Union Loop, in the city of Chicago, said Suburban Railroad Company shall also sell, or cause to be sold, on demand, passenger tickets of twelve rides for \$1 each, good from any stopping point on its said railroad line in the village of River Forest, over the lines of the said Suburban Railroad Company and the said Lake Street Elevated Railroad Company to and from any point on the said Union Loop, in the city of Chicago, with equal facilities for the purchase of said tickets, and that said Suburban Railroad Company shall furnish its passengers a continuous trip between all stopping points on its said line in the village of River Forest to any station on the Union Loop line in the city of Chicago at a rate of fare not exceeding ten cents for one continuous ride either way between said points, and not exceeding the fare charged at any point in the town of Cicero west of the east line of Central avenue in said town to the same point on said Union Loop or return, either for single trip, or at commutation rates, or otherwise, and that such further orders may be made in the premises as justice may require."

The respondent company interposed a demurrer to the petition, and the relator entered his joinder in demurrer, and the cause was submitted for determination to the court.

Messrs. Knight & Brown, for respondent, in support of demurrer to petition:

The duty, if any, owing by respondent, was one arising under contract, and cannot be enforced by mandamus.

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An ordinance passed by a village or city granting certain rights and privileges to a railroad company is a contract.

Belleville v. Citizens' Horse R. Co. 152 Ill. 171, 26 L. R. A. 681, 38 N. E. 584.

The ordinance does not constitute a franchise.

The writ will not be granted to compel the performance of executory contracts.

People ex rel. National Cigar Co. v. Dulaney, 96 Ill. 511; *People v. Chicago West Div. R. Co.* 18 Ill. App. 125; *High, Mandamus*, § 321; *Wood, Mandamus*, p. 18; *State ex rel. Ross County Comrs. v. Zanesville & M. Turnp. Road Co.* 16 Ohio St. 308; *People ex rel. Bliss v. Chicago West Div. R. Co.* 118 Ill. 113, 7 N. E. 116; *People ex rel. Harless v. Hatch*, 33 Ill. 9; *People ex rel. Stine v. Vermilion County Supers.* 47 Ill. 256; *Pike County Comrs. v. People ex rel. Metz*, 11 Ill. 202; *Benson v. Paul*, 6 El. & Bl. 273; *State v. Republican River Bridge Co.* 20 Kan. 404; *Tobey v. Hakes*, 54 Conn. 274, 7 Atl. 551; *State ex rel. Poyser v. Salem Church Trustees*, 114 Ind. 389, 16 N. E. 808; *State ex rel. Rosenfeld v. Einstein*, 46 N. J. L. 479; *Kennedy v. San Francisco City & County Bd. of Edu.* 82 Cal. 483, 22 Pac. 1042; *State ex rel. New Orleans v. New Orleans & O. R. Co.* 37 La. Ann. 589; *State ex rel. Mount Pleasant Cemetery Co. v. Paterson, N. & N. Y. R. Co.* 43 N. J. L. 505; *Parrott v. Bridgeport*, 44 Conn. 180, 26 Am. Rep. 439; *People ex rel. Whitney v. Masonic Benev. Asso.* 98 Ill. 636; *People ex rel. Hurd v. Johnson*, 100 Ill. 543, 39 Am. Rep. 63.

The contract itself, so far as it attempts to fix rates, is *ultra vires* and void.

People ex rel. Thatcher v. Hyde Park, 117 Ill. 467, 6 N. E. 33; *Mobile & O. R. Co. v. People*, 132 Ill. 559, 24 N. E. 642.

The charter being silent as to the motive power, the company had the right to use any kind of motive power in propelling its cars which it might see fit to adopt.

North Chicago City R. Co. v. Lake View, 105 Ill. 207, 44 Am. Rep. 788; *Taggart v. Newport Street R. Co.* 16 R. I. 668, 7 L. R. A. 205, 19 Atl. 326; *Buckner v. Hart*, 52 Fed. Rep. 835; *Halsey v. Rapid Transit Street R. Co.* 47 N. J. Eq. 380, 20 Atl. 859; *Williams v. City Electric Street R. Co.* 41 Fed. Rep. 556; *Croswell, Electricity*, § 183; *Booth, Street Railroads*, § 83; *Electric R. Co. v. Grand Rapids*, 84 Mich. 257, 47 N. W. 567; *Chicago, B. & Q. R. Co. v. West Chicago Street R. Co.* 156 Ill. 255, 29 L. R. A. 485, 40 N. E. 1008; *State, Kennelly, Prosecutor, v. Jersey City*, 57 N. J. L. 293, 26 L. R. A. 281, 30 Atl. 531.

There was therefore no consideration moving to the respondent for the supposed agreement upon its part to give the rate of fare as specified in the ordinance. The supposed promise by the respondent was given for nothing in return, and was therefore void.

Bishop. Contr. § 77; *Vogel v. Pekoc*, 157 Ill. 339, 30 L. R. A. 491, 42 N. E. 386.

The ordinance in question did not create a public duty.

A public duty can only arise when there

is some grant or right from the public at large, viz., the people of the state of Illinois.

6 *Thomp. Corp.* § 7826; *McNulta v. Corn Belt Bank*, 164 Ill. 427, 45 N. E. 954; *Kadiash v. Garden City Equitable Loan & Bldg. Asso.* 151 Ill. 531, 38 N. E. 236.

On petition for rehearing.

There is not a single statement in the petition, nor a single sentence in the ordinance, that indicates or shows that the respondent was operating a railroad upon or along any street, but, on the contrary, it shows that it was operating a railroad over a private right of way.

The ordinance before the court in this case authorizes the company to use the cars to convey passengers and their ordinary baggage and express matter; thus showing that it was not intended nor proposed in passing this ordinance that the town was treating of a street railroad. It is a matter of common knowledge that street railways are not used for the purpose of carrying express matter.

Thompson-Houston Electric Co. v. Simon, 20 Or. 60, 10 L. R. A. 251, 25 Pac. 147; *Louisville & P. R. Co. v. Louisville City R. Co.* 2 Duv. 178.

A steam railroad or a commercial railroad does not cease to be such because it may change its motive power, or because it may in part change its traffic.

Compton v. Cincinnati & H. Electric Street R. Co. 5 Ohio N. P. 367; *Bond v. Pennsylvania Co.* 171 Ill. 608, 49 N. E. 545; *Wiggins Ferry Co. v. East St. Louis Union R. Co.* 107 Ill. 450.

Assuming the respondent to be a street railroad, the village of River Forest did not have the power to fix the rates of fare beyond its own corporate limits.

Metropolitan City R. Co. v. Chicago West Div. R. Co. 87 Ill. 322; *Evanston Electric Illuminating Co. v. Koopersperger*, 175 Ill. 27, 51 N. E. 719; *Distilling & Cattle Feeding Co. v. People ex rel. Barnewolt*, 161 Ill. 101, 43 N. E. 779; *People's Pass. R. Co. v. Memphis City R. Co.* 10 Wm. 38, 19 L. ed. 844; *Cooley, Const. Lim.* 6th ed. p. 247; *Jersey City & B. R. Co. v. Jersey City & H. Horse R. Co.* 20 N. J. Eq. 73; *Chicago City R. Co. v. People ex rel. Story*, 73 Ill. 549; *Pittsburgh's Appeal*, 115 Pa. 4, 7 Atl. 778; *Central R. & Electric Co.'s Appeal*, 67 Conn. 197, 35 Atl. 32; *People ex rel. Bliss v. Chicago West Div. R. Co.* 118 Ill. 114, 7 N. E. 116; *People ex rel. West Side Street R. Co. v. Barnard*, 48 Hun. 57; *Abraham v. Meyers*, 29 Abb. N. C. 384, 23 N. Y. Supp. 225, 228; *South Pasadena v. Los Angeles Terminal R. Co.* 109 Cal. 315, 41 Pac. 1093; *Cochran v. Park Ridge*, 138 Ill. 295, 27 N. E. 939; *State ex rel. New Orleans v. New Orleans & C. R. Co.* 37 La. Ann. 592; *Hayes v. Michigan O. R. Co.* 111 U. S. 237, 28 L. ed. 414, 4 Sup. Ct. Rep. 369; *Durkee v. People ex rel. Askren*, 155 354, 40 N. E. 628.

Messrs. Thatcher & Griffen and Frank Little, for relator:

It is sought by this petition to enforce a plain duty to the public, which the Suburban Railroad Company, in violation of the plain 49 L. R. A.

provisions of the ordinance, and in violation of good faith, has shirked and evaded.

1 Wood, Railroad Laws, § 8; *Strauss v. Pontiac*, 40 Ill. 301.

Mandamus is the proper remedy to enforce a public right.

Pike County Comrs. v. People ex rel. Metz, 11 Ill. 202.

Where the application for the writ relates to a matter affecting the public, it is sufficient to entitle the person to become a relator that he is interested as a citizen.

Ottawa v. People ex rel. Caton, 48 Ill. 233; *Hall v. People ex rel. Rogers*, 57 Ill. 307; *San Antonio Street R. Co. v. State ex rel. Elmendorf* (Tex. Civ. App.) 38 S. W. 54; *Wright v. Milwaukee Electric R. & Light Co.* 95 Wis. 36, 36 L. R. A. 47, 69 N. W. 791; *Martin v. Second & Third Street Pass. R. Co.* 3 Phila. 316; *State ex rel. Grinsfelder v. Spokane Street R. Co.* 19 Wash. 518, 41 L. R. A. 515, 53 Pac. 719; *Glencoe v. People ex rel. Owen*, 78 Ill. 390.

The performance of the duty which a street-railway company owes to the public, to operate its lines in accordance with the provisions of a city ordinance under which its road was constructed, may be enforced by mandamus.

Potwin Place v. Topeka R. Co. 51 Kan. 609, 33 Pac. 309.

The village gave the railroad very substantial considerations to support the undertaking on the part of respondent.

People v. St. Louis, 10 Ill. 351, 48 Am. Dec. 339; *Metropolitan City R. Co. v. Chicago*, 96 Ill. 620.

The local authorities are not confined to the conditions required by the railroad act. *Abraham v. Meyers*, 29 Abb. N. C. 384, 23 N. Y. Supp. 225, 228.

Boggs, J., delivered the opinion of the court:

The objection that the petition is not verified by a sufficient affidavit has been obviated by an amended affidavit filed by leave of the court.

It is urged that the writ is here sought to be availed of for the purpose of securing the fulfillment of the terms and conditions of a private contract, and that it is fundamental law that mere contract obligations cannot be enforced by mandamus. The appellee is a quasi public corporation. The sovereign power, when granting a public franchise to corporations of that character, may declare that certain acts, in the nature of duties to the public shall be performed by the corporation to or upon whom the franchise is conferred, and may provide that the investiture of the franchise shall be conditional upon the acceptance of the burden of performing such acts or service. It is now well settled that, when there is a grant and acceptance of a public franchise involving the performance of such acts or service, the corporation accepting the franchise may be compelled by the writ of mandamus to perform the duty so enjoined by the grant, and consented to by the acceptance thereof. *Merrill, Mandamus*, §§ 27, 157, 159; *Haugen v. Albina Light &*

Water Co. 21 Or. 411, 14 L. R. A. 424, 28 Pac. 244; *Indianapolis & C. R. Co. v. State ex rel. Lawrenceburg*, 37 Ind. 489; *Potwin Place v. Topeka R. Co.* 51 Kan. 609, 33 Pac. 309; *San Antonio Street R. Co. v. State ex rel. Elmendorf* (Tex. Civ. App.) 38 S. W. 55.

But it is insisted that the authority granted the respondent company by the ordinance under consideration is not a franchise, but a mere license, and which, having been acted upon, has become irrevocable; and *Belleville v. Citizens' Horse R. Co.* 152 Ill. 171, 26 L. R. A. 681, 38 N. E. 584, is cited as in support of the contention. The general assembly, representing the people at large, possesses full and paramount power over all highways, streets, alleys, and like public places in the state. Had the charter which gives life to the respondent company been granted upon the conditions expressed in the ordinance under consideration, and had the company accepted such charter as it did the ordinance, and acted under it in like manner as under the ordinance, the enforcement of the service and duties imposed by the charter might, it is clear, have been accomplished by the aid of the writ of mandamus, though the right obtained by the charter to enter upon the streets of the village be in such case but a license. The state does not, however, exercise directly that full, paramount power which it possesses over streets, alleys, etc.; but in the distribution of governmental powers the general assembly adopted the policy of selecting the cities and villages of the state as governmental agencies, and delegating to such municipalities the power to regulate and control the use of the streets, alleys, etc., within their respective limits. Such power thus delegated is exercised by the municipal authorities acting in behalf of the state for the benefit of the public. While it is true that the charter of a street-railway corporation is granted under the general laws of the state, yet a charter so obtained gives but the bare power to exist. In order to enable such a corporation to carry out the sole purpose for which it has existence, it must have a further exercise of sovereign power in its behalf. Some city or village clothed, by delegation, with authority to exercise sovereign power possessed by the state, must grant such corporation authority to enter upon its streets and alleys and construct and operate its road there. The power possessed by the state to attach as conditions to such a grant the performance of duties owing by a quasi public corporation to the public, and directly beneficial to the public, may be exercised by a municipality in the exercise of the power by it possessed by delegation from the state to permit the use of its streets, alleys, and public places by the corporation. It is clearly shown by the petition and ordinance that the respondent company is operating a street railway. It was invested with corporate life, and was granted corporate powers to enable it to serve the public as a public carrier of passengers. Its property is impressed with a public use, and it must exert its powers for the benefit of the public. It is not a

private, but a quasi public, corporation, and owes it as a duty to the public to demand reasonable rates only for the transportation of passengers, and to serve its patrons without unjust discrimination, and this duty may be enforced by the state acting directly or through a governmental agency. *Rogers Park Water Co. v. Fergus*, 178 Ill. p. 571, 53 N. E. 363, and authorities cited. The ordinance, the acceptance thereof, and the enjoyment of the benefits of its provisions by the respondent company must be regarded as establishing, so far as the respondent company is concerned, and as estopping it to deny, that the exaction of a greater sum for the transportation of passengers from its stopping places in the village of River Forest to the city of Chicago than is demanded for the like service from stopping places on its line within the specified portion of the town of Cicero is an unreasonable exaction, and unjust discrimination against those of the public who may desire to reach Chicago from the village of River Forest by way of the cars of the respondent company. That being established, compliance with the provisions of the ordinance in the respect named becomes a duty to the public, the performance whereof is within the right and power of the village, acting as the agency of the state, to secure by means of the conditions incorporated in the ordinance. The fact that the ordinance required that the company should formally accept it as conditioned had no effect to render the grant a mere private contract. The state, through the village as its representative, was acting, and the power which was exercised by the village was that of the sovereign. That which the ordinance required the company should do and should consent to do did not become mere contract obligations on the part of the company to perform acts beneficial to the village. The village, as a corporate entity, had no interest whatever in the acts to be performed. Compliance with the ordinance in the respect under consideration was not beneficial to the village in its corporate capacity, but was a duty to the public to be performed by the company for the benefit of the public. There is nothing in the nature of that duty rendering it impracticable to enforce the performance of it by the writ of mandamus, and, in our view, the writ may be invoked to secure observance by the respondent company.

Respondent, treating the duties imposed upon it as mere contract obligations, argues that the undertakings are wholly without consideration. In the absence of the ordinance, the respondent company had no power or right to enter upon the streets of the village, and erect poles, string wires thereon, and construct and operate its road by electricity upon and along such streets. These privileges constitute ample consideration, if any could be deemed necessary. The privileges granted the respondent company by the terms of the ordinance have been, and are being, fully enjoyed by it. It cannot be permitted to take and retain all advantages and benefits of the ordinance, and escape performance of duties to the public upon

which its rights to such advantages and benefits are predicated, upon the ground that the ordinance and the duties imposed by it are *ultra vires* both the village and the respondent company. The plea of *ultra vires* will not, as a general rule, prevail, when it will not advance justice, but will, on the contrary, accomplish a legal wrong; and it is a general rule that undertakings, though they be *ultra vires*, will be enforced against quasi public corporations, if said corporations retain and enjoy the benefits of concessions granted on condition such undertakings should be performed. *Hcims Brewing Co. v. Flannery*, 137 Ill. 309, 27 N. E. 286; *Kadish v. Garden City Equitable Loan & Bldg. Asso.* 151 Ill. 531, 38 N. E. 236; *Eckman v. Chicago, B. & Q. R. Co.* 169 Ill. 312, 38 L. R. A. 750, 48 N. E. 496.

Whether mandamus will lie to require the respondent company to transport passengers beyond its own line does not arise. It appears from the petition that the respondent company has perfected running arrangements with other lines of railroad, and is engaged in transporting its passengers, by means of its own cars and the cars of connecting lines, to and around the loop in the city of Chicago, and that it offers such service at all points in the village of River Forest; and the complaint is that it exacts a greater rate of fare for twelve continuous rides from points in the village of River Forest to and around the loop in the city of Chicago than is charged for a like number of rides from the designated points in the town of Cicero, contrary to its duty and obligation under the ordinance. The purpose of the petition is not to require the respondent to make arrangements with connecting carriers to carry passengers beyond its own line, for such arrangements already exist, and the respondent company is engaged in the business of furnishing transportation from the village of River Forest to and from the city of Chicago; but the design of the writ is to prevent discrimination in rates charged at points in the village and in that portion of the town of Cicero specified in the ordinance.

There is no force in the point, vigorously pressed, that, if mandamus will lie, it cannot be granted at the application of the relator in this petition. The village, in its corporate capacity, has no interest in the enforcement of duties owing by the company to the public. As a corporate entity, the village is not affected by compliance or noncompliance with the rates of fare charged or collected by the respondent from the passengers. The writ relates to a matter affecting the public. The people are regarded as the real party, and it need not appear that the relator has any legal interest in the result. It is enough that he is a citizen, and is interested, as a citizen, in having the right enforced. *Pike County Comrs. v. People ex rel. Metz*, 11 Ill. 202; *Ottawa v. People ex rel. Caton*, 48 Ill. 233; *Hall v. People ex rel. Rogers*, 57 Ill. 307. The demurrer must be, and is, overruled.

Counsel for respondent company ask that, 49 L. R. A.

in case the demurrer be overruled, it be allowed to raise an issue of fact, and in support say, "The company is not selling the twelve fares for \$1, and was not at the time the petition was filed." The facts averred are that the respondent company did on or about March 2, 1898, offer, and has since then offered, such tickets for sale from said points in said town of Cicero, and the petition set forth a copy of such tickets sold by the company, and a copy of the following notice posted by the company in the cars operated by it, viz.:

Notice.

On and after Wednesday, March 2, 1898, tickets will be sold—twelve rides for one dollar—by conductors on the cars of this company, good for one continuous ride, from stopping points in the town of Cicero over this line of the Suburban Railroad Company and the Lake Street Elevated Railroad and around the Union Loop in the city of Chicago; the use of the tickets to be governed by the rules of the respective railroad companies.

J. M. Roach,

President Suburban Railroad Co.

The petition further avers that the respondent refused to sell like tickets good from points in the village of River Forest. The facts which counsel say that they desire to establish, if an issue of fact is raised, it will be observed, do not meet the case made by the averments of the petition, but in truth amount to an admission that the averments of the petition are true, but that the company had stopped selling the tickets at the time when the petition was, after leave given, filed in this court, and had not sold such tickets since the filing of the petition. The facts so stated in effect concede the averments of the petition to be true, and the entire argument of counsel for the respondent is that it has full legal right to sell the commutation tickets from points in the town of Cicero, and to refuse to sell such tickets from points in the village of River Forest. It is manifest that the only real issues in the case are those of law raised by the demurrer. The statute does not govern the practice in mandamus suits begun in this court. *People ex rel. Cunningham v. Thistlewood*, 103 Ill. 139. This court, in its discretion, may or may not allow an issue of fact to be made after the case has been submitted on demurrer to the petition. *People ex rel. Damron v. McCormick*, 106 Ill. 184. It is manifest that, in the exercise of a sound discretion, we should proceed to final judgment on the issue of law on which both parties have been fully heard.

The judgment of the court is that a peremptory writ of mandamus issue, commanding the respondent, said Suburban Railroad Company, that at all times when it shall sell or cause to be sold said tickets of twelve rides for \$1, good for one continuous ride from any stopping point in the town of Cicero west of the east line of Central avenue, in said town, over the lines of said Suburban Railroad Company and the said Lake Street Elevated Railroad Company to and

from any point on the Union Loop in the city of Chicago, said Suburban Railroad Company shall also sell, or cause to be sold, on demand, passenger tickets of twelve rides for \$1 each, good from any stopping point on its said railroad line in the village of River Forest, over the lines of said Suburban Railroad Company and the said Lake Street Elevated Railroad Company to and from any point on the said Union Loop in the city of Chicago, with equal facilities for the purchase of said tickets as prayed in the petition.

Writ awarded.

Rehearing denied April 7, 1899.

David FROST, *Plff. in Err.*,
v.

City of CHICAGO.

(178 Ill. 250.)

A penal ordinance prohibiting any colored netting or other material which has a tendency to conceal the true color or quality of the goods, to be used for covering any box, basket, or other package of fruit, berries, or vegetables of any kind, is a vexatious and unreasonable interference with and restriction upon the rights of dealers in fruit, and is therefore void when based only on the general police power of the city.

(February 17, 1899.)

ERROR to the Criminal Court for Cook County to review a judgment convicting defendant of violating an ordinance forbidding the covering of receptacles in which fruit was put up for sale. *Reversed.*

The facts are stated in the opinion.

Messrs. Stedman & Soelke, with Mr. A. E. Gammage, for plaintiff in error:

An ordinance which excludes, directly or indirectly, the subjects of interstate commerce, or which restricts the sale of goods in the original packages in which they are shipped from another state, is unconstitutional.

U. S. Const. art. 1, § 8, ¶ 3; *Ex parte Kiefer*, 40 Fed. Rep. 399; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 483, 31 L. ed. 706, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Brown v. Maryland*, 12 Wheat. 447, 6 L. ed. 688; *Re Gooch*,

10 L. R. A. 830, 1 Inters. Com. Rep. 530, 44 Fed. Rep. 279; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Re Beine*, 42 Fed. Rep. 546; *Re Sanders*, 18 L. R. A. 549, 4 Inters. Com. Rep. 305, 52 Fed. Rep. 802; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Lyng v. Michigan*, 135 U. S. 166, 34 L. ed. 153, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; *Collins v. New Hampshire*, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768; *Scott v. Donald*, 165 U. S. 97, 41 L. ed. 644, 17 Sup. Ct. Rep. 265.

Burdens upon interstate commerce cannot be justified under the police power of a state.

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; *Henderson v. New York*, 92 U. S. 259, *sub nom.* *Henderson v. Wickham*, 23 L. ed. 543; *Re Lebolt*, 77 Fed. Rep. 589; *Iowa v. McGregor*, 76 Fed. Rep. 956; *Re Worthen*, 4 Inters. Com. Rep. 484, 58 Fed. Rep. 467; *Re Minor*, 5 Inters. Com. Rep. 329, 69 Fed. Rep. 233; *McLaughlin v. South Bend*, 126 Ind. 471, 10 L. R. A. 357, 26 N. E. 185.

An ordinance, if penal in its character, must be strictly construed.

Elgin v. Picard, 24 Ill. App. 340.

An ordinance, if oppressive, unequal, unjust, partial, or discriminating in its provisions, is inoperative and void; and the question as to whether an ordinance is unreasonable, and therefore void, is a question of law.

Ibid.; *Braceville v. Doherty*, 30 Ill. App. 653; *Lake View v. Tate*, 33 Ill. App. 89; *Rich v. Naperville*, 42 Ill. App. 222; *People ex rel. Morrison v. Cregier*, 138 Ill. 401, 28 N. E. 812; *Bloomington v. Latham*, 142 Ill. 462, 18 L. R. A. 487, 32 N. E. 506.

Messrs. Howard S. Taylor and George McA. Miller for defendant in error.

Carter, Ch. J., delivered the opinion of the court:

Plaintiff in error was found guilty in the court below of violating an ordinance of the city of Chicago, and fined \$15 and costs. The ordinance provided: "Sec. 1000. Colored Netting for Covering. It shall be and is hereby made unlawful to cover any box, basket, or any other package or parcel of fruit, berries, or vegetables of any kind, with any colored netting, or any other material which has a tendency to conceal the true color or quality of any such goods which may

NOTE.—The ordinance in the above case goes to unusual lengths in the regulation of the sale of goods.

For regulations of the sale of articles of food, see also, as to sale of oleomargarine, *State v. Marshall* (N. H.) 1 L. R. A. 51, and *note*; *Com. v. Huntley* (Mass.) 15 L. R. A. 839; *Com. use of Allegheny County v. Miller* (Pa.) 6 L. R. A. 633, and *note*; *Com. use of Allegheny County v. Weiss* (Pa.) 11 L. R. A. 530; *Re Gooch* (C. C. D. Minn.) 10 L. R. A. 830; *Com. v. Paul* (Pa.) 30 L. R. A. 896; *Com. use of Philadelphia County v. Schollenberger* (Pa.) 22 L. R. A. 49 L. R. A.

A. 155; and *State v. Myers* (W. Va.) 35 L. R. A. 844.

As to the sale of lard, see *State v. Snow* (Iowa) 11 L. R. A. 355.

As to sale of milk, see *State v. Dupaquier* (La.) 26 L. R. A. 162; *Deems v. Baltimore* (Md.) 26 L. R. A. 541; and *State v. Broadbelt* (Md.) 45 L. R. A. 433.

For statute against mingling of articles of food, see *Dorsey v. State* (Tex.) 40 L. R. A. 201.

For constitutional right to deal in wholesome food, see also *Helena v. Dwyer* (Ark.) 39 L. R. A. 266.

be sold, offered for sale, or had in possession for the purpose of being sold or offered for sale. Any person who shall violate the provisions of this section shall, upon conviction, be fined not less than \$10 or more than \$25 for each offense." The testimony tended to show that the defendant below sold peaches in baskets covered with red tarlatan,—a perforated cloth,—and that these baskets of peaches had been shipped to him from the state of Michigan, put up in the same manner in which he sold them. There was some evidence to the effect that this colored netting tended to conceal the "true color or quality" of the fruit, and some to the contrary. It appears from the record that large quantities of fruit put up in this manner are shipped and sold; that a covering of some kind is necessary to prevent loss of the fruit by pilfering and other means, and to protect it from insects; that such fruit requires ventilation; and that experience has demonstrated that a covering of netting is better than one of wood, paper, or other material, because it allows free access of air, does not bruise the fruit, and affords better means of inspection. The case seems to have turned below upon the color of the netting used, although there was testimony to prove that white, green, or blue netting (sometimes, but less frequently, used) would also conceal to some extent the true color or quality of the fruit. The case assumed some importance, as it appeared from the evidence that red tarlatan manufactured for the purpose has come into general use by packers and shippers of and dealers in fruit, and counsel say that many other cases are pending, to be finally determined by the decision of the case at bar.

Some minor questions have been raised, having reference to the admission or exclusion of evidence, and also to the point that as the evidence showed that plaintiff in error did not himself cover or cause to be covered with the colored netting the baskets of peaches which he had for sale, but merely offered them for sale as he had received them, he did not come within the ordinance. These minor questions may well be waived, and the case considered on more meritorious grounds, involving the validity of the ordinance. Nor have we thought it necessary to consider the point made by the plaintiff in error, that the ordinance is not a mere local inspection law, but is an attempt to regulate interstate commerce, and to restrict the sale of goods in the original packages in which they were shipped from other states, and is therefore void, but are of opinion that the objection that it is void for unreasonableness was well made, and should have been sustained. We have reached the conclusion that the ordinance is a vexatious and unreasonable interference with and restriction upon the rights of dealers in certain articles of trade and commerce. The only valid basis upon which such a regulation can rest is that its purpose is to prevent deception, and imposition upon buyers of such articles as

are named in the ordinance. The evidence shows, as common observation would teach, that such packages must have some covering, and shows, also, that tarlatan has been found the best and most suitable covering for the preservation of fruit so packed and sold; and the validity of the ordinance is made to depend, and indeed its validity is defended only, upon the question of the color of the material. It is not pretended that there is anything in red tarlatan which is deleterious to health, or which imparts to the fruit any noxious material or quality, but only that it tends to impart to the fruit beneath a more wholesome tint or appearance than it would otherwise have. It is natural, and not unlawful, for the packer and dealer to put up and offer for sale his goods in an attractive form; and a regulation would not seem to be reasonable which would prevent the dealer in certain commodities from offering for sale his goods in packages tinted so as to correspond in some degree with the color of the goods themselves. No buyer who is ordinarily careful and intelligent is deceived by such devices of tradesmen. He may examine what he buys, and no law can protect him from the consequences arising only from his own folly. At most, the colored netting would tend to conceal the true color or quality of only the top layer of the fruit in the package, leaving the same latitude for deception as in cases where no covering is used. It will be noticed that the provision in question of the ordinance does not make it unlawful to sell decayed or unwholesome fruit, or to practice deception on the public by methods employed in packing or displaying it. From whatever view the ordinance is regarded, it is difficult to see how it can be of any public benefit whatever; and while, ordinarily, that is a question for the municipal legislature, it may be considered by the courts in determining the question of reasonableness. It is not contended by counsel that the power to pass such an ordinance is in terms conferred on the city council by any act of legislature (*Lake View v. Tate*, 130 Ill. 247, 6 L. R. A. 268, 22 N. E. 791), but the power to enact it is referable to the general police power of the city; and it is conceded that the question of its reasonableness is open for decision, and is the subject of fair contention in the case. It was shown, and is a matter of common knowledge, that much fruit is shipped and sold wrapped up in tissue paper and in tinfoil, and in packages and baskets covered with wood, all of which material effectually conceals the "true color and quality" of the fruit, until removed. It would be as reasonable to prohibit the one as the other. Fruit dealers would be subjected to unjust and oppressive discrimination by the enforcement of such an ordinance. Being unreasonable and oppressive in character, the ordinance is void, and should have been so declared by the court below.

The judgment is reversed.

VIRGINIA SUPREME COURT OF APPEALS.

W. K. ANDREWS, Appt.,
v.

ROANOKE BUILDING ASSOCIATION &
INVESTMENT COMPANY.

(.....Va.....)

1. The statute of limitations does not run against the right of a withdrawing stockholder in a building and loan association to compel payment of his demand, until a fund accrues out of which, in accordance with the charter and by-laws of the association, his claim should be paid.
2. Notice of withdrawal, given by a member of a building and loan association, does not sever his relation so completely as to preclude him from bringing a suit for the appointment of a receiver and the winding up of affairs of the company, when it has failed in its duty to set apart a fund to meet its obligation to withdrawing members, and the stockholders have taken such action as to preclude the possibility of relief from that source.

(July 5, 1900.)

A PPEAL by plaintiff from a decree of the Hustings Court of Roanoke City sustaining a demurrer to a complaint filed to wind up the defendant corporation. *Reversed.*

The facts are stated in the opinion.

Mr. S. Hamilton Graves, for appellant:

No right of action accrues to a withdrawing member of a mutual building and loan association until there are funds in the treasury which, under the by-laws, are applicable to the payment of his claim.

Heinbokel v. National Sav. Loan & Bldg. Asso. 58 Minn. 340, 25 L. R. A. 215, 59 N. W. 1050; *Engelhardt v. Fifth Ward Permanent Dime Sav. & L. Asso.* 148 N. Y. 281, 35 L. R. A. 289, 42 N. E. 710; *Pawlick v. Homestead Loan Asso.* 15 Misc. 427, 37 N. Y. Supp. 164; *Schout v. Conkey Ave. Sav. Aid & L. Asso.* 11 Misc. 454, 32 N. Y. Supp. 713; *Texas Homestead Bldg. & L. Asso. v. Kerr* (Tex.) 13 S. W. 1020.

Had petitioner brought an action at law immediately after perfecting his notice of withdrawal, to recover the amount due him, a full answer to his action would have been that the defendant was a mutual association, and its by-laws were a contract between it and the plaintiff, and that there were no funds in the treasury, under the by-laws, out of which he could be paid.

Heinbokel v. National Sav. Loan & Bldg. Asso. 58 Minn. 340, 25 L. R. A. 215, 59 N. W. 1050; *Engelhardt v. Fifth Ward Permanent Dime Sav. & L. Asso.* 148 N. Y. 281, 35 L. R. A. 289, 42 N. E. 710; *Pawlick v. Homestead Loan Asso.* 15 Misc. 427, 37 N. Y. Supp. 164; *Schout v. Conkey Ave. Sav. Aid & L. Asso.* 11 Misc. 454, 32 N. Y. 713; *Texas*

Homestead, Bldg. & L. Asso. v. Kerr (Tex.) 13 S. W. 1020.

No right of action accrued to petitioner five years prior to the institution of his suit.

Messrs. Cooke & Glasgow for appellee.

Keith, P., delivered the opinion of the court:

Appellant instituted his suit in the hustings court of the city of Roanoke, on behalf of himself and all other creditors of the appellee on the 30th of September, 1898, in which he states that he is the owner of ten shares of the stock of the company, upon which he had paid \$500 in monthly instalments of \$10 each; that on the 20th of April, 1893, he gave notice of withdrawal to the company in due form; that under the by-laws, as they then existed, his notice did not become effective until the 20th of the ensuing May; that on the 15th day of April, 1893, at a meeting of the stockholders, a change was made in the by-laws, the effect of which was to create a specific sum out of which withdrawals could be paid, which was limited to one quarter of the amount paid into the association by the holders of instalment stock; that as of May 15, 1893, there were in existence 1,643 shares of instalment stock, monthly payments upon which would have produced something more than \$400; that a number of said shares have been paid for and discharged, and the residue have all been converted into paid-up stock under the amendments of the by-laws of May 15, 1893, with the exception of twenty-two shares, for which notice of withdrawal had been filed prior to May 15, 1893, and of which the shares of appellant constitute a part; that at a regular annual meeting of the stockholders, held on the 15th of April, 1898, further amendments to the charter and changes in the by-laws were proposed, and to that end a petition was presented to the judge of the hustings court, who entered an order as of the 19th of July, 1898, making the amendments asked for, by virtue of which, whenever there happens to be as much as \$500 in the treasury, the company notifies its stockholders, and invites bids from them, the member offering the largest number of shares of stock to be canceled for the least amount of money being accepted. It appears that there is not, and never has been, in the treasury of the company, a fund applicable to the demands of the appellant; nor can there be in the future, since there are no longer any contributing members.

There are other averments of fact in the bill, the tendency of which is to strengthen the position of the appellant, but enough has been said to enable us properly to present our conclusions with respect to the law of the case.

NOTE.—As to withdrawals from building and loan association, see *Engelhardt v. Fifth Ward Permanent Dime Sav. & L. Asso.* (N. Y.) 35 L. R. A. 289, and note; *Rabbitt v. Wilcoxon* 49 L. R. A.

(Iowa) 38 L. R. A. 183; *Gibson v. Safety Homestead & L. Asso.* (Ill.) 39 L. R. A. 202; and *Southern Bldg. & L. Asso. v. Price* (Md.) 42 L. R. A. 206.

The defendant demurred, and also filed a plea of the statute of limitations, setting forth that the cause of action did not arise within three or five years before the institution of the suit.

The position occupied by a withdrawing member of a building association is not very clearly defined by the authorities. It is said that he is not in all respects a creditor, for, if that were so, he might get judgment, issue an execution, acquire a lien upon real estate, and subject the personalty of the association, to the prejudice of other creditors. He is no longer a member of the association, so far as his right to participate in its management and control is concerned. He has no right of action against the company until a fund accrues out of which, in accordance with the charter and by-laws of the company, his debt should be paid; and, as it appears from the averments of this bill that no such fund existed at any time in this case, it would seem that the right of action has never accrued to him as a creditor. If this be true, then it follows that his right to sue is not affected by the statute of limitations; but, if he is to be regarded only as a creditor, he is still out of court, because there was no right of action which entitled him to be in court. A member of such an association must, upon withdrawal, retain some relation to the company, growing out of his membership, other than that of creditor. It seems to us that by so much as he falls short of being clothed with the rights of a creditor, by so much there must remain in him the residuum of his rights as a member; otherwise, as in the case at bar, he could not sue as a creditor, because there was no fund out of which his debt could be paid, and the company, by its dereliction of duty, would deny all redress if he is not permitted to seek a remedy in his capacity as stockholder. These propositions seem to be supported by authority.

In *Heinbokel v. National Sav., Loan & Bldg. Asso.* 58 Minn. 340, 25 L. R. A. 216, 59 N. W. 1050, the supreme court of Minnesota held that a member of an association who has brought himself within the rules by notice of withdrawal cannot bring an action, and take judgment against the association, when there is no money in the treasury legally applicable to the payment of his claim. To the same effect, see *Engelhardt v. Fifth Ward Permanent Dime Sav. & L. Asso.* 148 N. Y. 281. 35 L. R. A. 289, 42 N. E. 710.

In support of the position that a withdrawing member has not lost all of his right or interest as such in the association, there are numerous decisions and the authority of respectable text writers.

"The right of members to presently withdraw deposits is practically limited to funds on hand, and the withdrawing member must show that there are funds for that purpose before he can enforce his demand: but it is an abuse of discretion for the directors to so invest the entire funds in real estate as to leave none applicable to the payment of withdrawing members, and thus defeat their rights. When notice of withdrawal is

given the association, it should arrange the disposition of its receipts so as to meet its payments when due. While the right to withdraw is only grantable out of funds designated for that purpose, it is not intended that rightful lack of funds shall defeat the right as against the members. So, if the association is solvent, and a member gives notice of withdrawal, and the notice had matured before the association is being wound up, he is entitled to be paid out of the assets, after outside creditors, in priority to those members who had not given notice, notwithstanding the fact that, after he had given the notice, there were no funds for payment. The intention of the rule is to prevent the application of the funds to withdrawals to such an extent that its operations will be crippled; and, when it winds up, the reason of the rule does not apply, which readily defeats the application of the rule itself." *Thompson, Bldg. Asso. chap. 8, § 13.*

It is said in *Endlich, Bldg. Asso. 2d ed. § 514*, where the demands of all the members of such a corporation cannot be paid in full, there are ordinarily several classes advancing contradictory claims, "to wit, members who have given notice of withdrawal, and the period of whose required notice may have expired before the proceedings to wind up were instituted, and members who have given no such notice. . . . The tendency of the English courts, whilst recognizing that a withdrawing member is not a creditor of the association in the ordinary sense of the word, has been to allow them a preference supposed to be based in the rules of the society over those who have given no withdrawal notice."

In *Sibun v. Pearce*, L. R. 44 Ch. Div. 354, Lindley, L. J., says, of the position of one who has given notice of withdrawal, but has not received payment: "That he is not an ordinary creditor is plain. He cannot come into competition with outside creditors. On the other hand, as between himself and the continuing members, he is entitled to be paid the amount due to him before they can divide the assets. In that sense he is a creditor, though he cannot take part in the affairs of the society."

We have seen that a withdrawing member cannot sue until a sufficient fund is accumulated by the society to meet his demand, for until that event has happened he has no right of action, and it is well established that the statute of limitations does not begin to run until the right of action accrues. We have seen that it is the duty of the association to set apart a fund to meet its obligation to withdrawing members, and it conclusively appears from the bill under consideration that this duty in this instance has not been performed, and that the course taken by the stockholders precludes the possibility that appellant can obtain relief from that source.

The prayer for relief asks the appointment of a receiver, and, if need be, the winding up of the affairs of the company. This prayer, upon the facts presented by the bill, is suf-

ficient to entitle the appellant to the relief which he seeks, if, upon a hearing on the merits, he is able to establish by proof the case which he has made in the pleadings.

The decree of the Hastings Court must be reversed, and the cause remanded to be further proceeded in, in accordance with the views expressed in this opinion.

IOWA SUPREME COURT.

CENTRAL STATE BANK

v.

S. R. SPURLIN, *Appt.*

(.....Iowa.....)

1. The addition of the word "trustee" to the name of the payee of a note does not destroy its negotiability.
2. Mere negligence in making inquiries as to the validity of negotiable paper before purchasing does not charge one with notice of infirmities.

(April 14, 1900.)

APPEAL by defendant from the judgment of the District Court for Hardin County in favor of plaintiff in an action brought to recover the amount alleged to be due on a promissory note. *Affirmed.*

The facts are stated in the opinion.

Messrs. W. J. Moir and John Porter for appellant.

Messrs. Albrook & Lundy and William B. Brown for appellee.

Waterman, J., delivered the opinion of the court:

The note sued on is in the following form:

\$250.00.

Marshalltown, Iowa.

May 27, 1896.

Twelve months after date, for value received, I promise to pay to J. M. Fitzgerald, trustee, or order, two hundred and fifty dollars, payable at Marshalltown Bank, with interest at 6 per cent per annum, payable annually, 6 per cent on interest due, and, if action is commenced hereon, a reasonable attorney's fee, and hereby consent that any justice of the peace may have jurisdiction on this note.

[Signed]

S. R. Spurlin.

The pivotal question to be determined is, Was this note negotiable? When a conclusion is reached upon this point, all of the other matters argued can be disposed of readily. The claim is that the payee of the note was not certain; that the word "trustee," following his name, makes it evident that some person other than Fitzgerald was interested in the note, as payee, and because of this the negotiability of the instrument was destroyed. If the word "trustee" is to be construed as mere matter of description, then Fitzgerald would have a right of action on it in his own name, and its negotiability

would not be affected. Mr. Daniel in his work on Negotiable Instruments (vol. 1, § 415), says: "If a note be payable to an individual, with the mere suffix of his official character, such suffix will be regarded as mere *descriptio personæ*, and the individual is the payee." This is universally admitted with relation to such words as "agent," "president," and "executor." As to the title "cashier," commercial usage has so altered the rule that the bank may sue thereon, and its possession of the note will, alone, be sufficient evidence of title. *Id.* § 1189. For some reason that to us does not seem quite clear, the authorities are not altogether in harmony as to the effect when the word "trustee" is added to the payee's name. The use of the suffix "agent," or "executor," indicates, as well as the word "trustee," that some person other than the named payee is equitably interested in the proceeds of the note. So this reason is not sufficient for holding that negotiability is destroyed, and no other has been advanced or occurs to us. In a well-considered case the court of chancery appeals of Tennessee, after noting the conflict of authority, thus concludes: "We take it that the decided weight of authority, and, it seems to us, of sound reason, supports the position that the addition of the word 'trustee' to the name of the payee of a note does not destroy its negotiability." *Fox v. Citizens' Bank & T. Co.* (Tenn. Ch. App.) 35 L. R. A. 678, 37 S. W. 1102. See also *Bush v. Peckard*, 3 Harr. (Del.) 385; *Downer v. Read*, 17 Minn. 493 (Gil. 470); *Binney v. Plumley*, 5 Vt. 500, 26 Am. Dec. 313; *Pierce v. Robie*, 39 Me. 205, 63 Am. Dec. 614. We are quite content to follow these holdings. The case of *Gordon v. Anderson*, 83 Iowa, 224, 12 L. R. A. 483, 49 N. W. 86, cited and relied upon by appellant, is not in conflict with this principle. In that case the note was made payable to "Chas. R. Whitesell *et al.*" The payee there was undoubtedly rendered uncertain, for by its terms the legal title to the note was vested in others, unnamed, jointly with Whitesell.

2. This instrument was, for the reasons given, negotiable. The undisputed evidence shows that it was purchased by plaintiff bank in the usual course of business, before due, without notice of any infirmity, and that full value was paid therefor. It was shown that the bank made some inquiry as to the paper before purchasing. The claim is made that, had it inquired further, it would have learned that the note was obtained by fraud, and was without consideration. Without saying that the evidence does

NOTE.—As to negotiability of note payable to trustee, see also *Fox v. Citizens' Bank & T. Co.* (Tenn.) 35 L. R. A. 678. 49 L. R. A.

not show the bank to have been diligent in this respect, the rule is that mere negligence on the part of the purchaser is not sufficient to charge him with notice. *Lehman v. Press*, 106 Iowa, 389, 76 N. W. 818, and cases cited.

The uncontradicted evidence thus showing that plaintiff was a bona fide holder, the de-

fenses offered could not be urged against it. The trial court would have been justified at the close of the testimony in ordering a verdict for plaintiff. This being true, we need not consider the many criticisms of the charge of the trial court; for the errors committed, if any, were without prejudice.

Affirmed.

KANSAS SUPREME COURT.

STATE of Kansas *ex rel.* A. A. GODARD,
Attorney General,

v.

W. A. JOHNSON *et al.*, Judges and Officers
of the Court of Visitation.

(61 Kan. 803.)

*Chapter 28 of the Laws of the Special Session of 1898, entitled "An Act Creating a Court of Visitation, Declaring Its Jurisdiction and Powers, and Providing for Proceedings and Procedure Therein," is unconstitutional and void for the reason that, in the powers conferred upon that tribunal, legislative, judicial, and administrative functions are commingled and interwoven together in a manner violative of the constitutional requirement that the three great departments of government shall be kept separate, and the powers and duties of each exercised independently of the others.

(Doster, Ch. J., dissents.)

(May 5, 1900.)

PETITION for a writ of mandamus to compel defendants to assume jurisdiction of a petition praying them to determine what are reasonable rates for the shipment of cattle between certain points within the state. *Denied.*

Statement by **Smith, J.:**

On the 8th day of February, 1900, the state solicitor filed with the clerk of the court of visitation an information, based on the affidavit of J. W. Robison, praying said court of visitation to inquire into and find what are reasonable rates or charges for the shipment of cattle in this state between the several stations on the lines of road operated by the Atchison, Topeka, & Santa Fé Railway Company, and especially between Eldorado, Kansas, and Kansas City, Kansas; that a complete schedule of such rates or charges be made; and that said company be enjoined from demanding, charging, or receiving any other or different rates or charges. The material part of said informa-

tion is as follows: "That said the Atchison, Topeka, & Santa Fé Railway Company is a railroad corporation incorporated and organized under the laws of the state of Kansas, and is, and for several years last past has been, engaged as a common carrier in operating certain lines of railroad in said state, carrying freight and live stock, between numerous points and stations therein, including the haul from Eldorado, Kansas, to Kansas City, Kansas. That said complainant, J. W. Robison, is a citizen and resident of said state, and is an extensive shipper of cattle, and has frequent occasion to make use of the facilities afforded for shipment over said railroad; and many other citizens and residents of this state are, and for a long time have been, engaged in the business of feeding and shipping cattle, and are interested, in common with said complainant, in the rates charged by the railroads, including the lines of road operated by said the Atchison, Topeka, & Santa Fé Railway Company, for such shipments. That previous to December 1, 1899, said railway company charged for the shipment of cattle a certain rate per car load, which rate, as it concerned and affected said complainant, was thirty-six and 20-100 (\$36.20) dollars per car, 36 feet in length, from Eldorado to Kansas City, Kansas, and that such rate or charge gave to said company a fair and reasonable compensation for the services performed. That, in disregard of the rights of said complainant and other shippers of cattle, said company on or about December 1, 1899, put in and promulgated a new and greatly increased rate for all such shipments of cattle, and asked and demanded therefor a charge that was and is unreasonable and unjust, and greatly in excess of what a reasonable charge should be for such service. That the new rate or charge is partially based upon weight, but is skillfully devised so as, as far as possible, to conceal the purpose to increase rates. That, in the practical use and application of such new rate, said company now exacts for a shipment of a car of cattle from Eldorado to Kansas City, Kansas, about forty-two (\$42.00) dollars per car, as against the charge of thirty-six

*Headnote by **SMITH, J.**

NOTE.—On the question of requiring courts to exercise powers that do not belong to the judicial department of government, see also *State ex rel. Paul v. Gloucester County Circuit Court Judge* (N. J. L.) 1 L. R. A. 86; *White County Comrs. v. Gwin* (Ind.) 22 L. R. A. 402; *State* 49 L. R. A.

ex rel. Railroad & Warehouse Commission v. Adams Exp. Co. (Minn.) 38 L. R. A. 225; *Norwalk Street E. Co.'s Appeal* (Conn.) 39 L. R. A. 794; and *Fox v. McDonald* (Ala.) 21 L. R. A. 529.

and 20-100 (\$36.20) dollars per car made prior to December 1, 1899. That a correspondingly increased rate has been put in force and is charged between all other stations on the line of the road of said company in this state. That such increase has been made, and such unjust and unreasonable rates are being demanded and exacted from the shippers of cattle in this state, without any legal excuse, and without any regard to what is a reasonable charge for such services." Upon such information being filed with the clerk, and brought to the attention of the judges of the court of visitation, said clerk refused to issue a citation to the railway company, and the judges thereof declined and refused to make an order directing the clerk to issue the same, on the ground and for the reason that the information did not present a case for consideration and adjudication by said court of visitation as to any particular charges or rates paid to or demanded by said railway company, nor present a case which called for an exercise of the judicial powers of said court, but that the matters alleged in said information called for the exercise of powers which were purely legislative or administrative in their nature,—the court being asked merely to determine and fix a schedule of charges which should regulate the rates or charges which might be exacted or demanded by said railway company in future,—and were such powers as the court believed it could not exercise. The attorney general has filed a petition in this court, setting out the matters contained above, and praying that a writ of mandamus issue to the clerk and judges of said court of visitation, commanding them to assume jurisdiction of, and to hear and determine, the case presented by said information.

The law creating the court of visitation is chapter 28 of the Laws of 1898 (Gen. Stat. 1899, §§ 5779-5820), entitled "An Act Creating a Court of Visitation, Declaring Its Jurisdiction and Powers, and Providing for Proceedings and Procedure Therein."

Section 1 creates a court of record, with a seal, to be known as a "court of visitation," consisting of a chief judge and two associate judges, and provides for their qualifications.

Section 5 requires the appointment by the governor of a state solicitor, and that "it shall be his duty to appear and represent the state in all actions and proceedings before the court of visitation to which the state is a party."

The act further provides:

"Sec. 7. The court shall sit at its rooms in the state-house but may for good cause sit in any other place in the state, and shall be deemed in perpetual session for the transaction of business.

"Sec. 8. The court of visitation shall have power and jurisdiction throughout the state:

(1) To try and determine all questions as to what are reasonable freight-rates, switching and demurrage charges, and other charges connected with the transportation of property between points in this state.
(2) To apportion charges between connect-

ing roads, and determine all questions relating to charges for the use of cars and equipments; and to regulate the charges for part car-load and mixed car-load lots of freight, including live stock. (3) To classify freight. (4) To apportion transportation charges among connecting carriers. (5) To require the construction and maintenance of depots, switches, side-tracks, stockyards, cars and other facilities for the public convenience. (6) To compel reasonable and impartial train and car service for all patrons of the railroad. (7) To regulate crossings, and intersections of railroads and regulate the operation of trains over them. (8) To prescribe rules concerning the movements of trains, to secure the safety of employees and the public. (9) To require the use of approved appliances and methods, to avoid accidents and injuries to persons. (10) To restrict railroad corporations to operations within their charter powers, prevent the oppressive exercise thereof, and compel the performance of all duties required of railroads by law. (11) To summon juries, as a court of equity, in any case or matter before it; such juries to be selected as may be directed by rule. Jurors to possess the qualifications, except as to locality, required by law for jurors in the district courts. (12) Such other and further powers as are given by this act or may be conferred by law."

Section 9 provides that, in all matters within its jurisdiction, said court shall possess full common-law and equity powers. It may issue appropriate writs and process to compel the attendance of parties and witnesses, may issue writs of injunction and mandamus, and appoint receivers to carry its judgments into effect, and shall have the same power to punish for contempt as district courts now have, and may exercise it in the same manner, and cause the attendance of a jury whenever required in the exercise of such power.

By § 10 the court has power to establish rules for its government and for the regulation of practice therein, and it is authorized to appoint masters, referees, or receivers in causes before it. It may make rules regarding the framing and filing of the proceeding, and the entering and promulgating of orders and decrees, and generally regulate the practice to be used in said court where special provision is not made or special procedure prescribed.

Section 11 makes it the duty of the sheriff to whom any process of said court shall be directed or delivered to serve and execute the same without delay, and gives the court the same power over such officers as the district court has over sheriffs.

Section 12 confers upon the court power to appoint a marshal to serve processes, and also to appoint a bailiff.

Section 13 relates to pleadings and amendments thereto.

Sections 14, 15, 24, and 25 read:

"Sec. 14. Whenever a complaint on oath shall be presented to the state solicitor, charging that any railroad company demands or collects unreasonable charges, dis-

criminate for or against any shipper, violates any provision of law, or fails or refuses to perform any duty, or stating a valid ground of complaint for any other cause over which the court has jurisdiction, it shall be the duty of said solicitor to forthwith file an information in the name of the state, charging the matters set forth in the complaint.

"Sec. 15. Proceedings in said court shall be instituted by the filing of an information in the name of the state. Upon the filing of the information, the clerk shall at once issue a citation to the defendant and deliver or mail it to the sheriff of the county where it is to be served. The citation shall be accompanied by a certified copy of the information. The sheriff receiving such citation and copy shall without delay serve the same, in the same manner as a summons in a civil action in the district court is served, and shall make due return of service thereon, taxing thereon his lawful fees as for serving a summons, which return shall be made by delivering or mailing to the clerk. The citation shall require the defendant to answer the information within twenty days from the day of service. Reply, if any, shall be filed within twenty-five days from the day of service as shown by the return. At the expiration of twenty-five days from the date of service of the citation, as shown by the return, the clerk shall, whether an answer has been filed or not, enter the case on the trial docket for the first Monday of the next succeeding month, and it shall be thereafter subject to call for trial or disposition in its order on the docket; but because of its superior public importance, or other sufficient reason, the court may advance any case to hearing and determination out of its order on the trial docket."

"Sec. 24. If, upon the hearing of an information alleging the unreasonableness of any railroad company's rate for the transportation of any article or schedule of articles between given points on its line within the state, the court shall deem it probably unjust that such rate or schedule alone should be changed without changing or revising the entire schedule as to such articles over the entire line of such company, the court may order the information to be amended so as to bring such entire schedule before it for consideration; and shall order the said company to answer such amended information, and shall as soon as may be proceed thereon, saving all testimony already taken or adduced.

"Sec. 25. When the court proceeds for the first time to determine what is a reasonable charge for the given service under consideration, the burden of proof shall rest on the railroad company to show what is a reasonable charge. On all subsequent proceedings to change or modify any charge, the burden of proof shall rest on the party moving to change or modify to show that the charge, allowed by the prior decree of the court is unreasonable."

Section 26 provides that no schedule of rates or special contract or agreement proposed

mulgated or entered into by any railroad shall be receivable in evidence on behalf of such company as proof tending to show what is a reasonable charge for any services; and the fact that any railroad company has been accustomed to demand or receive any given rate of compensation shall not be received as evidence of the reasonableness of such charge.

Sections 28 and 32 read:

"Sec. 28. Upon the conclusion of every trial, the court shall without unnecessary delay proceed to enter such decree as the pleadings and proofs warrant. After the trial of any action involving the reasonableness of a general schedule of freight charges on any line of road, the court shall find specially such facts as its deems most material. It may find the value of the line of road and of all property used in connection therewith, either separately or in gross, the actual cost thereof, the amount of the capital stock, bonded and other indebtedness of the company, what, if any, part thereof is fictitious or fraudulent, the average yearly revenues of the company and the sources from which they are derived, whether its revenues will probably increase or diminish, the average expenses of operation and maintenance and the purposes to which they are devoted, what, if any, unreasonable or unlawful uses are made of the funds of the company, as well as other matters deemed of special importance; but the failure of the court to make such findings, or any of them, shall not be ground for reversal of its decree. It shall find generally as to the reasonableness of the charges at issue, and may at its discretion find specially as to particular items. The court shall thereupon enter a decree in accordance with its findings and decision, adjudging and decreeing what are reasonable rates for each and every charge and service at issue in the case, and perpetually enjoining the defendant from demanding, charging, or receiving any other or different rates or charges than such as are by the decree determined to be reasonable. The decree shall embody a complete schedule of the charges adjudged to be reasonable, and the classification of freight applicable to and necessary for the explanation thereof."

"Sec. 32. If, after the promulgation of any order or decree of said court, any railroad company bound thereby shall refuse, or for thirty days shall neglect, to comply with or obey, in good faith, such order or decree, the court may, upon application made on three days' notice to said railroad company, and proof of such neglect or refusal, order sequestration of the whole or any part of said company's property, owned or leased, and appoint a receiver or receivers to forthwith take possession and charge of said property or designated part of said property and operate the same and carry such order or decree into effect; and property so taken shall be operated by such receiver or receivers, who shall receive all income therefrom, until such company shall furnish security to the satisfaction of said court for its full and faithful obedience to and compliance with

said order or decree; whereupon the accounts of such receiver or receivers shall be passed, and the net proceeds of operating said property shall be paid to said company and the property returned to it."

Section 34 provides for a review by the supreme court of final decrees of the court of visitation, in like manner as judgments of district courts may be reviewed, with power to stay the issuing of any writ or process; such stay not to affect the use, conclusiveness, or exclusiveness of any such decree as evidence in any case or proceeding; no stay to be allowed unless the proceedings in error shall be commenced within sixty days after the promulgation of the decree.

Messrs. A. A. Godard, Attorney General, and **J. S. West**, for plaintiff:

In Kansas the jurisdiction of any inferior court, save such inherent power and jurisdiction as it may possess by reason of being a court, must be conferred by statute.

The court is a tribunal "clothed with judicial authority, and acting in a judicial capacity."

Auditor of State v. Atchison, T. & S. F. R. Co. 6 Kan. 506, 7 Am. Rep. 575.

It is not necessary to designate a tribunal a court in order to make it such.

Prell v. McDonald, 7 Kan. 447, 12 Am. Rep. 423; *Anthony v. Halderman*, 7 Kan. 64.

The courts have certain inherent powers. *Re Millington*, 24 Kan. 214; 8 Am. & Eng. Enc. Law, 2d ed. p. 28.

The legislature intended to create, and did create, a court, as by the Constitution it had a right to do.

A court for the exercise of the visitatorial powers of the state over its railway corporations is not particularly novel.

1 Beach, Priv. Corp. § 48.

Parts of a statute repugnant to constitutional provisions do not nullify the whole of the act of which they are a part, if they can be so separated from the remainder as to leave a complete and intelligible whole.

Re Hendricks, 60 Kan. 805, 57 Pac. 965.

Courts of chancery have for centuries required the performance of many acts which might well have been required by the legislature, but still they are courts.

When we speak of the separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree.

Story, Const. 5th ed. chap. 7, § 525; *Cal- len v. Junction City*, 43 Kan. 627, 7 L. R. A. 736, 23 Pac. 652; *Speed v. Crawford*, 3 Met. (Ky.) 207; *Morton v. Woodford*, 99 Ky. 367, 35 S. W. 1112; *Martinez v. Ward*, 19 Fla. 175; *Salem & Turnp. Bridge Corp. v. Essex County*, 100 Mass. 282; *State ex rel. Manning v. Higgins*, 125 Mo. 364, 28 S. W. 638; *Huston v. Clark*, 112 Ill. 344; *State* 49 L. R. A.

ex rel. Spencer v. Ensign, 55 Minn. 278, 56 N. W. 1006; *Canada Northern R. Co. v. International Bridge Co.* 7 Fed. Rep. 653; *Bryant v. Robbins*, 70 Wis. 258, 35 N. W. 545.

The legislature are the visitors of all corporations founded by them for public purposes, where there is no individual founder or donor, and may direct judicial process against them for the abuses or neglects which by common law would cause a forfeiture of their charters.

Amherst Academy v. Owls, 6 Pick. 433, 17 Am. Dec. 387; *Delaware v. Wilmington*, 3 Harr. (Del.) 294; *Bloodgood v. Mohawk & H. R. Co.* 18 Wend. 51, 31 Am. Dec. 313; *State ex rel. Cappel v. Milwaukee Chamber of Commerce*, 47 Wis. 680, 3 N. W. 760; *State ex rel. Waring v. Georgia Medical Soc.* 38 Ga. 608, 95 Am. Dec. 408; *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681.

All the presumptions are in favor of the validity of a law enacted by the legislative department.

People ex rel. Henderson v. Westchester County Supers. 147 N. Y. 15, 30 L. R. A. 74, 41 N. E. 563; *Re Davis*, 58 Kan. 388, 49 Pac. 598.

Messrs. Garver & Larimer, also for plaintiff:

Among the duties and powers of the court of visitation are to investigate and determine the reasonableness of freight rates or charges made between connecting roads for the use of cars and equipments; to apportion transportation charges among connecting carriers; to compel the performance of duties required of railroads by law, etc.

The investigation of such matters calls for an exercise of judicial power.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484.

Messrs. A. J. Myatt, Robert Dunlap, Allen & Allen, E. D. Kenna, and A. A. Hurd for defendants.

Smith, J., delivered the opinion of the court:

The Constitution of this state, like the Constitution of the United States, has created three departments of government,—the executive, legislative, and judicial:

"Art. 1, § 1. The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor, treasurer, attorney general and superintendent of public instruction. . . ."

"Art. 2, § 1. The legislative power of this state shall be vested in a house of representatives and senate."

"Art. 3, § 1. The judicial power of this state shall be vested in a supreme court, district courts, probate courts, justices of the peace, and such other courts inferior to the supreme court as may be provided by law. . . ."

The framers of the Constitution of the United States were influenced by the doctrine

of Montesquieu, then in the height of its influence, that the powers essential to governments should be distributed among three separate bodies of magistrates, viz., legislative, executive, and judicial. Madison, in No. 47 of the *Federalist*, p. 375, affirmed that such doctrine was recognized by the convention as the foundation of its labors. Montesquieu wrote: "There can be no liberty . . . if the power of judging be not separated from the legislative and executive powers. . . . Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor." It will be noticed that there is no express provision in the Kansas Constitution to the effect that persons charged with the exercise of powers properly belonging to the one shall not exercise any functions pertaining to either of the others. Yet this court, in the case of *Re Sims*, 54 Kan. 1, 25 L. R. A. 110, 37 Pac. 135, has said: "We think, however, that in our Constitution these powers are as clearly separated as though the framers of the Constitution had said so in terms." Mr. Chief Justice Kingman emphasizes this by saying that to confer both executive and judicial powers upon a court is "as dangerous to good government as it is subversive of the Constitution, which has carefully kept separate the executive, legislative, and judicial departments of the government, 'to the end that this may be a government of laws, and not of men.'" *Auditor of State v. Atchison, T. & S. F. R. Co.* 6 Kan. 505, 7 Am. Rep. 575. In another place he says that it is absurd to claim that it is in the power of the legislature to give a court authority to review acts which are purely executive in their character. In *Coleman v. Newby*, 7 Kan. 86, Mr. Justice Valentine discusses the separation of the sovereign powers, and insists that they must be independently maintained, and power exercised only by the particular department to which it has been delegated. He held that the power to make rules for the district court could not be conferred upon the supreme court, for the reason that it was a legislative function, which belonged to the legislature, and could not be exercised by the judicial department. He states that the prescribing of rules by which human conduct shall be governed in the future is a legislative power, and that "to declare what the law is or was belongs to the judiciary, but to declare what it shall be in the future belongs to the legislature." If the making of rules by the supreme court for one of the inferior courts violates the constitutional limitation, certainly the making of general rules and a schedule of rates governing the future conduct of persons and corporations cannot be conferred on a court or judicial tribunal. Again, in *Re Davis*, 58 Kan. 368-372, 49 Pac. 161, Allen, J., says: "It is not asserted that the Constitution does not make a valid and effectual division of the powers of

government into executive, legislative, and judicial departments, nor is the wisdom of such a division of powers questioned, nor has there been any suggestion in the brief or on oral argument that such a division is unreasonable or illogical. It has been generally, if not universally, accepted as the best and safest division of powers yet devised by man, and is recognized as firmly established by all writers on the Constitution. . . . The legislature enacts general rules for the guidance of all departments of the government. It levies taxes, and directs the expenditures of the money raised thereby, but it executes no law. The judiciary declares the law, and directs as to its application to controversies that arise. . . . The fundamental law embodied in the Constitution binds all departments of the government, and fixes the limit of their powers. To its mandates all must yield obedience, for it is superior to any and all agencies created under it." All writers upon constitutional law are agreed that the functions of the three departments should be kept as distinct and separate as possible, except so far as the action of one is made to constitute a restraint upon the action of the other, to keep them within proper bounds, and to prevent hasty and improvident action. *Cooley, Const. Lim.* 6th ed. 46. Keeping in view that the separation of powers named must be maintained, it will be well to refer to several sections of the act creating a court of visitation, which fix its jurisdiction and authority, to ascertain what species of power is conferred upon that tribunal:

The first paragraph of § 8 gives authority "to try and determine all questions as to what are reasonable freight rates, switching and demurrage charges, and other charges connected with the transportation of property between points in the state." This, together with other sections, as we shall see, is a grant of judicial power to the court to determine what are reasonable freight rates for services already rendered; but as to what shall be charged in the future for such services it is legislative in character. "(2) To apportion charges between connecting roads, and determine all questions relating to charges for the use of cars and equipment; and to regulate the charges for part car-load and mixed car-load lots of freight, including live stock." This also combines both legislative and judicial powers, dependent on the manner the power is exercised. "(3) To classify freight." This is an administrative function. "(4) To apportion transportation charges among connecting carriers." This is subject to the criticism in respect to the first and second clauses. "(5) To require the construction and maintenance of depots, switches, sidetracks, stockyards, cars and other facilities for the public convenience." This is administrative and legislative. "(7) To regulate crossings and intersections of railroads and regulate the operation of trains over them." This is administrative, and authorizes the court to make rules and regulations to govern the

parties affected. It is thus, in a sense, the exercise of legislative power." "(8) To prescribe rules concerning the movement of trains to secure the safety of employees and the public." This is, in a manner, a legislative power, as the rules established become the rules governing the railway corporation. "(9) To require the use of improved appliances and methods to avoid accidents and injuries to persons." As this gives power to prescribe the appliances and regulate their use, it may be said to be legislative and administrative. Powers manifestly not judicial are conferred by § 28, wherein the duty is imposed on the court to enter a decree, without unnecessary delay, after the trial of an action, involving a general schedule of freight rates, and it authorizes the court to find specially such facts as it deems most material. The court shall thereon enter a decree in accordance with its findings and decisions adjudging and decreeing what are reasonable rates for each and every charge and service in the case, and perpetually enjoining the defendant from demanding or receiving any other or different rates or charges than such as are by the decree determined to be reasonable. It is provided that the decree shall embody a complete schedule of the charges adjudged to be reasonable, and a classification of freight applicable to and necessary for the examination thereof. The nature of the power vested in the court by this section will be referred to hereafter.

Legislative power to prescribe rates which railway corporations may charge for carrying freight or passengers exists, beyond question, and its exercise has been uniformly upheld by the courts. And this power the law-makers may delegate to boards or commissions, which has been frequently done. *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191. The extent of the power is curtailed only by limitations placed upon it by the courts in the application of certain constitutional guaranties prohibiting the destruction of property rights vested in the owners of the railway. *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702. The court of visitation is endowed with complete common-law and equity powers, lavishly conferred. It has three judges, a clerk, a seal, and a marshal. It may summon juries, issue writs of mandamus and injunction, punish for contempt, appoint receivers, referees, and masters; and full power is granted to carry its decrees into effect. The attorneys for the state, the complainant, the court of visitation, and the railway company unitedly agree that the court of visitation is a judicial tribunal, and that the powers conferred upon it are in large part purely judicial. Being a court, the vital question decisive of the constitutionality of the law creating it is whether such tribunal has been endowed with legislative powers to an extent destructive of that separation of governmental functions ordained by the 49 L. R. A.

Constitution. In treating the propositions involved, there is no room for originality. We shall travel the beaten path of precedent to a conclusion, leaving to those who dispute the authority to which we adhere, and which we reannounce, the task of breaking away from settled principles, and to blaze new roads through fields of innovation, regardless of those constitutional rules of safety adopted and handed down by our forefathers, the established result of wisdom and experience. In *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362-397, 38 L. ed. 1014, 1023, 14 Sup. Ct. Rep. 1054, Mr. Justice Brewer, speaking for the court, said: "It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or an administrative, rather than a judicial, function. . . . The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission. They do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation." Again, in *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 479-499, 42 L. ed. 253, 17 Sup. Ct. Rep. 900, it is said: "It is one thing to inquire whether the rates which have been charged and collected are reasonable,—that is a judicial act,—but an entirely different thing to prescribe rates which shall be charged in the future,—that is a legislative act." In *Interstate Commerce Commission v. Alabama Midland R. Co.* 168 U. S. 144-162, 42 L. ed. 421, 18 Sup. Ct. Rep. 47, Mr. Justice Shiras, speaking for the court, said: "Discussion of those assignments is rendered unnecessary by the recent decisions of this court, wherein it has been held, after elaborate argument, that Congress has not conferred upon the interstate commerce commission the legislative power of prescribing rates, either maximum or minimum or absolute, and that, as it did not give the express power to the commission, it did not intend to secure the same result indirectly, by empowering that tribunal, after having determined what, in reference to the past, were reasonable and just rates, to obtain from the courts a peremptory order that in the future the railroad companies should follow the rates thus determined to have been in the past reasonable and just." In a late case decided by the supreme court of Nebraska (*Nebraska Teleph. Co. v. State ex rel. Yeiser*, 55 Neb. 627, 45 L. R. A. 113, 76 N. W. 171) it was expressly held that the jurisdiction to determine what compensation a public-service corporation may exact for services to be rendered by it is a legislative,

and not a judicial, function. The opinion in the case of *Norfolk Street R. Co.'s Appeal*, 69 Conn. 576-597, 39 L. R. A. 794, 37 Atl. 1087, and 38 Atl. 708, is an able and well-considered argument of the questions involved here. The incapacity of the legislature to execute a power which is essentially judicial, and the judiciary to execute a power which is essentially legislative, is discussed with great clearness and force. On the question now under consideration it is said: "The regulation of such charges is held to be distinctively a legislative function, which may be delegated by the legislature to a subordinate legislative or administrative body, but if this subordinate body or the legislature exceeds its powers, and a person is thereby injured in his rights of property, he may invoke the judicial power to determine that question of legal injury; and the reasonableness of the charges, although a question legislative in its nature, must be reviewed by the court, as necessarily incident to the exercise of its judicial power. But, if the court should attempt to establish for the future a schedule of charges, it would exceed the limits of judicial power; it would act as legislator in respect to a matter as to which it must also act as judge." Foster, J., in the case of *Cotting v. Kansas City Stock-Yards Co.* 82 Fed. Rep. 845, said: "It should not be assumed that courts, in deciding this constitutional question, can undertake to fix rates, but merely to decide whether the rates prescribed by the law are in violation of the complainants' constitutional rights." In the same case Judge Thayer, p. 856, used the following language: "The judiciary have no power to prescribe a schedule of maximum rates." In the *Express Cases*, 117 U. S. 1-29, *sub nom. Memphis & L. R. Co. v. Southern Exp. Co.* 29 L. ed. 791-803, 6 Sup. Ct. Rep. 556, 628, the court, in passing upon a decree of the lower court in fixing the terms upon which a railroad and an express company should do business with each other, said: "The regulation of matters of this kind is legislative in its character, and not judicial. To what extent it must come, if it comes at all, from Congress, and to what extent it may come from the states, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt." In *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400, it is stated that the right to fix rates is a legislative one.

We start, then, in considering the boundaries of judicial and legislative power under our Constitution and system of government, from a fixed monument, to determine whether the legislative power to make rates may be conferred upon the judicial tribunal known as the "Court of Visitation." The rate-making power, being essentially legislative in its nature, whether exercised directly by the legislature, or delegated by it to a competent board or commission, can no more be imposed on or exercised by the ju-

dicial department than can the pardoning power of the governor, or any other distinctively executive function. It is a cardinal principle of representative government that the making of laws and rules regulating the future conduct and fixing the rights of parties belongs to the legislative department,—a power which can never be reposed in or exercised by the judiciary. Some of the legislative powers, as before stated, may be delegated to municipal boards and local commissions, but what is called the "power to enact laws" cannot be delegated. But, whether these functions are such as may be delegated or not, they are wholly incompatible with judicial powers, and can never be conferred on, or exercised by, the judicial department. While the line of division between the three powers is not marked distinctly, and it is not always easy to lay down an abstract rule defining each of the separate powers of sovereignty, all courts and all authority unite in holding that the rate-making power is intrinsically legislative. In exercising such power, whether by the legislature or by a commission, general rules prescribing the duties, fixing the rights, and regulating the conduct of persons and corporations in the future are made, and the combining of such a power with those essentially judicial, or vesting it in a court, is a palpable and flagrant violation of the constitutional principle and limitation regulating the separation of the sovereign powers. Gov. Leedy, in calling the special session which enacted the law, and in recommending the kind of legislation respecting freight rates deemed by him to be necessary, said the courts had decided "that the question as to whether an existing rate is reasonable is a judicial question, and that the question as to what rate shall be collectible in the future is a legislative question." We know that some powers are exercised, and may properly be exercised, by one department, that are not strictly its own; but these are such as are expressly authorized by the Constitution, or as are necessary to its independence, or incidental to the execution of its essential powers. For instance, the courts appoint clerks, referees, receivers, masters in chancery, etc.,—a power in its nature executive; and they also frame rules governing the transaction of their business in the future, which partakes of the legislative character. The executive entertains and decides applications for pardons, hears and determines matters incidental to the exercise of an intrinsic executive function, and such hearing and decision by him take on something of the judicial nature. The legislature appoints its officers, punishes for contempt, and these, as well as some other acts, partake of the executive and judicial character. However, these exceptional functions are either themselves expressly provided for in the Constitution or only incidental to the essential sovereign power confided to each department, and most of the functions named are necessary to the independence of such powers. Along this line are a few acts which occupy

an intermediate space between the departments, not easily defined nor distinctive in character, and which may be performed by one department without trenching upon the main and essential functions of the other. Some instances of the exceptional acts and powers referred to were cited by Mr. Justice Johnston in *Re Sims*, 54 Kan. 1, 25 L. R. A. 110, 37 Pac. 135, but conferring upon a single tribunal powers intrinsically judicial, intrinsically executive, and intrinsically legislative has never been sanctioned by any court, nor supported by any writer on the Constitution.

This act undertakes to give the court of visitation authority to act as legislator and judge in the same matter; to prescribe for the future regulation, government, and control of corporations, persons, and property; sit in judgment on its own rules, regulations, and laws; render judgments between parties; impose penalties to the extent of imprisonment, for any adjudged violations; and accompanying these powers so conferred are numerous and important functions which are essentially executive. The case of *Re Sims*, *supra*, involved the unwarranted combination of executive and judicial powers. It was held that a county attorney, although closely connected with courts, was an officer whose duties were mainly executive, and that the giving of judicial functions to aid him in the discharge of his executive duties conflicted with our theory of government, and constituted a breaking down of constitutional barriers devised to prevent tyranny and despotism. So jealously has this court guarded and upheld this principle of the separation of sovereign powers, that it recently decided that judicial powers cannot be reposed in a notary public, and that an act of the legislature expressly conferring upon a notary the judicial power to compel a witness to appear and testify in obedience to a subpoena was unconstitutional and void. Notaries public are authorized to subpoena witnesses and take depositions, and although the power of compelling the attendance of witnesses and the giving of testimony is, in a certain sense, incidental to the taking of depositions, the court overruled earlier cases, and held it to be an unconstitutional combining of executive and judicial powers. *Re Huron*, 58 Kan. 152, 36 L. R. A. 822, 48 Pac. 574. The Price-Raid commission, made up of executive officers of the state, was given authority to hear and determine what was due on certain claims, and it was held that the power exercised by it was not so far judicial in character that the supreme court could take cognizance of an appeal provided for in the statute. *Wilson v. Price-Raid Auditing Commission*, 31 Kan. 257, 1 Pac. 587. In *Re Sims*, 54 Kan. 1-4, 25 L. R. A. 111, 37 Pac. 135, Mr. Justice Allen, speaking for the court, said: "The single question presented for our consideration is whether that portion of the statute which authorizes the county attorney to punish as for contempt is in violation of the Constitution of this state. Nothing is more firmly fixed in the governmental systems of all English-

speaking countries than the division of powers between the three great departments of government,—the executive, legislative, and judicial. The question before us is whether the legislature has power to confer on an executive officer charged with the duty of searching out violations of the law, inquiring into facts, instituting and carrying on prosecutions for violations of the criminal laws of the state, the power, at the same time, and as ancillary to the performance of his duties as a prosecuting officer, to commit persons to jail as for a contempt of his authority. . . . It is sought to distinguish the case before us from those cited because of provisions in the Constitutions of Wisconsin and Indiana with reference to the separation of executive and judicial powers. We think, however, that in our Constitution these powers are as clearly separated as though the framers of the Constitution had said so in terms. It needs but a suggestion to show that the combination of executive and judicial powers may become tyranny at once. The advancement in the science of government made in modern times is due to the separation of the three great co-ordinate departments. If the legislature may confer on the county attorney one of the highest and most distinctive attributes of judicial power,—that of punishing for contempt,—to aid him in ascertaining from witnesses the facts with reference to violations of law, might the legislature not also confer on any attorney the power to examine witnesses in civil cases in the same manner, and to commit them for contempt if they refuse to answer his questions? Might it not also give to any executive officer, from the governor down, the power to subpoena witnesses to inform his judgment, and to aid him in any executive decision or determination? And, if the rule is established, can it be doubted that the division between executive and judicial offices will be completely broken down, and all constitutional barriers removed from those forms of oppression which have always attended this combination? . . . This is a commingling and confusing of executive and judicial functions in a manner incompatible with the Constitution, obnoxious to its whole spirit and to the spirit of free institutions, and the act to that extent is void." If the legislature is devoid of power to confer judicial functions upon executive officers, is there not the same lack of power to grant legislative and executive authority to a judicial tribunal? Mr. Justice Allen, in this opinion, does not even suggest that the power conferred upon the county attorney might be lodged in him as incidental to his executive duties or in aid thereof. In the same case Mr. Justice Johnston, in a concurring opinion, said: "No case has been sustained, however, where the new duties conferred upon an officer were incompatible with those already imposed by such office. . . . It is not within the power of the legislature to make a judge an arbiter in his own cause, and to give an attorney for one of two adverse parties the power to

determine the controversy is wholly inconsistent with our system of jurisprudence." In *Auditor of State v. Atchison, T. & S. F. R. Co.* 6 Kan. 505, 7 Am. Rep. 575, a statute prescribed the manner in which the property of railroads and other corporations should be assessed for the purposes of taxation, and one of the sections provided: "The county clerks of the several counties in which any railroad company now has, or hereafter may have, its track and roadway, or any part thereof, shall constitute a board of appraisers and assessors for the property of said railroad company." Laws 1869, chap. 124, § 2. There was a provision for an appeal to the supreme court from the assessments affixed by said board of appraisers. An appeal taken was dismissed upon the ground that assessment and taxation were legislative powers, and that to confer upon this court the power of review over a decision of said board of appraisers and assessors was an attempt to confer legislative functions upon a judicial body. Referring to the legislative and judicial departments, Kingman, Ch. J., speaking for the court, on page 507, 7 Am. Rep. 578, said: "The two are separate and distinct departments of government, each having its appropriate sphere of action, and each clothed with powers to execute the duties pertaining to its own functions; and when each confines itself within the sphere of its constitutional power there is less danger of that peril pointed out by an eminent jurist when he says in reference to this matter: 'There is an inherent and eternal difficulty in confining power of any kind within its proper limits. This general rule holds eminently true in regard to legislative and judicial bodies.' Sedgw. Stat. & Const. L. 217."

The power to fix rates and classifications is without doubt conferred upon the court of visitation by the terms of the law under consideration. By § 24, upon the hearing of an information alleging unreasonableness in any rate for the transportation of any article or schedule of articles "between given points" on its line, if the courts shall deem it probably unjust that such rate or schedule alone should be changed without changing or revising the entire schedule as to such articles "over the entire line of the company," the court may order the information to be amended so as to bring such entire schedule before it for consideration, and proceed to hear the complaint. Thereon, under § 28, it is authorized to find generally as to the reasonableness of the charges at issue, and "thereupon enter a decree in accordance with its findings and decisions, adjudging and decreeing what are reasonable rates for each and every charge and service at issue in the case and perpetually enjoining the defendant from demanding, charging, or receiving any other or different rate or charges than such as are by the decree determined to be reasonable. The decree shall embody a complete schedule of the charges adjudged to be reasonable and the classification of freight applicable to and necessary for the

explanation thereof." By § 32, after the promulgation of such order or decree, if the railroad company affected shall refuse to obey the same for thirty days, the court may seize the whole or any part of the company's property, and appoint a receiver to take possession and charge of the same, to operate the road, and carry the order or decree into effect. It will be noticed from this that the fixing and adjustment of rates and classification are not necessarily based upon the complaint of the injured shipper. To illustrate: In the case at bar Mr. Robison complained of excessive charges for the shipment of live stock from Eldorado to Kansas City, Kansas, a distance of 200 miles. If the court of visitation had taken up the information of the state solicitor based on this complaint, and deemed it probably unjust that the rate complained of for transportation of stock from Eldorado to Kansas City, Kansas, should be changed, without changing and revising the entire schedule of such freight over the entire line of the company, it could order the information to be amended to bring such entire schedule before it for consideration. Its consideration of the entire schedule is not solely for the purpose of fixing a reasonable rate on stock between the points named over the line of the railway, and of which the shipper complains, but for the more extended purpose of fixing a schedule for such articles over the entire line of the company in Kansas, and when so fixed and promulgated such rates become as effective and binding as they would be between the points mentioned in Mr. Robison's complaint. Thus we have the court of visitation, on its own motion, without complaint from any shipper, bringing before it for change and revision the entire schedule of freight rates over the whole system in Kansas of a great railway company. Whatever characterization may be given of the power exercised in determining what is a reasonable rate for Mr. Robison on his stock from Eldorado to Kansas City, Kansas, it cannot be said that by such process and under such proceeding the decree promulgating a body of rates over all other parts of the road than that existing between the towns named can be other than the exercise of power conferred by the Constitution upon the legislature. The statute under consideration is skillfully constructed to confer legislative power upon the court of visitation to fix rates. This deposit of authority, when exercised, is made to take the form of a decree in chancery; indicating that it is the result of a decision after a contest in court between a plaintiff and defendant. In *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 682, 28 L. ed. 297, 4 Sup. Ct. Rep. 192, it is said: "A court of chancery is not, any more than is a court of law, clothed with legislative power. It may enforce in its own appropriate way the specific performance of an existing legal obligation arising out of contract, law, or usage, but it cannot create the obligation." This tribunal possesses the extraordinary power of pro-

claiming in its decrees in a suit, in the name of the state (which is not interested as shipper) against the railroad company, schedules which are made conclusive in the future. And any future controversy which might arise between the shipper and the railroad company has thus been prejudged and determined. Here is found a combination of the legislative and judicial functions,—the legislative power of fixing a schedule of maximum rates in respect to services to be rendered in the future by the railroad company to a private shipper, and the judicial power by which a rule for the first time promulgated by that court as to what shall be reasonable rates, by decree and execution thereof, is enforced upon the railroad company, so that, when a controversy does actually arise between a shipper and a railroad company as to whether a charge for the service performed be reasonable or not, such controversy has been prejudged and settled, not in an action between the parties themselves, but in a proceeding in which the state has undertaken to prejudge and determine this question, and settle the rule of conduct to be binding upon the railroad company as to future controversies with private persons. In the usual process of making laws and providing for their enforcement, there is an interim between their enactment and their execution, affording opportunity for thought and preparation by persons affected. Here no time is lost. When a freight rate is established by this court, it goes forth with judicial sanction of reasonableness stamped upon it, and by a chancery decree a fixed rate is promulgated, and simultaneously its fairness judicially determined. Thus the victim first learns of the existence of law by reading a decree enacting it, in which he is condemned for its infraction. In *Nebraska Teleph. Co. v. State ex rel. Yeiser*, 55 Neb., on page 637, 76 N. W. 174, the following pertinent language is used: "Fixing the compensation which public-service corporations may charge for services to be rendered by them is legislating. It is lawmaking. The power of the courts is limited to declaring what the law is, and they are precluded by the Constitution from performing legislative functions; and though the courts of the land have from time to time declared laws fixing the compensation which public-service corporations might charge for services to be rendered by them void, because the compensation fixed by the law was unreasonable, in that the enforcement of the statute would confiscate the corporation's property, and thereby deprive it of its property without due process of law, we know of no court which has ever claimed that it had authority to determine what compensation would be a reasonable one for a service to be performed by such corporation."

Counsel for petitioner do not seem to question the rule that the establishment of freight rates is a legislative prerogative. Yet, as we understand them, they contend that this establishment may be accomplished through the decrees of a judicial tribunal in 49 L. R. A.

furtherance of and incidental to granted power to determine what are reasonable rates. In other words, admitting that to decide what is a reasonable rate is a judicial power, they argue that when a court determines this it may proclaim its findings in respect thereto, and this declaration is binding, not only upon parties to the inquiry, but upon all other parties who may thereafter be affected. Conceding that courts cannot legislate, they insist that courts may do that which in legal effect is nothing more nor less than legislation. It is one thing to determine whether a freight rate is reasonable, in a controversy between a shipper and a carrier, and another thing to decide, at the suit of the state or a private party, what shall be charged in the future for such services. A decision made in the first case might be a precedent when a similar controversy subsequently arose; but the promulgation of the first decision, however formally done by a judicial tribunal, could not have the far-reaching effect of a legislative act, for it is peculiarly within the province of the legislature to regulate future conduct. Chief Justice Marshall said: "The legislature makes, the executive executes, and the judiciary construes the law." *Wayman v. Southard*, 10 Wheat. 1, 6 L. ed. 253. In *Sinking Fund Cases*, 99 U. S. 700-761, *sub nom. Central P. R. Co. v. Gallatin*, 25 L. ed. 496-516, Mr. Justice Field said: "The distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it." In *Norwalk Street R. Co.'s Appeal*, 69 Conn. page 594, 39 L. R. A. 800, 37 Atl. 1086, Hamersley, J., uses this language: "One controlling consideration in deciding whether a particular act oversteps the limits of judicial power is the necessary inconsistency of such acts with the independence of the judicial department, and the preservation of its sphere of action distinct from that of the legislative and executive departments. A main purpose of the division of powers between legislature and judicature is to prevent the same magistracy from exercising in respect to the same subject the functions of judge and legislator. This union of functions is a menace to civil liberty, and is forbidden by the Constitution. There is no intrinsic difficulty in recognizing a plain infraction of such prohibition." Judge Cooley, in his *Constitutional Limitations* (page 108), notes the distinction between legislative and judicial power, and says: "The difference between the departments undoubtedly is that the legislature makes, the executive executes, and the judiciary construes the law." And it is said that that which distinguishes a judicial from a legislative act is that the one is a determination of what the existing law is, in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be,

for the regulation of all future cases falling under its provisions."

Counsel for the defendants say in their brief: "The great purpose of the act was to create a tribunal for the purpose of determining questions of general interest by judicial methods." The matter of general interest mentioned, as evidenced by the proclamation which called the special session of the legislature together, was the establishment of maximum freight rates over the railways of the state, which, as before stated, the governor informed the senate and house was a legislative question. In *Western Union Teleg. Co. v. Myatt*, 98 Fed. Rep. 335-354, Hook, J., says: "In the case under consideration it seems clear, not that the members of the court of visitation are representative executive officers of the state, but that they are the direct and active representatives of the legislative department. It would certainly be as inconsistent with our system of jurisprudence to empower them to act judicially in matters whereof they had legislative or administrative cognizance, as it would be to confer judicial powers upon an executive officer." The mayor and council of cities of the first class in this state are granted power to fix the rate of carriage of persons, drayage, and transportation of property other than by railroads within the city. In some cases the mayor and council are invested with judicial power. *Bland v. Jackson*, 51 Kan. 496, 33 Pac. 295. All ordinances must be reasonable, and whether such ordinances are reasonable is a judicial question, to be determined by the court. *Kansas City v. McDonald*, 60 Kan. 481, 45 L. R. A. 429, 57 Pac. 123. If such mayor and council could be invested with power to pass an ordinance fixing the maximum rate to be charged by hackmen and draymen within the city, and at the same time judicially determine that rates so prescribed and fixed by such ordinance were reasonable, we would have a case parallel to the one at bar, presenting a confusion and commingling of legislative and judicial power not to be tolerated under a democratic form of government.

Whether certain powers mentioned above, other than judicial, conferred by statute upon the court of visitation, are strictly legislative, administrative, or ministerial, it is unprofitable to inquire. It is enough to say that they are not judicial powers, and when that fact is determined they fall outside of the boundary lines to which the functions of courts extend. In the case of *Western U. Teleg. Co. v. Myatt*, 98 Fed. Rep. 335-354, the circuit court of the United States for the district of Kansas, by Hook, District Judge, has considered fully the questions presented in the case at bar; and in an able opinion the learned judge, after a review of many authorities, only a part of which we have cited, reached the same conclusion at which we have arrived. Counsel for complainant, Robison, frankly state in their brief that "if the establishing of schedules of charges to be made for services to be performed in the future is classed as purely legislative or ad-

ministrative in its character, then we concede that the court of visitation, if it is a court, could not be vested with any such power." And they further concede that, where the same act which creates a tribunal also attempts to vest it with these separate and independent powers (and it is evident that the legislature would not have created such a tribunal for the exercise of one class of such powers only) the whole act must fall, because of the invalidity of the inseparable part. The best method for the determination of legislative intent is to confine the search to the law itself. If a statute is unconstitutional in a part which is separable and independent and can be eliminated, courts sometimes lop off the obnoxious provisions, leaving the remainder to stand. Mr. Justice Brewer, in *Central Branch Union P. R. Co. v. Atchison, T. & S. F. R. Co.* 28 Kan. 453-460, states the rule summed up from the highest authorities as follows: "The legislature never enacts laws upon the supposition that one part of them is in conflict with the Constitution and must fail. It always proceeds upon the supposition that all that it does is within its constitutional power. Hence it never in terms says, that, if one portion of its statute fails, the other portion must also fail, nor that it rests one part upon the supposed validity of another part. It legislates as if all that it attempts to do was within its constitutional power; and when, in pursuance of its constitutional duty, the court ascertains that one part of its legislation conflicts with the Constitution and must fail, the inquiry is not whether the balance of the statute is said by the legislature to depend and rest upon the unconstitutional part, but whether, in the nature of things, and by reason of the evident interdependence of the two, one upon the other, the courts can fairly say that the legislature intended the two to stand together as a single entity, the one dependent upon the other, or the one an inducement or compensation for the other, or the two together making a single compact and harmonious whole; and, whenever that appears, then the unconstitutionality of either invalidates both."

We think that, by the several provisions of the statute under consideration, legislative, judicial, and administrative powers are so inextricably interwoven and bound up together as to render their separation impossible. There is absolute confusion in the law, and obliteration of all dividing lines. One kind of power is fused with and welded upon another. We must therefore hold that said court of visitation is wholly without that authority and jurisdiction which the legislature appears to have intended to confer upon it. We concur in the judgment of the judges of that court in their refusal to act in the matter presented to them, for the reason that rate-making is a legislative and administrative function, incompatible with judicial power. We are not unmindful of the rule which obliges us to uphold legislative acts unless their provisions clearly vio-

late some constitutional requirement, and that a doubt upon that question upholds the law. Where one department of government, however, having functions peculiar to itself, attempts to augment its power or extend its prescribed and legitimate sphere of operations beyond the boundaries marked out by the Constitution, we cannot shrink from the duty of defining those limits and obstructing such encroachment, in a proper case, according to our best understanding, in the light thrown upon the question by statesmen, judges, and lawyers who have considered, spoken, and written upon the subject of constitutional limitations of power. Despotism begins when the executive, legislative, and judicial departments of government cease to be independent of one another, and the tyrant exercises without check the powers of the three united.

The peremptory writ of mandamus will be denied.

Johnston, J., concurs.

Doster, Ch. J., dissenting:

I dissent from the judgment of the majority of the court in this case, and dissent from much that is said in the opinion of Mr. Justice Smith. In expressing my non-concurrence, I do not wish to be understood as affirming beyond all question the validity of the statute called the "Court of Visitation Act," in all its details, nor even in its general scope and design. No particular parts of the act have been assailed, except as subsidiary to its main provisions, and as inclusive in the general whole. Consequently I have not taken the trouble to ascertain whether particular portions of it may not be repugnant to the organic law. This might be the case, and yet the substantive part of the enactment be capable of separation from the remainder, and entirely within constitutional limits. The question whether the act in its essential provisions is violative of the fundamental law must be resolved, in my judgment, in its favor, because of the grave doubts involved in the subject, if for no other reason. I have not undertaken to satisfy myself as to its constitutional validity. It is sufficient for my purposes that reasonable doubts upon the subject exist. That a reasonable doubt as to the repugnance of a statutory enactment to the Constitution of the state determines the decision in favor of the statute is a rule to which the courts make constant reference, and by which they profess to be bound. Cooley, Const. Lim. 6th ed. 216. Unfortunately the declaration of this rule is often a mere profession, and not an actuality of performance. A judicial decision which requires a lengthy and labored argument to clear away all doubts as to the constitutional validity of a legislative enactment is one which belies all professions of adherence to the rule. If a case of constitutional invalidity is clear and free from doubt, the ordinary mind can be led to a positive conclusion without following to any great length the involved and sinuous ways of legal metaphysics. With much respect to
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my associates, I think they have succeeded only in involving the law in doubt.

The opposition to the act under consideration is based upon the theory of the distribution of governmental powers into the three classes, called "legislative, judicial, and executive," and the nonassimilation of one with the others. There is no disposition to question such classification of powers, nor the necessity of excluding public officers charged with the execution of one of them from the domain of the others. Without admitting that the court of visitation act produces an interblending of separable powers, I wish to say that in the practical affairs of government there is not and cannot be any such thing as a clearly-defined and complete separation of such powers. There is not and cannot be any such thing as a legislature which wills and ordains, and nothing else; a judiciary which interprets and decides, and nothing else; and an executive which enforces, and nothing else. The metaphysical distinction between the spheres of will, judgment, and action cannot be applied in the domain of political science. In the practical affairs of government, the distinctions between legislator, judge, and executioner are speculative and doctrinal, rather than actual, and the lines of demarcation between them vague and fanciful, rather than real. There are points at which the functions of the one assimilate so closely to the others as to be impossible of detection and separation. The most that can be done is to recognize the theoretical classification made, and preserve in general outline the distinction drawn. "Modern political science has, however, generally discarded this theory [the distribution of governmental powers], both because it is incapable of accurate statement, and because it seems to be impossible to apply it with beneficial results in the formation of any concrete political organization." Goodnow, Comparative Administrative Law, 20. See also Wilson, Congressional Government, 285-306; Stevens, Sources of the Constitution, 47; Von Holst, Const. Hist. 67, 68.

A most striking instance of the interfusion of the separable powers of government was furnished by the act of Congress of 1804, providing for the government of the territory of Louisiana. By § 12 of that act the governor and judges of the territory of Indiana were empowered to enact, promulgate, and administer a code of law for the government of the new territory. The judges were not only authorized to assist in the making of the laws, but were authorized to judicially administer them when made, and were further authorized to perform the executive duty of making appointments to the inferior judicial offices. Nor are the views as above expressed those of political theorists only. They are shared by the courts as well. "The position that a legislature cannot constitutionally perform a judicial act is supported by no authority, nor has it any reason in public policy or convenience. On the other hand, it is contradicted by legislative usage and the highest judicial decisions. It is

true, as has been argued by the plaintiffs, the Constitution of Pennsylvania divides the powers of government under three general heads of legislative, executive, and judicial; that it ordains that 'the legislative power of the commonwealth shall be vested in a general assembly, which shall consist of a senate and house of representatives;' that 'the supreme executive power shall be vested in a governor,' and that 'the judicial power shall be vested in a supreme court,' etc. This, however, is only a declaration of the general system or theory of our government, and was never intended to fix exact and impassable limits to each department. There are things necessary to be done in the administration of the government, of a character so mixed and blended, partaking of the elements of all these divisions of power, that we could not know to which to assign it. It could not be exclusively claimed by either." *Livingston v. Moore*, Baldw. 449, Fed. Cas. No. 8,416. Mr. Justice Johnston, of this court, in his concurring opinion in *Re Sims*, 54 Kan. 11, 25 L. R. A. 113, 37 Pac. 138, remarked: "I am unable, however, to sustain the position of the petitioner, and hold that the vesting of judicial power in an executive officer, and requiring him to perform both executive and judicial functions, is a sufficient objection to the statute. It is highly important to separate the legislative, judicial, and executive functions, and that the officer of one department should not exercise the functions conferred upon another. Under our system, however, the absolute independence of the departments and the complete separation of the powers is impracticable, and was not intended. 'It is true, with some exceptions, that the legislature cannot exercise judicial or executive power, that the courts cannot exercise legislative or executive power, and that the executive department cannot exercise legislative or judicial power; but it is not true that they are entirely separate from each other, or independent of each other, or that one of them may not in some instances control one of the others.' *Martin v. Ingham*, 38 Kan. 654, 17 Pac. 162. The governor has been vested with some judicial functions, and the legislature acts judicially when it tries a charge of contempt and adjudges punishment therefor. Ministerial duties have been placed upon courts; and, while scrupulous care should be used to prevent an officer of one department from intruding to any extent upon the duties conferred upon an officer of another department, nothing in our state Constitution, as there is in that of some other states, prevents the vesting of more than one function in a single individual. Illustrations of conferring more than one of these powers upon the same person are numerous. It has been held that a mayor of a city of the second class might, while acting as mayor, exercise the powers of a court, although the statute did not in terms create him a court. *Prell v. McDonald*, 7 Kan. 426, 12 Am. Rep. 423. Judicial powers have been conferred on county commissioners and coroners, whose duties are mainly ministerial. Probate

judges, whose duties are mostly judicial, have had conferred upon them many ministerial duties, and legislation giving such powers has been upheld. *Re Johnson*, 12 Kan. 102; *Intoxicating-Liquor Cases*, 25 Kan. 758, 37 Am. Rep. 284. Other instances might be cited, but these are sufficient to show that the legislature may confer judicial powers upon an executive officer, provided such duties are not inconsistent with those required of such officer."

Nor is the lodgment of dual and even tripartite governmental powers in a single tribunal lacking in illustration among the decided cases. Indeed, the decisions in which it has been allowed are almost as numerous as those which declare the general theory of distributive powers. In *State v. Young*, 3 Kan. 445-448, it was held that, under the organic act of the territory of Kansas before its admission as a state, municipal courts for the enforcement of municipal regulations might be created, although by § 27 of such organic act the judicial power of the territory was vested in a supreme court, district courts, probate courts, and justices of the peace. A similar ruling was made in *People ex rel. Atty. Gen. v. Provines*, 34 Cal. 520. In that case it was held that one holding the judicial office of police judge of the city and county of San Francisco might at the same time hold and perform the executive office of police commissioner of the city and county. The reason for this holding, and also that of *State v. Young*, 3 Kan. 445, 448, was that the effect of the distributive clauses of the Constitution was confined to the central government, and did not extend to the minor depositaries of power. In *Hovey v. State ex rel. Carson*, 119 Ind. 395, 21 N. E. 21, it was held that, while appointments were in their nature executive acts, they might nevertheless be exercised by the legislature, as to certain of the managing officers of the charitable institutions. In *For v. McDonald*, 101 Ala. 51, 21 L. R. A. 529, 13 So. 416, a similar ruling was made. In *People ex rel. Longenecker v. Nelson*, 133 Ill. 565, 27 N. E. 217, it was held that a power given to the judges of the circuit and county courts to make certain appointments to office might be rightfully exercised. In *Callen v. Junction City*, 43 Kan. 627, 7 L. R. A. 736, 23 Pac. 652, it was held that the statute which vested in the judge of the district court the power to determine as to the advisability of making additions to the territorial limits of cities was not unconstitutional, as being a delegation of legislative power to a judicial officer. The same decision was made in *Huig v. Topeka*, 44 Kan. 577, 24 Pac. 1110. In *Lynch v. Chase*, 55 Kan. 367, 40 Pac. 666, it was held that where the proceedings to remove the incumbent of a public office involved the examination of facts and the exercise of judgment and discretion, and although the power to hear and determine was in that, as in other cases, of a judicial nature, it was not judicial in the sense that it belonged exclusively to the courts, and therefore that it might be con-

ferred upon and exercised by the governor or other proper executive officer.

The books abound in similar decisions. I have selected those above cited at random. I have done so, not upon the supposition of their direct bearing upon the question for decision in this case, but to illustrate the frequency with which the theoretical separability of the powers of government is repudiated, or at least denied application. I grant that these cases do not establish the proposition that powers, both judicial and legislative, were rightfully conferred by the court of visitation act, no more than the cases cited in the majority opinion establish the proposition that the powers conferred by that act were both legislative and judicial, and therefore impossible of constitutional exercise. However, the cases I cite do establish what I think is a vital point in this controversy, namely, that a department of government, in the execution of a power essentially belonging to it, may (indeed, often must) administer some of the incidents of its power in accordance with the forms and methods of the other departments. For instance, as remarked by the supreme court of Massachusetts in considering the nature of the power of city authorities to construct and remove sidewalks: "The power to determine whether public convenience requires the construction of a sidewalk, and equally so its removal, involves the exercise of judgment not administrative only; and the exercise of the power is judicial in its character, although expressed in a legislative form." *Att'y. Gen. v. Boston*, 142 Mass. 200, 7 N. E. 722. Many of the cases hereafter cited will further illustrate this proposition.

The decision of my associates is based upon the assumption that the power to declare a schedule of railroad traffic charges is a legislative power. I deny that such is true, in the sense in which the claim is made, and in the sense in which it is necessary to make it in order to reach the conclusion at which they have arrived. There is not a single case in the books giving countenance to the claim as made. On the contrary, there is not a case which in terms or in its *rationale* does not decide or give countenance to a different theory. The power to declare a schedule of railroad rates is legislative only in the sense that the subject-matter of railroad rates is within legislative jurisdiction. The making of the rate itself is not a legislative duty, but, on the contrary, may be committed to an inferior tribunal or body, precisely as was done in the act under consideration. If the making of a schedule of railroad rates is the exercise of a legislative power, it must be, therefore, exercised by the legislature, and cannot be delegated. But it can be delegated. It has been delegated, and legislative acts delegating the power have been in every instance upheld. *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 630, 6 Sup. Ct. Rep. 334, 1191; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 14 Sup. Ct. Rep. 1047; *Atlantic Exp. Co. v. Wilmington & W. R. Co.* 111 N. C. 463, 18 L. R. A. 393, 4 Inters. Com. Rep. 294, 16 S. 40 L. R. A.

E. 393; *McWhorter v. Pensacola & A. R. Co.* 24 Fla. 417, 2 L. R. A. 504, 5 So. 129; *Georgia R. Co. v. Smith*, 70 Ga. 694. There are numerous other cases to the like effect, and none to the contrary. There is a difference between the power to make a law, and the power to adopt and enforce rules and regulations to effectuate the policy or accomplish the purposes of the law. The former is legislative, and cannot be delegated. The latter is the subject of constant exercise by inferior tribunals clothed with mixed legislative, judicial, and executive authority. While, therefore, the legislature, by virtue of its general authority over the subject of railroad traffic charges, may make a schedule of rates, the power to do so is not of that essential and inherent legislative character which forbids its exercise by some other tribunal thereunto lawfully authorized. The concrete question now presented to us is, What, of necessity, must be the nature and functions of the tribunal to which the power is delegated? Must the agency be, of necessity, like the principal which created it,—legislative in character and methods,—or may it be judicial in its nature and attributes, or may it be a combination of both? I have yet to hear a reason why the legislature may not employ judicial agencies in the ascertainment of the reasonableness of a schedule of traffic rates. To the unconditional exercise of legislative authority over the subject of transportation charges there is but one limitation. The rates fixed, whether by direct action of the legislature, or by a commission or other tribunal created by it, must be reasonable to the carrier. They must not be so low as to prevent the carrier earning a reasonable income, and thereby amount to a deprivation of property without due process of law. They must not be confiscatory, as it were. This is not only the settled rule, but the just decision of all the courts. The converse of this proposition is equally true, and, so far as judicial enunciation is concerned, is a far older rule. *Johnson v. Pensacola & P. R. Co.* 16 Fla. 623, 26 Am. Rep. 731; *Hutchinson*, Carr. 2d ed. § 443. From the earliest time the rule has been that the charges of a common carrier must be reasonable, and from the earliest time the question as to the reasonableness of the carrier's charges has been a judicial one. In the early days, before the business of transportation had assumed the proportions which now exist, and before it came to be conducted by the agencies now employed, the question as to the reasonableness of a carrier's charges was determinable with comparative ease and certainty in the particular cases in which it arose. The problems involved in it were simple. Transportation was carried on by the use of vehicles drawn by animals over the free highways, or for limited distances in small vessels of inexpensive character. The factors of the problem were few in number and easy of comprehension. Conducted as the carriage of goods now is over lines of railway hundreds, perhaps thousands, of miles in length, and requiring thousands of men and millions of

money to safely and expeditiously transact it, and vitally affecting as it does every member of the body politic, it is impossible of judicial regulation in the matter of reasonableness of charges through the determination of particular cases as they arise. In the settlement of every rate questioned are involved matters of original cost and continued maintenance, of the competition of rival lines, of distance, of long and short hauls, of expense of train service, of taxation of property, of car accounting with other roads, of classification of goods, of responsibility as warehouseman, of insurance against negligence, and a hundred or more others which in the first instance are only known to and appreciable by the railroad expert. Every one of these matters is involved in the problem of rate-making between any two given points. The determination of the reasonableness of the rate upon live stock, for instance, between the two points mentioned in these proceedings, Eldorado and Kansas City, Kansas, is no less complicated and difficult than is the determination of the reasonableness of a general freight schedule upon all classes of goods from and to all other points. The determination of the one problem as between the two points practically determines the same problem as between all other points. The factors involved are essentially the same. To impose upon a shipper the obligation of determining in his own interests and at his own expense the reasonableness of a freight charge as to any particular shipment of goods, involving as it does the consideration of questions which tax the best brain of the world, and to deny him relief unless he will do it, would be an unspeakable outrage. It is not done any longer. It is not undertaken any more. Thirty-five years have elapsed since the first railroad entered upon Kansas soil. During that time not a single common-law controversy over the reasonableness of railroad charges has reached this court. I doubt whether any have been brought in any of the courts of the state. The common-law rule which allowed them to be brought as particular instances of claimed overcharges occurred, while still in existence, no longer has application according to common-law methods. To refer an aggrieved shipper to the common-law remedy is like holding the word of promise to the ear, and breaking it to the hope. I claim that the common law, while still requiring reasonableness of charges by the carrier, no longer undertakes the adjustment of particular disputes as they arise, but it aggregates such disputes, and settles them in a judicial controversy, to which the public is a party on the one hand, and the carrier a party on the other; that is, I claim that the rule for so doing is in process of evolution through the adjudications of the courts. I grant that no adjudication directly declarative of such rule has been made, but I insist that the logic of every recent decision (and, among the number, all those cited by Mr. Justice Smith) furnishes material for an induction of the rule, and inevitably points to a final general-

ization as I have endeavored to make it. Either that is true, or the common-law jurisdiction of the courts to determine the reasonableness of railroad traffic charges must be abandoned as no longer tenable. Every decision cited in the majority opinion, and notably those made by the Federal courts, is assertive of the rule that the reasonableness of a carrier's charges, in its last analysis, is for the courts. These decisions have not been made in controversies between shipper and carrier, nor have they been made in controversies as to the reasonableness of a particular charge, but they have been made in controversies in which the carrier was a party on the one hand, and the state a party on the other, and they have been made as to general schedules of traffic rates. Furthermore, they did not adjudicate as to past transactions. They adjudicated as to transactions *in futuro*. They did not merely determine that as to past transactions or past shipments the rates fixed by legislative enactment of the states or commissions authorized by the states were unreasonably low. They determined that as to future transactions—as to future shipments—the rates so fixed would continue to be unreasonably low so long as the existing circumstances involving the carrier remained the same.

In the case of *Ames v. Union P. R. Co.* 4 Inters. Com. Rep. 835, 64 Fed. Rep. 165, it was decided by Mr. Justice Brewer that the traffic rates as fixed by the state of Nebraska were unreasonably low, in view of the then condition of the railroad business in that state, and hence that the further enforcement of the legislative schedule should be enjoined, but that jurisdiction of the injunction proceeding would be retained, to the end that, as future traffic might justify, the injunction order could be modified, and the reinstatement of the statutory schedule of rates be allowed. Upon appeal to the Supreme Court of the United States [169 U. S. 550, 42 L. ed. 850, 18 Sup. Ct. Rep. 418], it was ruled that, "if the circuit court finds that the present condition of business is such as to admit of the application of the statute to the railroad companies in question without depriving them of just compensation, it will be its duty to discharge the injunction heretofore granted, and to make whatever order is necessary to remove any obstruction placed by the decrees in these cases in the way of the enforcement of the statute." It is idle—it is puerile—to talk about the effect of this and other like decrees operating *in præsentia* only, and as to past transactions. They project themselves into the future, and were intended to do so. They operate upon things to be apprehended, and prevent their occurrence, the same as do all judgments restrictive of future action. The claimed difference between nullifying a schedule of unreasonably low rates without fixing a reasonable one in its stead, and nullifying a reasonable high one by fixing a reasonable one in its stead, will be further noticed presently. Now, decisions like those above noted have held that schedules of rates fixed by or under legislative authority were

and would be, under prevailing conditions, unreasonably low, and they were made in controversies in which the authorized agents of the general public were allowed a standing in court to defend the rates fixed by them. I demand to know by what reason, in the case of a general schedule of rates fixed by the railroad companies themselves, which the public claim are and will continue to be too high under prevailing conditions, that public may not have a standing in court to likewise adjudicate the question. The business of railroad transportation is of vital public concern. It is clothed with a public interest. It is not *juris privati*. That was decided in the case of *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, and has been repeated in a multitude of decisions since that one was made. If, in virtue of the private interest which railroad companies have in the maintenance of their right to charge reasonable tolls they can compel the state to litigate with them as to whether the rates fixed by law afford to them less than a fair compensation, and if, in virtue of that right, they can secure an adjudication of prospective application in their favor, upon precisely the same ground, ought the state to be allowed to litigate the public interests of all its citizens against the private interests of the carrier companies in the maintenance of an unreasonably high schedule of rates, and to secure in its favor a like decree of prospective application.

I think the rule of the rightfulness of an interposition by the state to secure a judicial adjudication of the reasonableness of a schedule of railroad rates was broadly intimated by the majority of the judges of the Supreme Court of the United States in *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 10 Sup. Ct. Rep. 462, 702, 3 Inters. Com. Rep. 209. That was one among the first of the cases holding that the reasonableness of a state schedule of railroad rates was, in its final aspect, a judicial question for the courts. In the majority opinion, on page 458, 134 U. S., page 981, 33 L. ed., page 220, 3 Inters. Com. Rep., and page 467, 10 Sup. Ct. Rep., Mr. Justice Blatchford says: "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination." In this case Mr. Justice Miller, in a concurring opinion, laid down what he regarded as ten fundamental legal propositions, as bases of action by the courts in adjudicating controversies between railroad companies and the public over the reasonableness of traffic charges. The third, fourth, sixth, and seventh of these propositions indicate the views which I think ought to be, and finally will be, the controlling ones. They are as follows: "(3) Neither the legislature, nor such commission acting under the authority of the legislature, can establish arbitrarily, and without regard to justice and right, a tariff of rates for such

transportation which is so unreasonable as to practically destroy the value of the property of the persons engaged in the carrying business, on the one hand, *nor so exorbitant and extravagant as to be in utter disregard of the rights of the public for the use of such transportation, on the other.* (4) *In either of these classes of cases there is an ultimate remedy by the parties aggrieved, in the courts, for relief against such oppressive legislation, and especially in the courts of the United States, where the tariff of rates established either by the legislature or by the commission is such as to deprive a party of his property without due process of law.*

(6) That the proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature or by its commission is by a bill in chancery asserting its unreasonable character, and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered. (7) *That until this is done it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method.*" The italics in the above quotations are mine. I know it does not well establish the soundness of a legal opinion to rest it upon isolated quotations from the argumentative writings of the judges, and I do not propose to do much in that way. My associates have done quite enough of it in their opinion. However, when a rule of law is in its formative stage, we may well look to such character of expressions, and even to the *dicta* of the judges, for light and guidance. But we are not left to the chance and casual thought of the courts upon the question for clear indications of the governing rule. Decisions quite clearly indicative of what the rule is, or ought to be, have been made.

An act of Congress approved June 30, 1870, authorized the construction and maintenance of a bridge over the Niagara river by the International Bridge Company, and it provided, among other things, that "all railway companies desiring to use said bridge shall have and be entitled to equal rights and privileges in the passage of the same, and in the use of the machinery and fixtures thereof, and of all the approaches thereto, under and upon such terms and conditions as shall be prescribed by the district court of the United States for the northern district of New York, upon hearing the allegations and proofs of the parties, in case they shall not agree." The bridge company and the railroad companies using the bridge could not agree, and the court was called upon, according to the act of Congress, to determine the terms and conditions of equality of right and privilege in the companies to the use of the bridge, and the terms and conditions

upon which, as to the bridge company, the railroad companies were entitled to use the structure. The case is so nearly like the one before us, and the decision of the court so nearly sustains the rule we contend for, that I quote the syllabus and a large portion of the opinion: "(1) A determination by a court, under the authority of a statutory enactment, in a case of disagreement, of the 'terms and conditions' upon which a railway company should be entitled to the use of a bridge and its appurtenances, after hearing the allegations and proofs of the parties, is not an improper exercise of the judicial function. (2) It is no less the exercise of a judicial function to prescribe a rule of conduct, or protect the existence of a right during a future period, than it is to determine whether the right has been invaded in the past. (3) When a statute refers the question of the conditions upon which an easement shall be enjoyed to a judicial tribunal for decision, after hearing the proofs and allegations of the parties, the implication is cogent that the decision shall proceed upon settled principles of law and equity, and not upon arbitrary discretion." "By the act in question Congress gave its sanction in advance, but upon the conditions that all railway companies desiring to use the bridge should have equal rights and privileges in the passage and in the use of the bridge, and of the machinery, fixtures, and approaches, 'under and upon such terms and conditions' as this court should prescribe, 'upon hearing the proofs and allegations of the parties, in case they should not agree.' The power of Congress over the subject was plenary. It exercised the power, and the International Bridge Company availed itself of the privileges, and assented to the conditions of the legislative sanction. Congress could not delegate its legislative power to any other authority, nor could it confer jurisdiction upon this court to exercise any but judicial functions: and if the act in question, in any of its provisions, contravenes these maxims of constitutional law as to those provisions, it is inoperative. But the act is not obnoxious to these objections. It devolves upon this court simply the judicial functions of determining the rights of parties when they may be brought into controversy. The rights are created and established by the act, and this is the office of the legislative department. The power to adjudicate upon these rights, to ascertain when controversy arises, their extent and value, and apply the appropriate remedy for their protection, is conferred upon the court; and this is the peculiar province of the judicial department. It is argued that the act attempts to confer upon the court the power to fix the rate of tolls which the International Bridge Company may charge, and that this is a legislative, and not a judicial function. If Congress had fixed the rate of tolls, as it had the right to prescribe the conditions upon which the franchise might be enjoyed, no other authority could have intervened to change these conditions. But suppose the act had, in terms, provided that the bridge com-

pany might charge reasonable tolls; would not this have been a complete exercise of the legislative power, and would it not have remained for the judicial department to decide, when controversy should arise, what were or were not reasonable tolls? And, if the act had provided for such a determination by a judicial tribunal, would this have been unconstitutional? It seems to me, clearly not. It is no less the exercise of judicial functions to prescribe a rule of conduct, or protect the existence of a right during a future period, than it is to determine whether the right has been invaded in the past. It is one of the common offices of a court of equity to do this." *Canada Northern R. Co. v. International Bridge Co.* 7 Fed. Rep. 653.

It is not true, as the above-cited cases and others bearing more or less directly upon the question evidence, that judicial action is confined to things in *presenti*, and cannot be made determinable of controversies to arise in the future, when the nature of the controversies can be known beforehand, and provision for their settlement can be made in advance; nor is it true that the courts cannot exercise what is called "administrative power." Administrative power, as well as I can define it, when exercised in respect to matters of public interest, is a quasi judicial power of discretionary control to effectuate a rule of legal policy. This definition is not entirely accurate or exact. It will suffice, however, as I believe, to comprehend, in general outline, cases of public concern in which the power called "administrative" is exerted. Such kind of power is in constant use by the equity courts. There is not a power conferred by the court of visitation act but what is of frequent exercise by the courts in railway mortgage foreclosure cases. While no cases of the promulgation of schedules of traffic rates by courts in the foreclosure of railway mortgages have come under my observation, it cannot be doubted, I think, that the judges in such cases have an unquestioned right to make, and through their receivers to enforce, a schedule of rates over the lines subject to their control. They have done what in principle is the same thing. In the case of *Waterhouse v. Comer*, 19 L. R. A. 403, 55 Fed. Rep. 149, and *Ames v. Union P. R. Co.* 4 Inters. Com. Rep. 619, 62 Fed. Rep. 7, it was ruled that the courts had power in railway foreclosure cases to control their receivers as to wages paid the employees operating the lines, and to that end to annul schedules of wages promulgated by the receivers, and at one time approved by the court, and to restore former schedules of wages. In the case of *Mercantile Trust Co. v. Farmers' Loan & T. Co.* 49 U. S. App. 462, 81 Fed. Rep. 254, 26 C. C. A. 383, it was said by the United States circuit court of appeals that courts of equity were charged with the performance of some duties that were administrative rather than judicial in their nature; as, for instance, whether the receiver operating a railway under process of mortgage foreclosure should renounce or adopt a contract of

lease of another railway which the mortgagor company had made before the foreclosure proceeding began. As to the question involved in the case, the court tersely stated its character as follows: "The issue in the court below presented a question of business policy, and not a question of law. The decision and order of the court were administrative rather than judicial." It is no answer to say that there is a difference between the powers of a court charged with the judicial administration of a trust, as in a foreclosure case, and its powers in other cases over which it has jurisdiction. The obligation of courts to assist in the collection of debts in mortgage foreclosure cases does not justify the exertion of any powers which may not be employed in the interest of litigants in other classes of cases. The law is the same to all suitors alike. It may be admitted that the traditional jurisdiction of courts of equity does not include the power to decree a schedule of traffic rates, except to the specific end of raising revenue from the tolls with which to discharge a creditor's lien; but the legislature, as I contend, may confer jurisdiction upon it to do so for other purposes, or in the interest of other parties. It is said there is a difference between nullifying a schedule of unreasonable rates, and decreeing a schedule of rates to be reasonable. I claim there is no difference. When a court judicially declares that a schedule of traffic rates is unreasonably low, and therefore relieves the company from the obligation to limit its charges thereby, it at the very same time, in effect, at least, decrees another schedule of rates in its stead. It decrees a schedule of reasonable rates. The common law required rates to be reasonable, and, when the court adjudges the legislative schedule to be unreasonable, it does but decree the enforcement of the common-law schedule in its stead. It does not at the time determine what is reasonable. It leaves that to future determination. Heretofore it had

been left to ascertainment in isolated and particular cases. That method is no longer practicable, as I think has been hereinbefore shown. No one, as before remarked, undertakes to resort to it, and no court will now pretend that the remedy is practicable or adequate. That the law should afford to railroad companies a remedy in the courts against an unreasonably low schedule of rates, and the right to adjudicate it as a whole, in a single controversy, but at the same time deny to the shipping public the right to abate as a whole and in a single controversy an unreasonably high schedule fixed by the company itself, would be a reproach to the administration of justice, and an outrage upon common right. Whether the power in the courts to adjudicate the question of traffic rates be called "judicial" or "administrative," it exists, in my judgment. I close with the following quotation from a recent and most philosophic and valuable work, entitled "Comparative Administrative Law," by Goodnow: "Although the general rule may be that the courts shall be confined in the main to the decision of controversies between individuals, nevertheless in many instances the needs of government make it seem advisable to intrust the courts with functions somewhat administrative in character. While this may be said of all states, it is especially true of those which have not really striven in their law to reach any clear distinction between judicial and administrative functions. Thus, in the commonwealths of the United States and England, where the exceptions to the logical adoption and application of the theory of the separation of powers are numerous, judicial officers, from time immemorial, have been intrusted with the discharge of executive or administrative functions." Page 29. I think there are no sufficient reasons for annulling the statute as has been done by my associates in their decision.

NORTH CAROLINA SUPREME COURT

N. B. FINCH *et al.*

v.

Joseph GREGG, *Appt.*

SEYMOUR-DANNE COMPANY, *Intervener. Appt.*

(126 N. C. 176.)

1. Assignment for value of a bill of lading made "to order of shipper" transfers title to the property covered thereby as

NOTE.—Rights and liabilities of the assignee of a bill of lading with draft attached as against the consignee, who does not get the goods or who finds them defective.

The decision in the main case is one of very great interest and importance in commercial law, and if followed would undoubtedly cause a revolution in commercial circles. It is to the effect that where an assignee of a draft (which was apparently a negotiable instrument) attached to a bill of lading receives payment of

against all the world except the shipper, so that the property can no longer be attached by a third person for the shipper's debts.

2. An assignee of a bill of lading with draft attached will, in case he receives payment of the draft, be subject to action for a return of the money in case the property covered by the bill does not comply with the contract.

3. Subsequent consignments covered by bills of lading with draft attached which had been assigned to the same person

the draft without any opportunity being given to the consignee to inspect the goods, he is liable to an action for the return of the money if the goods shipped are afterwards found not to comply with the contract of sale. The statement is made in the opinion that the consignee has the same right of action for damages against the assignee of the bill of lading for the defects in the goods shipped that he would have had against the consignor.

The case is very similar to that of *Landa v. Lattin Bros.* 19 Tex. Civ. App. 246, 46 S. W.

as a former one, the draft against which was paid, are subject to attachment in his hands for loss because of failure of the former consignment to comply with the contract.

4. An attachment suit may be amended so as to embrace the same cause of action against persons who have intervened to claim the property as was set up against the original defendant.

(March 13, 1900.)

APPEAL by defendant and intervener from a judgment of the Superior Court for Nash County in favor of plaintiffs in an attachment proceeding to recover damages for breach of contract in the sale of certain corn. *Affirmed* on intervener's appeal; *reversed* on defendant's appeal.

The facts are stated in the opinion.

Mr. Jacob Battle, for appellants:

When the contract of sale is executory, the

remedy of the purchaser to recover damages on the ground that the article furnished does not correspond with that contracted for does not survive the retention of the property by the vendee after discovery of defects, unless he notifies the vendor.

Reed v. Randall, 29 N. Y. 358, 86 Am. Dec. 305; *Beck v. Sheldon*, 48 N. Y. 365; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 23 N. E. 372.

In executory contracts for sale and delivery of personal property, the purchaser must give notice of any defect in the property delivered, as soon as discovered, if he wishes to hold the seller for such defect.

Sprague v. Blake, 20 Wend. 61; *Leavenworth v. Packer*, 52 Barb. 132; *Maxwell v. Lee*, 34 Minn. 511, 27 N. W. 196; *Thompson v. Libby*, 35 Minn. 446, 29 N. W. 150; *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515; *Fisher v. Samuda*, 1 Campb. 190.

48, cited in the main case, in which a bank cashed a draft drawn upon one to whom the drawer had consigned a shipment of wheat, the bill of lading being attached to the draft. The draft was presented and paid before the consignee had any opportunity to inspect the wheat, which, on examination, was found to be of inferior quality. The court held that the bank, by taking the assignment of the bill of lading, became the owner of the wheat, and responsible for the performance, and affected by the burdens, of the contract for its sale, and that the consignee could recover from it for the breach of warranty as to the quality of the wheat.

There seems to be no question but that the assignee of the bill of lading in these cases succeeded as such, and, leaving the draft out of the question, to the rights of the assignor, and to no greater rights, and that it could not have compelled the consignee to complete the contract of purchase and accept inferior goods any more than the consignor could have done. *Columbian Nat. Bank v. White*, 65 Mo. App. 677, cited in the main case, is an example of this. In that case a consignee of lumber to be sold on commission discovered, after paying the freight, that the lumber was of inferior quality, and refused to accept a draft for the purchase price attached to the bill of lading, which had been assigned to a bank which made an advance to the consignor on the faith of such bill of lading. And after waiting a reasonable time the consignee sold the lumber to reimburse himself for the freight charges paid. The bank sued him for the full amount of the draft, and the court held that it could not recover as his rights had not been disturbed or impaired by the change of ownership resulting from the assignment, and he had the same defenses as against the bank that he would have had as against the consignor.

If the bank had made the advances solely on the faith of a bill of lading, and no draft had been attached, the result reached in the main case, and in that of *Landa v. Lattin Bros.* 19 Tex. Civ. App. 246, 46 S. W. 48, *supra*, may for present purposes be conceded to have been correct, but if so it seems to have been based on a wrong ground. Both cases held that the consignee had the same right of action for damages against the assignee for the defects in the goods shipped that he would have had against the consignor; but it does not seem that the court could have intended the full effect of such a decision, as, for instance, on the amount of damages. The measure of damages against the seller in case of a breach of warranty according to many au-

thorities, would be the difference between the value of the goods if they had been as warranted, and their actual value in their defective condition. Goods which, if they had been as warranted, would, because of special circumstances such as sudden rise in value, or resales at a profit made to the knowledge of the seller, have been worth double the purchase price, may, when inspected, prove to be utterly worthless. The measure of damages against the consignor for the breach of warranty might, in that case, be much more than the consignee had paid. But on what principle can an assignee making a bona fide advancement on the faith of a bill of lading which it takes as a security, be compelled, on collecting the purchase price, to pay to the consignee much more than it has received from him?

In the cases mentioned, as the assignee bank was not an original party to the warranty, and had not even promised to assume any liability upon it, it would seem that the court's ruling, if it can be sustained at all, must be based, not on a breach of warranty to which the bank was not a party, but on the equities of the transaction, namely: that, as the assignee succeeded to no greater rights than the consignor had, and by receiving payment of the purchase price in full, it had received more than it was entitled to, and as it was paid under a mistake of fact (that is, a mistake as to the quality of the goods), and especially as the consignee had had no opportunity to inspect them, it should be required to return the excess received, under the general rule that where a payment is made under a mistake of facts it may be recovered back, although the one making the payment had the means of ascertaining the facts, if the position of the party receiving payment has not been changed in consequence thereof.

A fair measure of damages in such a case as against the assignee would seem to be the difference between the actual value of the goods and their value if they had been as warranted, not to exceed in any case the contract price.

There is, however, another principle involved in both these cases, which does not seem to have been considered by the court in either case. If the drafts were, as the reports leave us to infer, negotiable instruments. After the acceptance, or in this case the payment, of the drafts to which the bills of lading were attached the principles governing negotiable instruments applied, and as the assignee of the bill of lading was a bona fide holder of the draft the drawee could not recover back a payment made, and

The buyer must return or offer to return the article in a reasonable time after its falsity is discovered.

Smith v. Love, 64 N. C. 440.

A breach of the contract was not a breach of warranty, but a mere noncompliance with the contract that the defendant had agreed to fulfil.

Reed v. Randall, 29 N. Y. 358, 86 Am. Dec. 307.

A warranty can only exist where the subject-matter of the sale is ascertained and existing.

Benjamin, Sales, § 895.

There must be notice to the vendor, within a reasonable time, that the vendee does not accept the goods as filling the contract, or a waiver of the implied contract will be presumed.

Morehouse v. Comstock, 42 Wis. 626; 10 Am. & Eng. Enc. Law, pp. 142, 143.

If he had accepted without paying he would have been absolutely liable on such acceptance, notwithstanding a partial, or even a total, failure of consideration between him and the drawer. It would also seem that if the assignee had previously promised to accept a draft drawn on the bill of lading, or had authorized the consignor to draw on him for the purchase price, he would have been compelled to accept and pay the draft in the hands of a bona fide holder, although he discovered the defects in the goods before actual acceptance, the promise to accept being considered as an equivalent of acceptance.

This view is sustained by several cases, both in this country and in England. In *Kelly v. Lynch*, 22 Cal. 661, certain merchants had advanced money on a draft at three days' sight with bill of lading attached, and the consignor had thereafter given a second draft on such bill of lading in favor of a creditor, who indorsed it over to such merchants. The consignee was willing to accept the first draft and pay over any surplus remaining on the second draft, but was unwilling to accept both drafts, and a correspondent of the payee of the second draft accepted both drafts for the interest of such payee. The consignment proved to be nearly worthless, the consignor and the master of the vessel having been guilty of a gross fraud. An action was brought against the acceptor for the amount of the first draft, and he was held liable on the ground that there was a sufficient consideration for the acceptance, although the consignment was not as valuable as it was supposed to be,—especially as by such acceptance an acceptance on the part of the drawee was lost. The case is treated throughout as if there would have been no question whatever as to the liability of the drawee in case he had accepted the draft.

The above case of *Kelly v. Lynch* was decided on the authority of *Robinson v. Reynolds*, 2 Q. B. 196, which is stated therein to be fully in point. This case holds that a bank, to which a bill of exchange is indorsed for an advance made by it on the faith of a bill of lading for a purported consignment by the drawer to the drawee, may recover on an acceptance by the latter on the credit of the drawer and on the faith of the bill of lading which is thereupon transferred to him by the bank, although such bill of lading is forged, where the bank made no false representation in regard thereto, and knew nothing of the forgery, as the fact that there was a total want of consideration between the drawer and drawee of a bill of exchange does not affect a bona fide transferee without notice.

Thiedemann v. Goldschmidt, 1 De G. F. & J. 49 L. R. A.

It is considered sufficient evidence of acceptance that the vendee has not returned or offered to return the goods, nor notified the vendor of nonacceptance.

Barton v. Kane, 17 Wis. 38, 84 Am. Dec. 731.

The bank became the agent or trustee of the consignor to collect the price of the wheat, or corn, and apply the same to the payment of the draft.

Neill v. Rogers Bros. Produce Co. 41 W. Va. 37, 23 S. E. 707.

An agent is not liable in damages to a third person for failing to perform his principal's obligation.

14 Am. & Eng. Enc. Law, p. 873; 1 Am. & Eng. Enc. Law, p. 401.

If Finch, Richardson, & Co. had refused to pay the draft on the ground that the corn did not come up to the contract the Seymour-Danne Company could not have forced

4, 1 L. T. N. S. 50, 8 Week. Rep. 14, is quite similar. In this case a foreign factor authorized his correspondent to draw on him against a bill of lading to be shipped. The correspondent drew bills of exchange, and sent them with a forged bill of lading to his banker, who remitted the money to him. The bills of exchange were forwarded and accepted under the belief that the bill of lading was genuine. The acceptor brought an action to compel the banker to deliver up the bills of exchange, and the court refused to compel such delivery on the bank's undertaking to deliver up the bills of exchange if the decision at law should be against him. The lord chancellor held that the case was similar to that of *Robinson v. Reynolds*, and that on the merits the acceptor was liable.

In *Woods v. Thiedemann*, 1 Hurlst. & C. 478, a merchant in England received word from a merchant in Prussia that he was inclined to send him a cargo of wheat, and wished to know to what amount the English merchant would give him credit, and the latter authorized him to draw for a specified amount per quarter of wheat. The English merchant received word that a specified amount of wheat had been shipped, and that a bill of exchange had been drawn on a designated London bank. He asked his bankers to request the London bank which was their agent, to accept the bills of exchange for him, having previously stated that it would be for a large amount, and that the acceptance must be only on the strength of the bill of lading. The London Bank accepted the bills of exchange when presented by bona fide holders, and, although the bill of lading proved to be forged, was compelled to pay the same, receiving the amount thereof from such bankers who had induced it to accept. The court permitted the bankers to recover from their customer, the consignee, holding that it was not their duty, but that of the consignee, to see to the genuineness of the bill of lading, and that if he was unwilling to assume the risk he should have refused to give an order until he had satisfied himself that the goods were shipped and a genuine bill of lading issued.

In *Leather v. Simpson*, 40 L. J. Ch. N. S. 178, L. R. 11 Eq. 398, 24 L. T. N. S. 286, 19 Week. Rep. 431, 1 Asp. Mar. L. Cas. 5, a consignor notified his consignees that he would consign cotton to them. He then transmitted to a bank a bill of exchange on such consignees with a purported bill of lading attached, which was in fact forged. The bank transmitted the bill of exchange to the drawees with a memorandum that it held a bill of lading for the cotton. The

them to pay, but it could have taken possession and sold it, and held Joseph Gregg responsible for the balance due on the draft.

Columbian Nat. Bank v. White, 65 Mo. App. 679.

It was the right and the duty of the Seymour-Danne Company to intervene and assert its title to the corn, or the money which was held by the sheriff to await the determination of the attachment.

Hall v. Richardson, 16 Md. 397, 77 Am. Dec. 303.

A party claiming title to property seized under attachment may intervene at any time before final judgment.

Dodson v. Bush, 4 N. C. (Car. Law Repos.) 236; *Evans v. Governor's Creek & Min. Transp. Co.* 50 N. C. (5 Jones L.) 331.

An interplea being filed, the only issue is as to the title to the property levied on.

McLean v. Douglass, 28 N. C. (6 Ired. L.) 233; *Clark*, Code Civ. Proc. 2d ed. 9, pp. 328, 329.

Being the owner of the drafts, and, by the assignment of the bills of lading, the owner of the corn until it was paid for, it was the duty of petitioner to prosecute the claim, and, if the property was attached as the property of the drawer, to interplead, as it

did in this case, and resist the claim under the attachment.

Neill v. Rogers Bros. Produce Co. 41 W. Va. 37, 23 S. E. 705; *Broune v. Lamb*, 111 N. C. 22, 15 S. E. 1028.

An attachment takes effect only upon such interest as the debtor (the defendant) has in the property at the time of the levy.

1 Am. & Eng. Enc. Law, p. 930.

The amendment substantially changed the claim of the plaintiffs as set forth in their complaint and in the attachment affidavits.

The plaintiff cannot be allowed, under the color of bringing in additional parties, to commence a new action, when he would have failed entirely in the former one.

Pom. Rem. & Rem. Rights, § 420; *Grant v. Burgwyn*, 88 N. C. 101; *Robbins v. Harris*, 96 N. C. 561, 2 S. E. 70; *State ex rel. Clendinin v. Turner*, 96 N. C. 422, 2 S. E. 51.

Messrs. Cooke & Cooley and F. S. Spruill for appellees.

Clark, J., delivered the opinion of the court:

In January, 1899, the defendant Gregg, in Chicago, Illinois, sold to plaintiffs, Finch, Richardson, & Co., at Springhope, North Car-

olina, a bill of exchange was accepted by the consignees, and paid before maturity to enable them to obtain the cotton, after which the forgery was discovered. They then brought an action to have the money returned, but the court held that the case was similar to *Thiedemann v. Goldschmidt* and *Robinson v. Reynolds*, except that the money had actually been paid, on account of which fact there was still stronger reason for holding against the acceptor.

In *Baxter v. Chapman*, 29 L. T. N. S. 642, 2 Asp. Mar. L. Cas. 170, the acceptor of a bill of exchange with a forged bill of lading attached discovered the forgery before the acceptance was paid, and refused to pay the same unless a genuine bill of lading should be turned over to him. The court held, however, that he was liable on such acceptance, and that he could not impose such a condition of payment.

In *Hoffman v. Bank of Milwaukee*, 12 Wa'l. 181, *sub nom.* *Hoffman v. National City Bank*, 20 L. ed. 366, bills of exchange attached to a bill of lading were discounted by a bank, the drawee having previously promised the drawer to honor them. The drawee paid the bills of exchange when presented, and afterwards discovered that the bills of lading were forged, and sued to recover back the amount. The court held that money paid by the acceptor of a bill of exchange in discharge of his legal obligation as such is not paid by mistake or without consideration unless the bill of exchange was fraudulent in its inception, the consideration was illegal, or the facts impeaching the transaction were known to the holder at the time he became such, and that the fact that the acceptance was made on the faith of the bills of lading attached made no difference, where the bills of exchange were in the usual form and did not refer to the bills of lading, and the acceptance was made at the request of the drawers, and upon their representations that the goods had been shipped. The court also held that the payee who discounts a bill of exchange at the request of the drawer is regarded as a stranger to the acceptor as to the consideration for the acceptance, and if the acceptance is absolute in 40 L. R. A.

its terms, and the bill was received in good faith and for value, the payee may recover, though there was no consideration for the acceptance, or the consideration had failed; and that it was immaterial whether the bill of exchange was accepted while in the hands of the drawer at his request or after it had passed into the hands of the payee and at his request.

In *Goetz v. Bank of Kansas City*, 119 U. S. 551, 30 L. ed. 515, 7 Sup. Ct. Rep. 318, a bank discounted several drafts with bills of lading attached. The consignee after accepting and paying several drafts discovered that the bills of lading were forged, whereupon he refused to pay one draft which he had accepted, and sued to recover the amount of the drafts which he had paid. The court held that the bank did not, by discounting the drafts, or by indorsing invoices accompanying the bills of lading "for collection," guarantee the genuineness of the bills of lading, and that its right to recover on the acceptances was not defeated by the mere failure to inquire into the consideration of the draft because of rumors or general reputation as to the bad character of the drawer.

In *Young v. Lehman*, 63 Ala. 519, the consignee had written to the consignor a letter stating that the latter could, for any shipment of cotton to the former, draw on him for three fourths of the value of the cotton with bills of lading attached. A draft was drawn with a forged bill of lading attached and discounted by a bank. The consignee having been informed that a shipment had been made on which a draft had been drawn paid the draft when presented. On discovering the forgery he sued to recover back the amount of the draft as money paid under mistake. The court held that it was not the duty of the bank to see that the bill of lading was genuine, and that if it was not genuine there was simply a failure of the security for which the consignee stipulated with the drawer, and that the acceptor of a bill of exchange could not resist payment as against a bona fide holder because the acceptance was without consideration, or because the consideration had failed.

olina a car load of "good corn." Said Gregg drew a draft on plaintiffs for the price of the corn, and sold it to the Seymour-Danne Company, to which was attached the bill of lading, which was made out to his order, and which he assigned by indorsement to the purchasers of the draft. The plaintiffs paid said draft, but the car load of corn was injured, and the damage sustained thereby is the ground of plaintiffs' action. *Love v. Miller*, 104 N. C. 582, 10 S. E. 685. In May, 1899, the defendant Gregg sold another carload of corn to Finch, Richardson, & Co., Springhope, North Carolina, and also a carload to Woodward & Copeland at the same place. As with the January shipment, the bills of lading were made out to the order of shipper, who indorsed them to the Seymour-Danne Company, with a draft attached, drawn on the purchasers in Springhope. On arrival the two carloads were attached before a justice of the peace (the amount claimed being less than \$200) for the damages above stated, as sustained on the January shipment. To this proceeding Joseph Gregg alone was defendant, but the Seymour-Danne Company appeared before the justice of the peace, through their attorney, and were "allowed to make themselves parties defendant, and, intervening, they de-

fended said action." In the superior court, on appeal, the plaintiffs were allowed to amend the attachment proceedings by making the Seymour-Danne Company parties thereto. When the bill of lading, payable to order of shipper, was assigned by him, for value (*i. e.*, cashing of draft upon purchaser attached), to the Seymour-Danne Company, the latter became owner of the corn as against all the world except the shipper, as to whom the assignment was a security for the amount of the draft. *Dows v. National Each. Bank*, 91 U. S. 618, 23 L. ed. 214; *Dan. Neg. Inst. § 1734a*. Upon the arrival of the corn shipped in May at Springhope, Gregg had no interest therein which could be attached (*Emery v. Irving Nat. Bank*, 25 Ohio St. 360, 18 Am. Rep. 209), unless, possibly, it had been shown that the amount to be paid for the corn was greater than the amount for which the Seymour-Danne Company held the bill of lading as security; but that point does not arise here. But when the Seymour-Danne Company took the bill of lading on both occasions equally they took the contract of the shipper, and they stood in his shoes, with the same rights; no greater, no less. *National Bank of Commerce v. Merchants' Nat. Bank*, 91 U. S. 92, 23 L. ed. 208. The rights of the pur-

First Nat. Bank v. Burkham, 32 Mich. 328, holds that after the drawee has accepted and paid a bill of exchange they cannot recover from the payee on the ground that the acceptance and payment were on the faith of a security from the drawer which proved to be fictitious, although the payee also relied on such security, or on the ground that the payment was made under a mistake of fact. In this case the court says that the payee must in every case of discounting a bill rely on such security as he has from the drawer until the bill is paid or accepted. After that he is furnished with conclusive evidence that the drawer was authorized to draw the bill, and that it is immaterial what the payee relied on before payment or acceptance, the law leaving the risk with him, but that after such payment or acceptance the risk, if any, passes to the drawee. Although the decision in this case does not disclose what the security was, the principle involved would be the same whether it was a bill of lading or some other security.

In *Craig v. Sibbett*, 15 Pa. 238, brokers discounted a bill of exchange knowing that it was drawn against flour supposed by them to have been consigned to the drawee, the drawer having in fact procured the signature of the master to a bill of lading for flour never put on board. The bill was accepted and payment refused on discovery of the fraud. The claim was made that as the bill of lading was indorsed to the brokers as security in case of nonacceptance, they were apprised of the course of dealing, and must have known that the acceptance was on the tacit condition that the flour would be forwarded. The court, however, held that the drawee was liable on his acceptance, and that the fact that the brokers became holders of the bill before its acceptance was immaterial.

In *Randolph v. Merchants' Nat. Bank*, 7 Baxt. 458, a consignee of cotton authorized the consignor to draw on him at the rate of \$90 for each bale of cotton shipped. After a draft with bill of lading attached had been discounted for the consignor word was received to draw for 49 L. R. A.

only \$80 per bale of cotton, whereupon the discounting bank wrote to its correspondent agreeing in effect to guarantee the consignee for the excess of the draft over \$80 per bale of cotton. When the draft was presented the consignee at first refused to accept, but afterwards did so on being shown such letter and told by the vice president of the correspondent bank that in his individual opinion it guaranteed the entire draft. A sight draft discounted by the same bank was afterwards paid by the consignee when presented, and the draft which had been accepted was paid at its maturity. The consignee thereafter discovered that the bills of lading, in reliance on which the acceptances had been made, were fictitious, or at least that no cotton had been shipped, and brought suit to recover the amount paid on the drafts. In the opinion the court states that it is conceded no recovery could be had as to the sight draft or on the other draft if it had been accepted without the guaranty of the bank, and holds that such guaranty had no effect except to make the bank liable for the excess above the \$80 per bale of cotton.

Bockoven v. National Mechanics' & Traders' Bank, 11 W. N. C. 570, holds that an unconditional acceptance of a bill of exchange renders the acceptor liable, although the holder knew that the bill was accepted on the faith of a consignment to be made by the drawer and prevented such consignment by attaching the goods intended to be shipped for a debt due from the drawer.

From these cases, all of which hold that after a draft attached to a bill of lading is accepted the consignee becomes absolutely liable on the acceptance, and that after payment thereon is made he cannot recover it back, notwithstanding any failure of consideration between him and the drawer, it would seem that the decisions in the main case, and in *Landa v. Lattin Bros.* 19 Tex. Civ. App. 246, 46 S. W. 48, *supra*, were based on a wrong principle, and that if the right principle had been considered the decisions must have been different.

J. H. H.

chasers (the plaintiffs) "were not impaired or disturbed by the change of ownership in the property." They have the same defenses against the assignee of the bill of lading as against the shipper. *Columbian Nat. Bank v. White*, 65 Mo. App. 679. When the January car load arrived, the plaintiffs could either have refused to receive and pay for the corn, or they could have received it, and, upon notification of defects to the vendor in a reasonable time, have offered to return the goods, or, if sued for the price, have set up loss by reason of such defects. *Kester Bros. v. Miller Bros.*, 119 N. C. 475, 26 S. E. 115; *McKinnon v. McIntosh*, 98 N. C. 89, 3 S. E. 840. But here, the corn being shipped on a bill of lading with draft attached, the vendee was compelled to pay upon the delivery of the corn (if it was otherwise, liberty to inspect should have been shown), and an action lies to recover back money paid for defects in the corn, unless the claim was waived by delay to demand damages from January till this attachment in May. *Lewis v. Rountree*, 78 N. C. 323. Whether there had been a waiver was an issue of fact for the jury, to have been proven by the party alleging it. Both parties have agreed upon the facts as set out in the justice's return, and no waiver is therein found. The plaintiffs had, therefore, the same ground of action for damages against the Seymour-Danne Company for the defects in the January car load that they would have had against their assignor, Gregg, and on the arrival of two car loads in May, likewise assigned to the Seymour-Danne Company, while plaintiffs could not attach them as the property of Gregg, nor for damages due by Gregg, they could attach said car loads as the property of the Seymour-Danne Company, and for the damages sustained by delivery of a defective car load of corn to them by that company in January. *Landa v. Lattin Bros.*, 19 Tex. Civ. App. 240, 46 S. W. 48 (which we find a very clear and able discussion of a case "on all fours" with this). It is true the action was originally begun against Gregg alone, which could not be sustained, as no jurisdiction as to him was obtained by attaching the two car loads of grain, which, by the assignment of the bills of lading, had become the property of the Seymour-Danne Company; but the latter came in and were made parties before the justice, by which the court was seized of jurisdiction as to them, and on appeal the judge properly permitted the attachment proceedings to be amended to embrace them, as they were already parties, and claiming an interest in the subject-matter of the action. Code, § 184. The entry before the justice was, as the judge found, of a general appearance by the Seymour-Danne Company; but, if it had been an appearance merely "as interveners," to contest the title to the property, it would not have been an unauthorized change of the action in a proceeding quasi *in rem*, by attachment of property, to permit the plaintiffs to amend their attachment to embrace the same cause of action against the interveners as they had averred against the original defendant. 49 L. R. A.

Why turn the property loose, to be again attached by the same plaintiffs, for the same cause of action, *eo instanti* it is determined that these defendants (or interveners, if such) are the real owners of the attached property, instead of the original defendant?

The judgment must be modified by dismissing the action as to Joseph Gregg, who entered a special appearance, with his reasonable costs, but as to the Seymour-Danne Company it is affirmed.

W. K. NEAL, Admr., etc., of C. M. Coffin, Deceased, Appt.,
v.

CAROLINA CENTRAL RAILROAD COMPANY.

(126 N. C. 634.)

1. A railway company is not liable for the death of a person walking upon its track, going in the same direction as the train which killed him, in open daylight, on a straight piece of road, where he could have seen the train for 150 yards, and had power, up to the last moment, to prevent the accident, although the railroad company was guilty of negligence in running its engine at a prohibited rate of speed, and in not ringing its bell as required by ordinance, and in not keeping a proper lookout.

2. The question of the contributory negligence of plaintiff's intestate killed by a railroad train, is for the court, where there is no contradiction in his evidence, and defendant, who submits no evidence, demurs to that offered by plaintiff, thereby admitting its truth, and moves for a nonsuit.

(Douglas and Clark, JJ., dissent.)

(May 22, 1900.)

APPEAL by plaintiff from a judgment of the Superior Court for Mecklenburg County in favor of defendant in an action to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

The facts are stated in the opinion.

Messrs. Jones & Tillett and Clarkson & Duls for appellant.

Messrs. Burwell, Walker, & Cassler, for appellee:

It is only the negligence which proximately causes the injury, that is considered by the law in determining the liability of the defendant.

There was no negligence on the part of the defendant, and, if there was, the intestate's

NOTE.—For contributory negligence of person on railroad track, see also *Kelley v. Missouri P. R. Co.* (Mo.) 8 L. R. A. 783; *Spicer v. Chesapeake & O. R. Co.* (W. Va.) 11 L. R. A. 385; *Patton v. East Tennessee, V. & G. R. Co.* (Tenn.) 12 L. R. A. 184; *Clark v. Wilmington & W. R. Co.* (N. C.) 14 L. R. A. 749; *Anderson v. Chicago, St. P. M. & O. R. Co.* (Wis.) 23 L. R. A. 203; *Smith v. Norfolk & S. R. Co.* (N. C.) 25 L. R. A. 287; *Price v. Philadelphia, W. & B. R. Co.* (Md.) 36 L. R. A. 213; *Parish v. Western & A. R. Co.* (Ga.) 40 L. R. A. 364.

negligence was the proximate cause of the injury, and, in contemplation of the law, the only cause.

When a person walks upon the track of a railroad company it is his duty to look and listen for approaching trains, and to leave the track in time to avoid injury to himself from them, and, when he is possessed of the senses of sight and hearing, which is presumed till the contrary appears and is made known to the engineer, the latter has the right to suppose, up to the last moment and when it is too late to avert the injury, that the person will leave the track in time to avoid an injury to himself, and, if the person fails to do so, and is injured, the law does not refer the injury to any negligence on the part of the railroad company, but to the wrongful and careless act of the person injured, in not leaving the track.

McAdoo v. Richmond & D. R. Co. 105 N. C. 140, 11 S. E. 316; *High v. Carolina O. R. Co.* 112 N. C. 385, 17 S. E. 79.

The decision in such cases depends altogether upon the conduct of the injured person, or user of the track, and, if he was not so situated that he could not step from the track before the engine reached him, and he was injured, the law imputes the fault to him, as the sole author of his own injury.

Meredith v. Richmond & D. R. Co. 108 N. C. 616, 13 S. E. 137; *Norwood v. Raleigh & G. R. Co.* 111 N. C. 236, 16 S. E. 4; *Syme v. Richmond & D. R. Co.* 113 N. C. 558, 18 S. E. 114.

Where a party is injured by the want of ordinary care and diligence in another, but he does not use reasonable care and diligence himself, he cannot recover. He must be reasonably careful and diligent to protect himself from danger, no matter how it may arise.

Walker v. Reidsville, 96 N. C. 382, 2 S. E. 74; *Meredith v. Cranberry Coal & I. Co.* 99 N. C. 576, 5 S. E. 659.

Furches, J., delivered the opinion of the court:

This is an action to recover damages for the wrongful killing of Charles M. Coffin. The defendant does not deny the killing, but denies that it was caused by its default or negligence, and alleges that it was the result of the negligence of plaintiff's intestate. The evidence of plaintiff showed that intestate was killed by the shifting engine on defendant's road, in the city of Charlotte; that this engine was running backwards, drawing a gondola car after it; that it was running at a high rate of speed, in a westward direction, and intestate was walking on defendant's track, going in the same direction; that this train had come very near running over a team of mules at the street crossing, scaring the mules, and making them unmanageable, and that the engineer and crew were watching the mules, and laughing at the driver trying to manage them. The road was straight for 150 yards, and, as the killing occurred in open daylight, the crew and engineer might have seen intestate, and intestate

might have seen the train, for that distance. The intestate was walking on the defendant's track when he was knocked down by defendant's train, run over, and killed. The plaintiff also offered in evidence an ordinance of the city forbidding trains to run at a greater speed than 4 miles an hour while passing through the city, and requiring the bell to be rung. Plaintiff showed that this train was running at a high rate of speed, and greater than that allowed by the ordinance, and that no bell was being rung. The plaintiff, having offered evidence as to amount of damages, rested the case. Defendant offered no evidence, demurred to plaintiff's evidence, and moved to nonsuit plaintiff, under chapter 109, Acts 1897. After hearing argument of counsel, and upon full consideration of the matter, the court allowed defendant's motion, and assigned the following reasons therefor: "First. That the evidence, if believed, showed the defendant guilty of negligence. Second. That the evidence being that offered by the plaintiff, and without contradiction, must, as to the plaintiff, be believed, and, if believed, it showed, and the conclusion could not be reasonably avoided, that the plaintiff's intestate, by his own negligence, contributed to cause the injury. Third. That while it might be found that, notwithstanding the negligence of plaintiff's intestate, the defendant might, by ordinary care, have avoided the injury, the evidence, which, as to the plaintiff, must be believed, clearly showed that, notwithstanding defendant's negligence, the plaintiff's intestate, by the exercise of ordinary care, might himself, up to the last moment, have avoided the injury. Therefore the negligence of plaintiff's intestate, if not the proximate cause, at least concurred with defendant's negligence, up to the last moment, in together constituting the proximate cause of the injury. The third issue, therefore, should be answered 'No,' and the plaintiff is not entitled to recover in the action. In deference to this intimation, the plaintiff, having excepted, submitted to a non-suit, and judgment was entered accordingly." The plaintiff assigned the following grounds of error: (1) "That the court added at the end of the third issue tendered the clause, 'And, if so, was defendant's failure to avoid the injury the proximate cause thereof?'" (2) "The plaintiff assigns as error the rulings of his honor sustaining the demurrer and dismissing the action." (3) "That the court, in and by its said judgment, dismissed the action." The evidence was all introduced by the plaintiff; the defendant introduced none; and there is no exception as to the competency of any of the evidence.

The court finds from this evidence that the defendant was guilty of negligence; and while we think from the evidence, taken to be true, that it was guilty of negligence, as this negligence was shown by the evidence of the plaintiff, the court could not have found this issue against the defendant, if it had, complained of and excepted to it, and brought it before us for review. It was the

finding of an affirmative issue against the defendant upon the evidence of the plaintiff. *Spruill v. Northwestern Mut. L. Ins. Co.* 120 N. C. 141, 27 S. E. 39; *Anniston Nat. Bank v. Durham School Committee*, 121 N. C. 109, 28 S. E. 134; *White v. Suffolk & C. R. Co.* 121 N. C. 484, 27 S. E. 1002. But this ruling is not before us for review. The defendant neither excepted nor appealed, and the plaintiff cannot except to this finding, because it is in his favor. And it seems to us that there can be no doubt but what the intestate of the plaintiff was also guilty of negligence, if the evidence be true, and every word of it believed. This issue is, then, not one that must be found by a jury, but one that may be found by the court. It does not present a question where reasonable men might put different constructions upon it, and come to the conclusion that the plaintiff's intestate was not guilty of negligence. If plaintiff's intestate was walking upon defendant's road, in open daylight, on a straight piece of road, where he could have seen defendant's train for 150 yards, and was run over and injured, he was guilty of negligence. And, although the defendant may have also been guilty of negligence in running its train at a greater rate of speed than was allowed by the town ordinance, or in not ringing its bell as required by said ordinance, and in not keeping a lookout by its engineer as it should have done, yet the injury would be attributed to the negligence of the plaintiff's intestate. It has been so held in *Meredith v. Richmond & D. R. Co.* 108 N. C. 616, 13 S. E. 137; *Norwood v. Raleigh & G. R. Co.* 111 N. C. 236, 16 S. E. 4; *High v. Carolina C. R. Co.* 112 N. C. 385, 17 S. E. 79. These cases hold that it is not negligence in a railroad company where its train runs over a man walking on the railroad track, apparently in possession of his faculties, and in the absence of any reason to suppose that he was not. This is put upon the ground that the engineer may reasonably suppose that the man will step off in time to prevent injury. In *McAdoo v. Richmond & D. R. Co.* 105 N. C. 140, 11 S. E. 316, this doctrine is expressly held; and it is further held in that case that, on account of plaintiff's negligence in standing on the road and allowing defendant's train to run over him, this was concurring negligence, and prevented him from recovering damages. *McAdoo v. Richmond & D. R. Co.* has been cited and approved on this point in *Syme v. Richmond & D. R. Co.* 113 N. C. 505, 18 S. E. 114, and in *Smith v. Norfolk & S. R. Co.* 114 N. C. 744, 25 L. R. A. 287, 19 S. E. 363, 923, and many other cases. We know that it has been held in many cases that a railroad company is liable for damages for carelessly and negligently running over and killing or injuring persons on its road, in which it appeared that the persons killed or injured were also guilty of negligence; and it may not be easy to distinguish some of these from the one under consideration. But there is a distinction, and a distinct line of decisions, as we have shown by the cases we have cited. The distinction does not seem to lie so much in

the negligence of the parties, where both are guilty of negligence, as it does in the condition of the parties. And we think, upon examination, that it will be found that, where the company has been held liable, it is in cases where the party injured was not upon equal opportunities with the defendant to avoid the injury, and in cases where there was something suggesting to the defendant the injured party's disadvantage or disability; as where the party injured is lying on the railroad track, apparently drunk, or asleep, or on a bridge or trestle, where he could not escape, or could not do so without great danger. In such cases, if the engineer saw the party injured or by proper diligence should have seen him, the company is liable. It is in such cases as these that the doctrine of proximate cause, or the "last clear chance," is called in to determine the liability.

The doctrine of proximate cause—the "last clear chance"—is firmly established in this state, and we have no idea of abandoning or in any way disturbing it. We think the line of cases where it applies are distinct, and distinguishable from this case, whether we have succeeded in pointing out the distinction or not. Indeed, we do not understand the plaintiff to make this the principal ground upon which he rests his appeal and insists upon a new trial. Nor do we understand the plaintiff seriously to insist but what there is evidence tending to prove—if not to prove—that the plaintiff's intestate was guilty of negligence. But it is contended that if the intestate was guilty of negligence, the defendant being also guilty of negligence, the intestate's negligence was what is termed "contributory negligence," and that contributory negligence is an affirmative issue, and cannot be found by the court. To sustain this position, a number of recent cases have been cited; among them, *Spruill v. Northwestern Mut. L. Ins. Co.* 120 N. C. 141, 27 S. E. 39, and *Anniston Nat. Bank v. Durham School Committee*, 121 N. C. 109, 28 S. E. 134. In these cases, and quite a number of others, it was held that the court could not find an affirmative issue. This holding was entirely correct in those cases and in every other case where it has been held, so far as we remember. We do not wish to overrule or disturb this doctrine, as held in those cases; but to our minds this case is clearly distinguishable from them, as we hope to be able to show. In those cases, and in all others, as we think, where this has been held, there was some doubtful or disputed fact to be found, dependent upon the weight or the credit of the evidence. In such cases the court cannot find the facts, nor even intimate an opinion, without violating the statute of 1796 (Code, § 413); and, if the court has done so in this case, the plaintiff is entitled to a new trial. But the function of the jury is to find the facts (this must mean disputed facts), and must be exercised where there is evidence proving or tending to prove the facts disputed. If there is not, it is the duty of the court to say so and withdraw this dispute—this issue—

from the jury. This was conceded by the plaintiff, it being a negative finding of the issue. But the plaintiff contends that to find the intestate guilty of negligence was an affirmative finding, and one the court could not find. This is logically and legally true if the court had to find any disputed fact where there was any evidence showing or tending to show the negative of the issue, or if it was necessary that he should pass upon the weight or credit of the evidence. Where this is the case, the usual rule is to submit the issue to the jury, with the instruction that, if they believe the evidence, they will find the issue yes or no, as the case may be. This is usually a good rule, and in many cases saves an appeal to this court. But the court could not do that in this case without impeaching the plaintiff's witnesses. All the evidence was offered by the plaintiff, and the defendant had demurred to it. This was an admission by the defendant that the evidence was true. The plaintiff, by offering the evidence, had vouched for its credit. He could not impeach its credit. As to the plaintiff, it stood unimpeached and unimpeachable. It is true that, if the plaintiff offered other evidence tending to show the facts different, then it would have become a matter for the jury as to which witness they would believe. But both witnesses stand alike credited, so far as the plaintiff or the party introducing them is concerned. If this evidence, or any part of it, had been introduced by the defendant, it would have been the duty of the court to submit it to the jury, because the plaintiff would not have been bound to give credit to the defendant's witnesses, and the defendant could not give them credit by demurring to their evidence. But when the defendant demurred to the plaintiff's evidence (and but one construction can reasonably be drawn from it; that is, it could not reasonably mean different things), we cannot see why it did not become a question of law, as much so as if the facts stated in the evidence had been agreed to, as the facts in the case; and, if this is so, it certainly became a question of law for the court. This view of the case is sustained by *Williams v. Southern Bell Teleph. & Teleg. Co.* 116 N. C. 556, 21 S. E. 298; *Hinshaw v. Raleigh & A. Air Line R. Co.* 118 N. C. 1047, 24 S. E. 426; *Hygienic Plate Ice Mfg. Co. v. Raleigh & G. R. Co.* 122 N. C. 881, 29 S. E. 575; *White v. Suffolk & C. R. Co.* 121 N. C. 484, 27 S. E. 1002,—and we do not think it will be found to conflict with any opinion of this court. A number of cases may be found (some of which we have cited) in which it is said that the court cannot find an affirmative issue; and this is true in those cases, and in all cases where the court would have to find the facts to establish an affirmative issue. But in this case the court finds no facts. They are admitted by the demurrer of the defendant to the plaintiff's testimony. This being so, and the plaintiff's evidence clearly establishing the intestate's negligence, which was the concurrent cause of the injury, the plaintiff cannot recover, without overruling the authorities we have cited, 49 L. R. A.

and many others not cited. The doctrine of proximate cause and "the last clear chance" is not involved in this case. It falls under the doctrine announced in *McAdoo v. Richmond & D. R. Co.* 105 N. C. 140, 11 S. E. 316, and that line of cases.

Taking the view of the case we do, the judgment of the court below must be affirmed.

Faireloth, Ch. J., concurring:

When the plaintiff closed his evidence, defendant moved that plaintiff be nonsuited for the reason that upon his own evidence he was not entitled to recover. His honor was of opinion that the evidence, if believed, showed the defendant guilty of negligence; that the evidence, being that of the plaintiff, and without contradiction, must, as to the plaintiff, be believed, and, if believed, it showed that plaintiff's intestate, by his own negligence, contributed to cause the injury. The intestate was walking on the track of the defendant company when he was struck by the defendant's shifting engine and killed. At the time he was struck the intestate was walking along the track, in full possession of his senses, and in a place where he had a full view of the approaching engine for a long distance. The track was perfectly straight from the place where the intestate was struck by the engine to the crossing of the Southern Railway Company, a distance of 2 blocks and 225 feet, or 1,000 feet in round numbers; and there was no obstruction whatever to his view. There was a path running alongside of the track where plaintiff was walking at the time the engine struck him. Plaintiff's witness Sophia Lee testified that she saw the train, and heard it coming, and that plaintiff's intestate was between her and the train, walking right along the track, on a clear day. Upon this evidence it appears to me that, assuming the defendant to have been negligent, the causation of the injury was the concurrent negligence of both parties, and it has often been held that in that event neither party can recover. In *McAdoo v. Richmond & D. R. Co.* 105 N. C. 140, 11 S. E. 316,—a case quite like the present,—the court held that "the plaintiff could not recover if the engineer and fireman, without any actual knowledge of or acquaintance with him, had acted, as they did, on the assumption that he [intestate] would get out of the way." "There was no error . . . in the instruction predicated upon the supposition that they failed to ring [the bell]. According to the plaintiff's own testimony, he stood upon the track with his back towards the engine, and did not see it till after he was stricken by it. He was therefore, in any aspect of the case, negligent, and the jury would not have been warranted in finding that the defendant could have prevented the injury by using ordinary care." The court further says that it could make no difference at what rate of speed the engine was running at the time. "All this might possibly have been more clearly presented, if there had been a third issue, and his honor had said there was no

testimony to support an affirmative finding on it." The principles stated and applied in *McAdoo's Case* have since been repeatedly affirmed by this court, and expressed in emphatic language. In *Meredith v. Richmond & D. R. Co.* 108 N. C. 610, 13 S. E. 137, the court said: "We concur with the judge below in the opinion that the plaintiff was not entitled to recover, because, by the undisputed facts, considered in any phase presented by them, the plaintiff was negligent in failing to see the train approaching him from behind, while the servant of the defendant was not in fault in acting on the belief that plaintiff would move out of the way of the engine before it should reach him." In *Norwood v. Ralcoigh & G. R. Co.* 111 N. C. 236, 16 S. E. 4, this court decides: "If the engineer could, by proper watchfulness, have seen intestate standing or walking on the track, he would not have been negligent in acting on the assumption that intestate would step off in time to avert injury; and where the intestate was seen, or could, by proper care, have been seen, by the engineer, sitting upright on the end of a cross-tie, the latter was justified in believing that he would get out of danger; and his failure to leave the track, whether he was a trespasser or licensee, is considered by the law as the proximate cause of his death, unless it is shown that his condition or situation was such that he could not leave the track, and that this was known, or could, by the exercise of proper care, have been known, to the engineer." In *High v. Carolina C. R. Co.* 112 N. C. 385, 17 S. E. 79, this court decides: "Where an engineer sees on the track, in front of the engine which he is moving, a person walking or standing, whom he does not know at all, or who is known by him to be in full possession of his senses and faculties, the former is justified in assuming, up to the last moment, that the latter will step off the track in time to avoid injury; and, if such person is injured, the law imputes it to his own negligence, and holds the railroad company blameless." "The failure of the engineer to keep a proper lookout subjects the company to liability only in those cases where, if he had seen the situation of the injured party, it would have become his duty to pursue such a course of conduct as would have averted it. Whether he saw the plaintiff at a distance of 150 yards or of 10 feet, he was not at fault in acting on the supposition that she would still get out of the way. It is not material whether the train was moving fast or slow in such a case as this." "If the plaintiff had looked and listened for approaching trains, as a person using a track for a footway should, in the exercise of ordinary care, always do, she would have seen that the train, contrary to the usual custom, was moving on the siding. The facts that it was a windy day, and that she was wearing a bonnet, or that the train was late, gave her no greater privilege than she would otherwise have enjoyed as licensee, but, on the contrary, should have made her more watchful." "There was nothing in the conduct or condition of the plaintiff that imposed

upon the engineer, in determining what course he should pursue, the duty of departing from the usual rule that the servant of a company is warranted in expecting licensees or trespassers, apparently sound in mind and body, and in possession of their senses, to leave the track till it is too late to prevent a collision." In *Syme v. Richmond & D. R. Co.* 113 N. C. 558, 18 S. E. 114, this court decides: "When a person is injured while walking on a railroad track by an engine that he might have seen by looking, the law, as a rule, imputes the injury to his own negligence. There being no testimony tending to bring this case within any exception to the general rule, we are of the opinion that there was no evidence of want of ordinary care on the part of the defendant, while, in any aspect of the case, the plaintiff's intestate was negligent in getting upon the track in front of the engine without looking, and exposing his person to injury, when he might have seen that [the engine] was approaching, and have avoided the collision by stepping off the track." "On the other hand, the engineer was justified in assuming that the intestate had looked, had notice of his approach, and would clear the track in ample time to save himself from harm." Other cases might be cited of the same purport.

The defendant's motion was, in effect, a demurrer to the plaintiff's evidence, admitting every word to be true, and every fact that can be gathered from it. I am unable to see what is left for the jury to pass upon. I understand that when facts are agreed upon, or found by a special verdict, or admitted by demurrer, nothing remains to be done, except for the court to apply and fit the law to the facts. Here the proximate cause of the injury is plainly and manifestly the joint concurrent negligence of both parties, and there is no place found in these facts for what is called the "last clear chance." When the facts are clearly settled, from which only one inference can be drawn, the question is then one of law for the court to decide, and in such case the court should take the case from the jury, and direct a nonsuit or verdict, as the case may be. 1 *Shearm. & Redf. Neg. p.* 68, § 56; *Cooley, Torts*, 670. That the causes of the injury are concurrent seems plain according to these facts. Possibly, some sort of logic might conclude differently, but that is not the common-sense view to my mind; and, when logic and common sense cannot be reconciled, logic must give way.

Douglas, J., dissenting:

It is with a feeling of deep regret and much hesitation that I am forced to enter my most earnest dissent from the opinion of the court. I wish I could agree with the majority of the court that its opinion does not conflict with our former rulings, but I am utterly unable to do so with those cases before me. That plain words may have a hidden legal meaning utterly at variance with the ordinary usage of the language, and which I did not intend them to have, and never dreamed

they could have, when I used them, is beyond my comprehension. Feeling as I do, I would be untrue to myself were I to concur in an opinion which, to my mind, destroys the principle of our recent decisions, is in direct violation of the statute, and flatly contravenes the letter and the spirit of the Constitution. The rule as now laid down, stripped of its incidents, is as follows: "That the court may withdraw an issue from the jury, and direct an affirmative finding of contributory negligence against the plaintiff, whenever it thinks that the evidence of to find that it was of sufficient weight to prove the fact in controversy." That is all there is in it, dilute it as we may. It is true the court says, "provided there is no conflict in the testimony," but such a want of conflict does not of itself prove the issue. There may be only one witness or fifty witnesses swearing to the same thing, and, unless they swear to enough to prove the fact in issue, neither the court nor the jury can find it to be true. This line of reasoning forces me to the conclusion which this court has recently so repeatedly and emphatically announced, but which it now seems at least partially to repudiate,—that the court can never direct an affirmative finding of fact. To do so, it would be necessary for the court to pass directly upon the weight of the evidence, and to find that it was of sufficient weight to overcome the negative presumption always arising from the burden of proof; in other words, it would be saying, in the teeth of the statute, that a fact which the law required to be proved had been "sufficiently proven." And yet Mr. Justice Furches, speaking for a unanimous court in *Anniston Nat. Bank v. Durham School Committee*, 121 N. C. 109, 28 S. E. 134, says that this cannot be done, using the following words: "But no matter how strong and contradictory the evidence is in support of the issue, the court cannot withdraw such issue from the jury, and direct an affirmative finding. To do this is to violate the act of 1796 (§ 413 of the Code)." In *White v. Suffolk & C. R. Co.* 121 N. C. 484, 489, 27 S. E. 1002, the same justice, again speaking for a unanimous court, says: "The court can never find nor direct an affirmative finding of the jury. . . . The most the court can do is to instruct the jury, where there is no conflict of evidence, that, if they believe the evidence, they should find yes or no, as the case may be." In *Wood v. Bartholomew*, 122 N. C. 177, 180, 29 S. E. 960, Justice Furches, again speaking for a unanimous court, says: "The burden of the issue of contributory negligence is on the defendant. It is an affirmative issue, and cannot be found by the court. It must be determined by the jury." Other opinions of the same learned justice contain expressions to the same effect. The italics are my own. These emphatic expressions were neither casual nor *obiter*, but were used in the decision of questions directly raised, and in answer to the strenuous contentions of counsel urged in repeated and elaborate arguments. This court, at the last term, after most careful consideration, speaking with-

out dissent through Mr. Justice Montgomery, in *Creus v. Canticell*, 125 N. C. 516, 519, 34 S. E. 688, after intimating that the burden was really on the defendant, uses the following language: "The instruction then of his honor was erroneous, for, as the burden of proof was assumed by the plaintiff, the court could not withdraw the issue from the jury." *Anniston Nat. Bank v. Durham School Committee*, 121 N. C. 109, 28 S. E. 134. In that case Justice Furches, delivering the opinion of the court, said: "But, no matter how strong and contradictory the evidence is in support of the issue, the court cannot withdraw such issue from the jury, and direct an affirmative finding." It should be noted that in that case the court based its judgment solely upon the fact that the plaintiff had assumed the burden of proof, and made no allusion whatever to the fact that the only evidence was that of the plaintiff. Mr. Justice Clark has used similar language in speaking for the court, and does not wish now either to modify or withdraw it. Speaking for a unanimous court, in *Sherrill v. Western U. Teleg. Co.* 116 N. C. 655, he says, on page 657, 21 S. E. 429: "But when the plaintiff makes out a prima facie case, then to instruct the jury that the evidence rebuts it and overcomes it is to invade the province of the jury, and violates chap. 452 of the Acts of 1796 (Code, § 413), which forbids an expression of opinion by the judge upon the weight of the evidence."

I may be pardoned for citing some of the opinions of the court written by myself. They are in plain words, plainly setting forth the views I was known to possess and intended to express. Whatever other faults they may have, my opinions are neither the intangible mists of summer nor the shifting winds of March. In *Spruill v. Northwestern Mut. L. Ins. Co.* 120 N. C. 141, 27 S. E. 39, during my first term upon the bench, it is said for a unanimous court: "Where there is no evidence, or a mere scintilla of evidence, or the evidence is not sufficient, in a just and reasonable view of it, to warrant an inference of any fact in issue, the court should not leave the issue to be passed upon by the jury, but should direct a verdict against the party upon whom the burden of proof rests. That the verdict should be directed against the party upon whom rests the burden of proof is the essence of the rule. . . . If the verdict of a jury is in the opinion of the court against the weight of evidence, it can be set aside; and to the proper exercise of this discretion there can be no objection. But to permit the judge to pass upon the sufficiency of the evidence necessary to rebut a legal presumption without submission to the jury would infringe upon the exclusive powers of the jury. . . . The rule laid down in some authorities that, wherever the judge would be justified in setting aside the verdict as against the weight of evidence, he would be equally justified in taking the case from the jury and directing a verdict, cannot receive our sanction. It is not the law in North Carolina, and never can be under our present

Constitution. 'The ancient mode of trial by jury' guaranteed by the Constitution is that at common law, and is none the less the right of the citizen than it was of the subject. Direction of a verdict and granting a new trial are essentially different in nature and effect. The one regulates the trial by jury, the other denies it; the one recommit the case to the jury, the other takes it away completely; the one merely reopens the case for a fairer trial, while the other ends it without redress, save the precarious method of appeal, where findings of fact can be reviewed only from the meager notes of the judge and the uncertain recollection of counsel. The mere fact that the judge can never, save by waiver or consent, render a verdict, but can direct it only in the name of the jury, shows the intent and spirit of the law. These principles are 'fundamental,' and 'a frequent recurrence' thereto is of constitutional obligation." This case appears to have been cited in more than twenty different cases, including the opinion of the court from which I am respectfully dissenting. In *Cow v. Norfolk & C. R. Co.* 123 N. C. 604, 31 S. E. 848, this court, in reviewing *Spruill's Case*, says: "Had the question not been again presented by counsel, it would almost seem needless to repeat, what we have so often said, that the burden of proving negligence rests upon the plaintiff, while the onus of showing contributory negligence rests upon the defendant. In both cases this must be shown by a greater weight of the evidence, and of this relative weight the jury alone can determine. A negative presumption necessarily accompanies the burden, and remains until the burden is lifted or shifted by direct admissions or a preponderance of proof. . . . Where there is evidence tending to prove negligence on the part of both parties, the case must always be submitted to the jury, and it makes no difference if this evidence appears in the testimony of the plaintiff. The court may say to the jury that there is no evidence tending to prove a fact, but it can never say that a fact is proved. . . . It is the settled rule of this court that a verdict can never be directed in favor of the party upon whom rests the burden of proof, who in all cases is considered to have the affirmative of the issue, whatever may be its form. Though this rule was discussed and reaffirmed in *Spruill v. Northwestern Mut. L. Ins. Co.* 120 N. C. 141, 27 S. E. 39, it did not have its origin in that case, but in *Wittkowsky v. Wasson*, 71 N. C. 451, where the doctrine was distinctly laid down in the following words, quoted from the opinion of Wells, J., in the court of exchequer chamber: 'There is in every case a preliminary question, which is one of law, viz. whether there is any evidence on which the jury could properly find the question for the party on whom the burden of proof lies. If there is not, the judge ought to withdraw the question from the jury, and direct a nonsuit, if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant.' In other words, the verdict must, in either event, be directed against the party

on whom lies the onus, and by necessary implication can never be directed in his favor. . . . The burden of proving contributory negligence is always upon the defendant. Therefore a direction in his favor, based in any degree upon the contributory negligence of the plaintiff, would be a direction in favor of the party upon whom rested the burden of proof, which is directly opposed to the uniform current of our decisions. If there had been any reasonable doubt that the burden of proving contributory negligence rested upon the defendant, it has been set at rest by chapter 33 of the Laws of 1887. . . . It therefore follows that on a motion for a nonsuit the court can consider only the evidence relating to the negligence of the defendant, and, if there is more than a scintilla tending to prove such negligence, the motion must be denied, and the case submitted to the jury." That case cites a large number of authorities, which it is needless now to recite. Can there be any question as to its meaning? There was a single dissent. In *Bolden v. Southern R. Co.* 123 N. C. 614, 31 S. E. 851, this court, with a single dissent, says: "By force of statute, as well as a settled rule of decision, the plea of contributory negligence is an affirmative defense, in which the burden, both of allegation and proof, rests upon the defendant. It is true that contributory negligence may be shown by the evidence of the plaintiff, but whether the weight of that evidence is sufficient to overcome the presumption in his favor arising from the burden of proof is a question for the jury. The action of the plaintiff in going upon the bridge was argued as contributory negligence, but, if it be viewed as an implied assumption of risk, the same rule will apply. Both doctrines are alike as being in the nature of a plea of confession and avoidance, inasmuch as they are affirmative defenses set up to excuse the negligence of the defendant. As such, the burden of proof is in both cases upon the defendant, and an issue can be found in its favor only by a jury." In the subsequent case of *Cogdell v. Wilmington & W. R. Co.* 124 N. C. 302, 32 S. E. 706, it is said by a unanimous court that "contributory negligence and assumption of risk, being in the nature of pleas in confession and avoidance, are affirmative defenses, and cannot be considered on a motion for nonsuit," citing *Bolden v. Southern R. Co.* 123 N. C. 614, 31 S. E. 851. It is useless to further cite the large number of cases wherein this court has said that the court could never direct an affirmative finding. If it did not mean "never" when it said it in the above cases, I suppose it did not mean it in the others. I meant it then, and mean it now.

The rule now adopted by the court is an adaptation of the Federal rule; and, while it may find a home with us by adoption, it is not to the manner born, and is the legitimate offspring neither of our Constitution nor of our laws. The Federal courts, as well as those of some few of the states, still adhere to the English practice of allowing the court

to express an opinion upon the weight of the evidence; that is, the court, under this rule, may in all cases say to the jury what it thinks ought to be their verdict. This practice, which may serve to explain some decisions in those tribunals where it still exists, has been repudiated by a large majority of the states, and was positively prohibited by statute in this state as far back as 1796. This prohibition has been brought forward in successive compilations, and is still in force as § 413 of the Code, which reads as follows: "No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon." This distinct line of demarkation between the powers of the judge and the jury, established in the childhood of our state, and remaining in full force for more than a hundred years, has become a fundamental part of "the law of the land." I am aware that there are some cases tending to sustain the rule now adopted by the court, but they were decided before I came upon the bench, and are in direct conflict with our later, as well as our earlier, decisions. The earliest case cited by the court is that of *Meredith v. Richmond & D. R. Co.* 108 N. C. 616, 13 S. E. 137, decided in 1891, which cites upon this point only the *Cases of McAdoe, Parker, and Daily*. In *McAdoe's Case* all the issues were submitted to the jury, and none found by the court. In *Daily's Case*, 106 N. C. 321, 11 S. E. 320, while the court below held that the plaintiff, who was an idiot, could not recover, on account of his contributory negligence, this court held that there was no evidence tending to prove the negligence of the defendant. *Parker's Case*, 86 N. C. 221, was decided before the passage of the act of 1887 (chap. 33), which expressly provides "that in all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it shall be set up in the answer and proved on the trial." I am also aware that there have been two or three *dicta* to the same effect, but I do not feel bound by them. I am not responsible for all that may be said in an opinion from which I do not dissent, but only for such matters as are necessarily involved in the decision of the case. *Dicta* are the overflows of judicial learning, and, like the freshets in our streams, are always dangerous, and generally harmful. Occasionally they add fertility to the fair fields of jurisprudence, but more often they tend to cut gullies through well-established principles, or to create stagnant ponds of doubt whose mist and malaria are equally dangerous.

The tendency of judges to invade the province of the jury is shown throughout the entire history of the law, and the survival of the system in full vigor as the foundation stone of Anglo-American jurisprudence is in itself the strongest proof of its inherent

merit. Courts of equity from the first refused to recognize the system, and we have recently seen to what extent a trial by jury can be evaded by proceedings in injunction and in the nature of contempt. Courts of admiralty, following the principles of the civil law, have also discarded the jury; and it is a significant fact that they also have refused to recognize the doctrine of contributory negligence, always apportioning the damages in proportion to the comparative negligence of the parties. In view of this tendency, this court has felt it its duty more than once to assert the independence of the jury. In *Cable v. Southern R. Co.* 122 N. C. 892, 900, 29 S. E. 379, the court says: "This court does not favor the growing practice of taking cases from the jury. The jury is a constitutional body, as much so as the court itself, and in the exercise of its peculiar powers of equal responsibility and independence." In *State v. Shule*, 32 N. C. (10 Ired. L.) 153, the court says: "We think there was error in the mode of conducting the trial. . . . There was a departure from the established mode of proceeding, and the wisest policy is to check innovation at once; particularly as in this case it concerns the 'trial by jury' which the 'bill of rights' declares 'ought to remain sacred and inviolable.' . . . The innovation is that, instead of permitting the jury to give their verdict, the court allows a verdict to be entered for them, such as it is to be presumed the court thinks they ought to render, and then they are asked if any of them disagree to it; thus making a verdict for them, unless they are bold enough to stand out against a plain intimation of the opinion of the court." The court then proceeds to lay down the rule substantially as stated in *Spruill v. Northwestern Mut. L. Ins. Co.* 120 N. C. 141, 27 S. E. 39. In *State v. Allen*, 48 N. C. (3 Jones, L.) 257, 262, Judge Pearson, speaking for the court, says: "It is our duty to see to it that the trial by jury shall remain 'sacred and inviolable,' and if, upon the circuits, there has grown up any practice encroaching upon the trial by jury as 'heretofore used,' although such practice may, to some extent, have been sanctioned by decisions of this court, it is our duty to put a stop to it; and, while we will not allow a jury to encroach upon the province of the judge,—i. e. to declare and explain the law, and undertake, by an abuse of their power, to decide questions of law, . . . on the other hand, we are equally solicitous to see that the court shall not commit usurpation upon 'the true office and province of the jury.' Repetition of error can never justify the violation of a positive enactment of a statute, much less the infringement of a fundamental principle upon which our social existence is declared to rest. An error may have crept into our practice by reason of the judges not having attached due importance to the distinction between the condition of things in England, whence we are in the habit of taking our notions of law, and the condition of things here, where the

trial by jury is protected both by the Constitution and by legislative enactment. A judge is not at liberty to express an opinion as to the sufficiency of the evidence. When there is a defect, or entire absence of evidence, it is his duty so to instruct the jury; but, if there be any competent evidence, relevant and tending to prove the matter in issue, it is 'the true office and province of the jury' to pass upon it, although the evidence may be so slight that anyone will exclaim, 'Certainly no jury will find the fact upon such insufficient evidence.' Still the judge has no right to put his opinion in the way of the free action of the jury, even should he deem it necessary to do so, in order to prevent them from being misled by the arguments of counsel or their own want of apprehension. It is true, juries will sometimes find strange verdicts, acting under the influence of ignorance or of prejudice, but in general juries are honest, and it is considered safer for the lives and property of the people to submit to the inconvenience of particular cases of this kind than in any wise to allow the judge to encroach upon 'the true office and province of the jury.' This partial evil is in a great measure obviated by allowing the judge to grant a new trial in all cases (except where a party is acquitted upon a criminal charge) whenever he thinks the jury have found against the weight of the evidence." I have no apology to make for quoting so much of this opinion. It is a great opinion of a great judge, fully equal in importance to that of *Hoke v. Henderson* [15 N. C. (4 Dev. L.) 1, 25 Am. Dec. 677], about which we have recently heard so much. I have given to the latter opinion the deliberate assent of my judgment and my conscience, and have carried it to its fullest legitimate extent. In doing so I have nothing to retract, but I feel equally bound by the underlying principles of *State v. Allen*. Are the constitutional rights of the officeholder any more sacred than the constitutional guaranties of the citizen? I think not. I understand the opinion of the court to admit that there is sufficient evidence tending to prove the negligence of the defendant, and to base its judgment purely upon the contributory negligence of the plaintiff, which it presumes to have been shown beyond the possibility of a reasonable doubt. It should be borne in mind that much of the evidence upon which the court apparently relies as showing contributory negligence was brought out by the defendant on cross-examination. That driving a train at a greater rate of speed than that allowed by law is at least evidence of negligence is well settled. In *Grand Trunk R. Co. v. Ives*, 144 U. S. 418, 36 L. ed. 489, 12 Sup. Ct. Rep. 683, the court says: "Indeed, it has been held in many cases that the running of railroad trains within the limits of a city at a rate of speed greater than is allowed by an ordinance of such city is negligence *per se* [citing authorities]. But perhaps the better and more generally accepted rule is that such an act on the part of the railroad company is always to be con-

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sidered by the jury as at least a circumstance from which negligence may be inferred in determining whether the company was or was not guilty of negligence." The opinion of the court disposes of the case at bar in the following words: "And it seems to us that there can be no doubt but what the intestate of the plaintiff was also guilty of negligence if the evidence be true, and every word of it believed. This issue is, then, not one that must be found by a jury, but one that may be found by the court. It does not present a question where reasonable men might put different constructions upon it, and come to the conclusion that the plaintiff's intestate was not guilty of negligence." By this I presume the court means that the negligence of the deceased was the ultimate proximate cause. This remarkable finding, coupled with the unqualified assertion that no reasonable man can put a different construction upon it, becomes still more remarkable in view of the fact that two members of this court have put a different construction upon it. This exquisite but unconscious satire upon the rule itself well illustrates its inherent fallacy. I do not mean to be flippant, or to treat the opinion of the court with any disrespect, but surely it is a legitimate argument to show that it necessarily involves a *reductio ad absurdum*. If reasonable men cannot take a different view of this matter, it follows that the two judges who have taken a different view of it cannot be considered as reasonable men. But suppose two other judges should in some other case have the misfortune to differ from a majority of the court as to the effect of the evidence, they also would come under the ban. This would leave the remaining member of the court far above his associates upon the lonely pedestal of solitary infallibility. Suppose he, too, should fall from his high estate, what would become of the court? And yet this court must say that no reasonable man can draw but one conclusion from the evidence, or the case must go to the jury. Why not let it go to the jury, as was said in *Allen's Case* should be done, in all cases of doubt? The court is not only putting itself in the place of the jury, but is deciding the case by a majority verdict.

Another exceedingly able and interesting opinion is the dissenting opinion of Justice Bynum in *Wittkowsky v. Wasson*, 71 N. C., on page 458. The present attitude of the court renders that opinion almost prophetic. The opinion of the court in the case at bar says that the evidence introduced by the plaintiff must be taken as true, as far as he is concerned. This absolutely reverses the reason of the rule. A party is estopped from impeaching the credibility of his witnesses, but not from denying the correctness of their statements. Moreover, much of the evidence was brought out by the defendant on cross-examination. On a motion for nonsuit, the defendant admits the truth of the plaintiff's evidence, which must be construed in the light most favorable to the plaintiff. So construing the evidence, can anyone say

that, if the engine had been going at not more than 4 miles an hour,—the maximum speed allowed by the ordinance,—the engineer could not have stopped in time to prevent the killing? As the intestate was going in the same direction, if he were walking at the rate of 3 miles an hour, the train would have gained on him only 1 mile in an hour. The intestate is presumed to have known the law, and he had a right to assume that the defendant would obey the law. He had a right to presume that the defendant would give him the ordinary signals required by law, and would not run him down, and crush the life out of him, without giving him some slight warning. Surely, a human life is still worth something,—the pulling of a bell cord, the opening of a whistle. We are constantly told that we should be shocked at the excessive verdicts of juries. That is often the case, but there are other things which also touch my judicial sensibility. A human form mangled beyond recognition, and an immortal spirit hurled into eternity without a moment's warning, are a greater shock to the instructed conscience of a Christian age than any verdict rendering merely pecuniary damages. This may be called mere sentimentality. Be it so. I can never hope to attain that high plane of judicial temperament where I shall be entirely free from human sympathy. In addition to the weight of reason and authority in favor of drawing the line at affirmative verdicts, another advantage is that it is a natural boundary, seen and known of all men. Where the dividing line between great principles is marked by nothing more substantial than stakes, which can easily be put down, and as easily pulled up and moved, the principles themselves are in imminent danger. I deeply feel the importance of this decision, and may overestimate its danger. I hope I do, but it seems to me to involve ultimate results far-reaching and dangerous in their nature.

With such strong convictions and sincere apprehensions, I cannot afford to cast away the moorings of the past, and turn my opinions loose to float without chart or compass, the aimless driftwood of a shoreless sea.

Clark, J., dissenting:

The jury system, whatever its defects, is the best which the wisdom of the ages has yet evolved for the ascertainment of the truth of disputed issues of fact. It is the bulwark of the liberty and the rights of the citizen. The line between the province of the court and of the jury was distinctly run and marked by our ancestors in the act of 1796 (now Code, § 413). Bynum, J., in *Wittkowsky v. Wasson*, 71 N. C. 458, ably and prophetically pointed out the evils of the judiciary passing beyond that line and invading the province of the jury as the sole triors of the facts. It is to be deeply regretted that his views did not then prevail. It is a still further invasion of the province of the jury, and contrary to a long line of the decisions of this court (as Mr. Justice Douglas has shown), to permit a judge to direct an affirmative finding, which is nothing less than the court passing upon the evidence and holding that a fact is sufficiently proved. It is the province of the jury to disbelieve uncontradicted evidence if they attach no faith to the witnesses. If there is no evidence in support of the party having the burden of proof upon an issue, the judge may direct a negative finding for its absence; or, if the uncontradicted evidence is in support of the contention of the party having the burden of proof, the court may tell the jury, "if they believe the evidence," to find in favor of that side; but the judge cannot, even in such case, direct an affirmative finding, for that is to pass upon the credibility of the witnesses and the weight of the evidence, which the jury alone is authorized to do.

MAINE SUPREME JUDICIAL COURT.

Harry D. PINKHAM
v.
Alphonzo J. LIBBY *et al.*

(93 Me. 575.)

The death of a stallion, preventing an exercise of the privilege of return by one who had paid for a fruitless service, with an agreement for the privilege of return during the season, does not create any failure of consideration which will give a right to repayment..

(February 3, 1900.)

NOTE.—As to effect of intervening impossibility of performance upon the liability for breach of contract, see *Stewart v. Stone* (N. Y.) 14 L. R. A. 215, and *note*; and *Remy v. Olds* (Cal.) 21 L. R. A. 645.

For the death of a person as affecting obligation of contract for services, see *Parker v. Macomber* (R. I.) 16 L. R. A. 858, and *note*.
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A GREED statement for the opinion of the Supreme Judicial Court in an action to recover back money paid for the services of a stallion which died before the service was completed. *Judgment for defendants.*

The facts are stated in the opinion.

Messrs. Beane & Beane, for plaintiff:

If the agreement is for an act which the party alone can perform, and he is prevented by the act of God, the obligation is discharged; but if the stipulations can be substantially performed, he is not excused.

Was it not incumbent upon the defendants, if they were to make this answer, to show that Arrival was not overworked or overdriven,—that God, and not the defendants, caused his death; that they were not negligent in his treatment, but used due care and diligence, proper medicine and appliances, for his recovery?

Mr. A. M. Spear, for defendants:

In the light of the facts as understood by

the parties, and fairly interpreted, the privilege of return was, as a legal proposition, incidental to the main contract, and contingent entirely upon future events, to wit, the necessity of a return and the ability and existence of the stallion to perform the service.

Sickness and death of the stallion before the privilege of return was requested bring the defendants fully within the protection of the law.

Elliot Nat. Bank v. Beal, 141 Mass. 570, 6 N. E. 742; *Taylor v. Caldwell*, 3 Best & S. 826; *Wells v. Calnan*, 107 Mass. 516.

The agreed statement does not show or claim that it was the fault of defendants that the stallion died. Hence no presumption of fault on the part of the defendants arises, but rather a presumption of the exercise of due care.

Beaulieu v. Portland Co. 48 Me. 291; *Robinson v. Fitchburg & W. R. Co.* 7 Gray, 92.

This contract was for the service of a particular horse, of particular merit, and particular pedigree. Could the defendants have compelled the plaintiff to accept the services of another stallion? We think not when the converse is true.

Marvel v. Phillips, 162 Mass. 399, 26 L. R. A. 416, 38 N. E. 1117.

The death of the stallion excused any further performance of the contract on the part of the defendants, and leaves no right of recovery of damages on the part of the plaintiff.

Butterfield v. Byron, 153 Mass. 519, 12 L. R. A. 571, 27 N. E. 667.

Mr. O. B. Clason also for defendants.

Whitehouse, J., delivered the opinion of the court:

The plaintiff agreed to pay the defendants \$75 for the service of their stallion to a valuable mare owned by him, "with the privilege of return for the season." At the time of the service the plaintiff gave to the defendants his negotiable promissory note for the sum of \$75 in full payment of the contract price. But the service proved fruitless, and the exercise of the "privilege of return" was prevented by the sickness and death of the stallion. In the meantime the plaintiff's note had been discounted at a bank in the regular course of business, and, after it had been merged in a judgment of the court, was duly paid.

The plaintiff now brings this action to recover the amount paid by him under this contract on the ground of a want or failure of consideration.

It is the opinion of the court that upon the facts presented in the agreed statement the action is not maintainable.

It should be observed, in the first place, that this is not a contract of warranty, but for a service "with the privilege of return," for which he was to pay \$75. This sum was not to be divided and made payable in two instalments, one for the service and another for the "privilege of return," or in a specified instalment for each service. The consideration was entire, and the plaintiff unhesitatingly gave his negotiable note for the full 49 L. R. A.

amount of the contract price at the time of the service. This note was presumptively payment. It was equivalent to cash, and the fact that the plaintiff was willing to give it has much significance upon the precise understanding of the parties in relation to this contract. By reason of his knowledge of the breeding qualities of the mare, the plaintiff apparently decided that it was not for his interest to pay the price of a contract of warranty, but preferred to pay the price of a service with the privilege of return; and from his readiness to pay the entire sum at the time the contract was made it is evident that the service actually obtained at that time was deemed by him the most important and substantial feature of the contract. In the event that this service proved fruitless, he had the "privilege of return" for further service. But it would seem that the plaintiff did not consider it probable that he would have occasion to exercise the privilege. It is obvious that that part of the contract by which one service of the stallion was actually obtained was considered positive and absolute. It depended upon no contingency. But the "privilege of return for the season" was not absolute and unconditional. It necessarily contemplated the continued existence of the stallion, and it is a settled rule of law that "in contracts from the nature of which it is apparent that the parties contracted on the basis of the continued existence of a given person or thing, a condition is implied that, if the performance become impossible from the perishing of the person or thing, that shall excuse such performance." 2 Chitty, Contr. 11th Am. ed. 1076; *Knight v. Bean*, 22 Me. 531; *Marvel v. Phillips*, 162 Mass. 399, 26 L. R. A. 416, 38 N. E. 1117, and cases cited; *Spalding v. Rosa*, 71 N. Y. 40, 27 Am. Rep. 7; *Yerrington v. Greene*, 7 R. I. 589, 84 Am. Dec. 578; *Taylor v. Caldwell*, 3 Best & S. 826. The plaintiff was absolutely assured of one service before the payment of the contract price, but the right to further service was contingent upon the life of the stallion. There was no guaranty that the horse would live through the season.

The plaintiff does not controvert this familiar principle. He does not deny "that in this case the death of the stallion excused exact or full performance" of the contract. He does not claim that the plaintiff would be entitled to recover damages for the non-fulfilment of it. But he insists that the death of the stallion did not relieve the defendants from the obligation either to return the money to the plaintiff, or give him a substantial performance of the contract by furnishing the service of some other stallion.

The agreement between these parties was analogous to a contract for personal services involving the exercise of individual skill and judgment, which can be performed only by the person named. Such contracts are not deemed to be of absolute obligation, but are subject to an implied condition that the person shall be alive and able to perform the services at the time required. *Dickey v. Linscott*, 20 Me. 453, 37 Am. Dec. 66; *Green-*

leaf v. Grounder, 86 Me. 298, 29 Atl. 1082; *Spalding v. Rosa*, 71 N. Y. 40, 27 Am. Rep. 7; *Marvel v. Phillips*, 162 Mass. 399, 26 L. R. A. 416, 38 N. E. 1117.

In the last-named case the court says: "A contract to render such services and perform such duties is subject to the implied condition that the party shall be alive and well enough in health to perform it. Death or a disability which renders performance impossible discharges the contract. Neither Phillips nor his estate is bound to furnish a substitute, nor is the plaintiff bound to accept one."

The plaintiff doubtless preferred the defendants' stallion because his pedigree, record, and peculiar merits seemed best calculated to accomplish the purpose in breeding contemplated by him. He contracted for the service of a particular stallion, and could not be compelled to accept the services of any other. The defendants contracted to furnish the services of their stallion, and not the services of any other. Nor does it anywhere appear in the statement of facts that there was ever any suggestion or intimation from the plaintiff that he desired or would accept the service of any other stallion in lieu of that one selected by him.

There is a class of cases represented by *Butterfield v. Byron*, 153 Mass. 517, 12 L. R. A. 571, 27 N. E. 667, in which it is held that,

if one contracts to furnish labor and material in the construction of a building, and his contract becomes impossible of performance on account of the destruction of the building, he may recover *pro rata* for what he has done or furnished; and, on the other hand, that the owner of the building, who has made payments in advance, in such a case may recover back so much of his money as was an overpayment. But this doctrine is clearly inapplicable to the case at bar. As before stated, the contract price was indivisible, and incapable of apportionment. The payment made by the plaintiff cannot, upon the facts of this case, be fairly deemed an overpayment. If, therefore, the plaintiff is entitled to recover anything, it must be the full amount of the contract price. But this would be unjust to the defendants. It is true the service actually had was ineffectual, and of no value to the plaintiff. But *non constat* that the privilege of return would have been of any value. The defendants made no engagement of warranty that any service would be successful.

The absolute part of the contract was executed by the voluntary act of the plaintiff in giving his negotiable note for the contract price, and the contingent part became impossible of performance. The entry must therefore be:

Judgment for defendants.

MARYLAND COURT OF APPEALS.

STATE of Maryland, Appt.,

v.

William H. KNOWLES.

(.....Md.....)

1. In construing a statute in which a word susceptible of more than one meaning is repeated in different parts of the act, a presumption arises that it is used in the same sense throughout; but the presumption falls where such a construction will nullify the law, if this result can be avoided by any fair and reasonable construction of the whole act.
2. The word "may" in an act creating a board of dental examiners, and providing that a graduate from a university or college authorized to grant diplomas in dental surgery may be examined by such board with reference to qualifications, will be construed "must," since the duty of examination is for the benefit of both the public and the applicant.
3. Discrimination in favor of the graduates of a regular college of dentistry, in a statute requiring graduates of other universities or colleges authorized to grant diplomas in dental surgery to be examined with reference to qualifications, is not an arbitrary and unconstitutional discrimination, in violation of U. S. Const. 14th Amend. and Md. Declaration of Rights, art. 23.

NOTE.—As to regulation of right to practise dentistry, see cases in note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.) 14 L. R. A. on page 581.

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4. A statute providing that any person desiring to practise dentistry may be examined "with reference to qualifications" by the board of medical examiners will not be held unconstitutional on the ground that its language is so vague and indeterminate as to permit an examination upon any subject, since it will be presumed that the qualifications only referred to are those appropriate to, and requisite for, the practice of dentistry.

5. An exception in a statute after general words of prohibition is matter of defense, which must be interposed by the accused in a prosecution for a violation of the statute, and need not be negated by the indictment.

(February 15, 1900.)

APPPEAL by the state from a judgment of the Criminal Court of Baltimore City in favor of defendant in a proceeding against him for practising dentistry without a certificate. *Reversed.*

The facts are stated in the opinion.

Messrs. Isidor Rayner, Attorney General, and E. P. Keech, Jr., for appellant:

It is too late in these days to deny the power of the legislatures of the various states to enact statutes regulating the conduct of those businesses, trades, and professions which have primarily to do with the public health or welfare.

Re Taylor, 48 Md. 28, 30 Am. Rep. 451; *McAllister v. State*, 72 Md. 390, 20 Atl. 142; *Singer v. State*, 72 Md. 464, 8 L. R. A. 551,

19 Atl. 1044; *State v. Broadbelt*, 89 Md. 565, 45 L. R. A. 433, 43 Atl. 771; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Williams v. Mississippi*, 170 U. S. 213, 42 L. ed. 1012, 18 Sup. Ct. Rep. 583; *State v. Randolph*, 23 Or. 74, 17 L. R. A. 470, 31 Pac. 201; *Schoolcraft v. Louisville & N. R. Co.* 92 Ky. 233, sub nom. *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L. R. A. 579, 17 S. W. 567.

The courts, in construing a statute, will hold that "may" is equivalent to the word "shall" or "must," whenever reason or the necessities of the case so require.

Sifford v. Morrison, 63 Md. 14; Endlich, Interpretation of Statutes, § 306; Smith, Const. & Stat. Constr. pp. 724 et seq.; Maxwell, Interpretation of Statutes, pp. 286 et seq.

In permitting its board of examiners to waive the requirement of examination, the state has not added to the burdens of the appellee or any other applicant of registration. But it has vested in the board of examiners the power to employ other means to satisfy itself of the competency of the applicant, of the sufficiency of which the board is the only judge.

Iowa Electric Medical College Asso. v. Schrader, 87 Iowa, 659, 20 L. R. A. 355, 55 N. W. 24; *Williams v. Dental Examiners*, 93 Tenn. 619, 27 S. W. 1019; *State v. Creditor*, 44 Kan. 565, 24 Pac. 346; *Hewitt v. Charier*, 16 Pick. 353.

The qualifications referred to must be those reasonably necessary to the proper knowledge and practice of the profession of dental surgery.

Smith, Const. & Stat. Constr. p. 656; Endlich, Interpretation of Statutes, §§ 400 et seq., 532; Maxwell, Interpretation of Statutes, pp. 396 et seq. See also note to *Alexander v. Worthington*, 5 Md. 471; *Knuckles v. State*, 87 Md. 204, 39 Atl. 619.

What the subjects necessary to a proper knowledge to pursue the profession of dentistry are the legislature, in its wisdom, has left to its technically trained board of examiners, who must, by the very terms of the act, be dentists of experience.

A possible evil resulting from a discretion conferred upon a public officer is no ground for holding a statute to be unconstitutional and void as denying equal protection of the laws of the state to all its citizens, when no abuse or illegal exercise of the discretion has been shown to exist.

Williams v. Mississippi, 170 U. S. 213, 42 L. ed. 1012, 18 Sup. Ct. Rep. 583; *Hiss v. Baltimore & H. Pass. R. Co.* 52 Md. 242, 36 Am. Rep. 371.

The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable application, no objection to their validity can be raised.

Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Singer v. 49 L. R. A.*

State, 72 Md. 464, 8 L. R. A. 551, 19 Atl. 1044; *Gosnell v. State*, 52 Ark. 228, 12 S. W. 392.

The legislature may adopt more than one standard of competency or method of ascertaining it.

Hewitt v. Charier, 16 Pick. 353; *Williams v. People*, 121 Ill. 84, 11 N. E. 881; *State v. Creditor*, 44 Kan. 565, 24 Pac. 346; *State v. Vandersluis*, 42 Minn. 129, 6 L. R. A. 119, 43 N. W. 789.

Mr. Albert S. J. Owens, for appellee:

The general rule of law as to the degree of proficiency required of professional persons in their dealings with the public, the lack of which in any case submitted to their care will impose liability, is that the person assuming to practise shall possess and exercise as much knowledge and skill in any given case as are possessed by the average person in the particular profession.

It is certainly beyond the power of a legislative body to delegate, without the slightest attempt to control, the authority to fix the limits of an examination for admission to practise dentistry, to the whim and caprice of an irresponsible and arbitrary discretion.

Douling v. Lancashire Ins. Co. 92 Wis. 63, 31 L. R. A. 112, 65 N. W. 738; *O'Neil v. American F. Ins. Co.* 166 Pa. 72, 28 L. R. A. 715, 30 Atl. 943; *Anderson v. Manchester F. Assur. Co.* 59 Minn. 182, 28 L. R. A. 609, 63 N. W. 241, 60 N. W. 1095; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Baltimore v. Radecke*, 49 Md. 227, 33 Am. Rep. 239; *Singer v. State*, 72 Md. 465, 8 L. R. A. 551, 19 Atl. 1044.

Pearce, J., delivered the opinion of the court:

The appellee was indicted in the criminal court of Baltimore city under the act of 1896 (chap. 378), which repealed and reenacted, with amendments, article 32 of the Code of Public General Laws of Maryland, entitled Dentistry. He demurred to the indictment upon the ground that the act is unconstitutional. The demurrer was sustained, the indictment was quashed, and the state has appealed.

The act mentioned created a state dental board of examiners, consisting of six members, charged with the duty of issuing certificates to those entitled under the act to practise dentistry in the state. The 5th and 12th sections alone concern this appeal, and these are as follows:

"Sec. 5. Any person twenty-one years of age, who has graduated at, and holds a diploma from, a university or college authorized to grant diplomas in dental surgery by the laws of any one of the United States, and who is desirous of practising dentistry in this state, may be examined by said board with reference to qualifications, and after passing an examination satisfactory to the board, his or her name, residence, or place of business, shall be registered in a book kept for that purpose, and a certificate shall be

issued to such person. Any graduate of a regular college of dentistry may, at the discretion of the examining board, be registered without being subjected to an examination."

"Sec. 12. Nothing in this article shall be so construed as to interfere with the rights and privileges of resident physicians and surgeons, or with persons holding certificates duly issued to them prior to the passage of this act; and dental students operating under the immediate supervision of their instructors in dental infirmaries or dental schools chartered by the state of Maryland."

This act is assailed on the ground that it violates the 23d article of the Maryland Declaration of Rights and the 14th Amendment to the Constitution of the United States. The contention is twofold, viz.: (1) That the board may, if it chooses, refuse to examine one holding a diploma from a college or university authorized to grant diplomas in dental surgery, and can thus arbitrarily deny the right to practise dentistry in this state, to anyone holding such diploma, however skilled in his profession, or however qualified to pass an examination; and that as the test of constitutionality is, not what has been, but what may be, done or refused under the law, this grant of arbitrary power to do or to refuse to do must invalidate the law. And (2) that the language of the act, "may be examined with reference to qualifications," is so vague and indeterminate as to permit an examination upon any subject which the whim, caprice, or hostility of the board may suggest, and thus again confer upon the board unreasonable and arbitrary power, equally fatal to the validity of the law. If either of these contentions were well founded, we should be compelled to pronounce the law unconstitutional, because we are in hearty accord with the declarations of the Supreme Court of the United States in *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, that, "when we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." But we cannot deduce a grant of arbitrary power from any reasonable construction of the language of this act. Upon the first point of the appellee his position is that, as the word "may" occurs twice in § 5, and as there can be no question that in the later clause it is employed in its usual and natural sense, the same sense is necessarily and unalterably impressed upon its employment in the former clause. But he has produced no authority for this position, and we do not think any satisfactory reason can be given for announcing so inexorable a rule of construction. It may, indeed, well be conceded that, where a word susceptible of more than one meaning is repeated in the same act or section of an act (either meaning being in each case open to reasonable adoption), a presumption arises, more or less forcible according to the circumstances, that it is used throughout in the

same sense; but where the subject-matter to which the word refers is not the same in both clauses, or where the surrounding circumstances are different, this presumption must yield to an adverse presumption, furnished by an analysis of the various purposes of the law, and of the language in which those purposes are expressed. Now, it is too plain for controversy that the appellee is correct in saying that the last "may" is used in a permissive sense, because it is expressly coupled with "discretion," which negatives the possibility of its use in a mandatory sense. But, if the same sense is to be impressed upon its use in the preceding clause, the result will be to nullify the law; and this result cannot be tolerated if it can be avoided by any fair and reasonable construction of the whole section. In order to reach such fair and reasonable construction, let us suppose for a moment the latter clause to be eliminated from the law. How, then, would the word "may" in the former clause be understood? Would it not necessarily be construed "shall" or "must," in conformity with the established rule of law that where the duty to be performed is for the benefit of the public or third persons it shall be so construed? The duty of examination upon application (where there is no express discretion to waive examination) is for the benefit of both the public and the applicant,—for the benefit of the public, because it protects the public against ignorant and incompetent practitioners; and for the benefit of the qualified applicant, because it puts him before the public with the seal of approbation from a competent and disinterested tribunal. The origin and development of this elementary rule is clearly set forth in *Sifford v. Morrison*, 63 Md. 18, and many of the cases are there cited in which it has been recognized and applied.

Having determined the construction proper to be adopted if the former clause of the section stood alone, let us now restore the latter clause, and see if the conclusion reached can be thereby in any manner affected. For the reason already stated, it is impossible that "may" can in the latter clause be construed "shall," no matter how the former "may" is construed; and if, merely because this cannot be done, we are compelled to construe "may" in the former clause as used in a permissive sense, we shall be deliberately rejecting the meaning which an established rule of law and the plain purposes of the act require us to adopt in construing the former clause of the section. The law does not permit itself to be frightened out of its propriety by the hobgoblin of inconsistency, and we have no hesitation in holding that the only discretion conferred is to waive an examination when the applicant is a graduate of a regular college of dentistry, and that in all other cases covered by the act examinations must be granted when application is made in accordance with reasonable rules as to time and place. We think the act does mean to distinguish, for the purpose of examinations, between "a college or university authorized to grant diplomas in dental sur-

gery and "a regular college of dentistry." In the former, dentistry may be but an adjunct to the course, and there is no such assurance of thoroughness of instruction and practical application, as must be presumed in a regular dental college, where the whole time of the students and instructors is given to the theory and practice of dental science. Discriminations of this character have been sustained in *Williams v. Dental Examiners*, 93 Tenn. 619, 27 S. W. 1019, and in *State v. Creditor*, 44 Kan. 568, 24 Pac. 346; and the exact principle upon which these discriminations rest has been recognized in *State v. Vandersluis*, 42 Minn. 129, 6 L. R. A. 119, 43 N. W. 789, and in numerous cases where the authority to determine what colleges are "reputable and in good standing" has been held not to be an arbitrary or unreasonable authority.

Upon the second point little need be said. The language of the act might well have been more specific, but it is impossible to suppose that it refers to any other qualifications than those appropriate to and requisite for the practice of dentistry. To hold that this language would permit an examination in astronomy, classics, mathematics, or even in the kindred study of medicine, would be to adopt a forced and violent construction of the law, not for the purpose of sustaining, but defeating, it. The constitutionality of the act was not assailed on any other grounds than those we have considered, nor can we perceive how it could be otherwise successfully assailed, in view of the numerous decisions of the Supreme Court of the United States, where similar statutes have been held to violate no constitutional requirement. There is no stronger or clearer exposition of the law applicable to this case than that contained in the following passage from the much-cited and oft-approved case of *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231: "The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation." In *Singer v. State*, 72 Md. 464, 8 L. R. A. 551, 19 Atl. 1044, this court, in sustaining the act of 1886 (chapter 439) regulating the business of plumbers in Baltimore city, adopted the language last quoted, and added: "No one questions the right of every person in this country to follow any legitimate business or occupation he may see fit. This is a privilege open alike to everyone. His own labor, and the right to use it as a means of livelihood, is a right as sacred, and as fully protected by the law, as any other personal or private right. But, broad and comprehensive as this right may be, it is subject to the paramount right, inherent in every gov-

ernment, to impose such restraint and to provide such regulations in regard to the pursuits of life as the public welfare may require." The most recent expression of this court upon this subject is in the case of *State v. Broadbelt*, 89 Md. 565, 45 L. R. A. 433, 43 Atl. 771, sustaining the act creating a state live-stock sanitary board, from which the following passage may be appropriately reproduced: "If the legislature of Maryland has by the statute under consideration made a class to which the provisions of the act were designed to apply, and if that classification is just and reasonable, and not purely arbitrary, the ruling on the demurrer [sustaining it] was wrong." The same reasons which apply to the profession of medicine apply with equal force to the profession of dentistry, which is but a special branch of the medical profession. *State v. Vandersluis*, 42 Minn. 130, 6 L. R. A. 119, 43 N. W. 789; *Gosnell v. State*, 52 Ark. 231, 12 S. W. 392; *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A., note, p. 581.

We were informed at the argument in this court that the learned judge of the criminal court expressed himself as being clearly of the opinion that the statute is a valid exercise of the legislative power, and that he sustained the demurrer only on the ground that the indictment does not negative the exception contained in the 12th section of the statute,—a ground not relied on by the appellee's counsel either below or in this court. The rule that where, after general words of prohibition, an exception is created in a subsequent clause or section, it must be interposed by the accused as matter of defense, is too firmly settled in this state to be questioned. *Stearns v. State*, 81 Md. 344, 32 Atl. 252; *Kiefer v. State*, 87 Md. 562, 40 Atl. 377. For the reasons stated, the judgment will be reversed, and the case will be remanded for a new trial.

Judgment reversed, and new trial awarded, costs above and below to be paid by the appellee.

JAMES CLARK COMPANY *et al.*, *Appts.*,
v.
William COLTON *et al.*, Receivers of South
Baltimore Bank.

Winfield S. CAHILL *et al.*, *Appts.*,
v.
SAME.

(.....Md.....)

1. Officers of a bank will be presumed to have had knowledge of its insolvent condition at the time of certain payments to them, attacked as unlawful preferences, where the bank had been insolvent for many years, and became hopelessly insolvent the day following the payments.

NOTE.—As to unlawful preference by insolvent bank, see *Elmira Sav. Bank v. Davis* (N. Y.) 25 L. R. A. 546, and note (this case was reversed in 40 L. ed. 700); also *O'Brien v. Grant* (N. Y.) 28 L. R. A. 361; and *O'Brien v. East River Bridge Co.* (N. Y.) 48 L. R. A. 122.

2. The claim that a bill for a receivership was not filed under Code Gen. Pub. Laws, art. 23, §§ 264, 264a, relating to the dissolution and winding up of insolvent corporations, and that therefore the court had no jurisdiction to decree dissolution, cannot be set up by the officers of the corporation to defeat an action by the receivers against them to recover the amount of unlawful preferences, where the decree was made at their instance, and provides that the estate and assets of the corporation shall be administered according to the insolvent law, and that the receivers shall have the same powers as to setting aside illegal preferences which are thereby given to permanent trustees.

3. Payment by an insolvent bank of a check of a company in which the president of the bank holds most of the stock, and of a note on which its directors are indorsers, although it has not committed the formal act of insolvency, will be held to be an unlawful preference, whether the estate be administered in equity or under the insolvent law, and will be set aside in an action by receivers appointed under Code Gen. Pub. Laws, art. 23, relating to the dissolution of insolvent corporations, art. 47, § 22, of which prohibits preferences made when insolvent or in contemplation of insolvency.

(McSherry, Ch. J., dissents.)

(April 27, 1900.)

A PPEALS by defendants from decrees of the Circuit Court of Baltimore City in favor of plaintiffs in an action brought to recover assets of the insolvent bank. *Affirmed.*

The facts are stated in the opinions.

Messrs. Robert H. Smith and Gans & Haman, for appellants:

If a payment, assignment, or conveyance is to be declared void as a preference on the ground of insolvency, it must be by reason of commercial insolvency, which does not mean inadequacy of aggregate assets to balance aggregate liabilities, but "inability to pay debts when due in ordinary course of business."

Castleberg v. Wheeler, 68 Md. 280, 12 Atl. 3; *Steinberger v. Independent Loan & Sav. Assn.* 84 Md. 635, 36 Atl. 439.

The check paid the James Clark Company was paid in regular course by the cashier of the bank, just as any other check.

Winchester v. Baltimore & S. R. Co. 4 Md. 231.

Directors of a corporation, when the corporation is insolvent but still transacting business, are not trustees for the creditors.

Fear v. Bartlett, 81 Md. 443, 33 L. R. A. 721, 32 Atl. 322; *Brant v. Ehlen*, 59 Md. 24; *Graham v. La Crosse & M. R. Co.* 102 U. S. 148, 26 L. ed. 106; *Hollins v. Brierfield Coal & I. Co.* 150 U. S. 371, 37 L. ed. 1113, 14 Sup. Ct. Rep. 127; *Hospes v. Northwestern Mfg. & Car Co.* 48 Minn. 174, 15 L. R. A. 470, 50 N. W. 1117; *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205, 28 L. R. A. 707, 17 So. 525, *Overruling Corey v. Wadsworth*. 99 Ala. 68, 23 L. R. A. 618, 11 So. 350; *Buell v. Buckingham*, 16 Iowa, 284, 85 Am. Dec. 49 L. R. A.

516; *Planter's Bank v. Whittle*, 78 Va. 737; *Whitwell v. Warner*, 20 Vt. 425; *Smith v. Skeary*, 47 Conn. 47; *Warfield v. Marshall County Canning Co.* 72 Iowa, 666, 34 N. W. 467; *Schufeldt v. Smith*, 131 Mo. 280, 29 L. R. A. 830, 31 S. W. 1039; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 7 Atl. 514; *Brown v. Grand Rapids Parlor Furniture Co.* 16 U. S. App. 221, 22 L. R. A. 817, 58 Fed. Rep. 286, 7 C. C. A. 225; *Bank of Montreal v. J. E. Potts Salt & Lumber Co.* 90 Mich. 345, 51 N. W. 512.

That directors are not trustees for creditors is the established English doctrine.

Re Winchman Shipbuilding & Boiler Co. 38 L. T. N. S. 659, L. R. 9 Ch. Div. 329.

The Maryland statute avoiding transfers in contemplation of insolvency means "an inability of the debtor to pay his debts as they become due, in the ordinary course of business."

Castleberg v. Wheeler, 68 Md. 277, 12 Atl. 3; *Williams v. Cohen*, 25 Md. 486.

If a debtor honestly believes himself to be solvent he rebuts the presumption of intent to prefer, which arises from the fact of actual insolvency.

Collier. Bankruptcy, p. 42: *Toof v. Martin*, 13 Wall. 40, 20 L. ed. 481; *Castleberg v. Wheeler*, 68 Md. 277, 12 Atl. 3.

The acts done were payments in ordinary course of business while the bank was a going concern, and hence these payments, even if the bank were insolvent in the sense of the statute, would not be preferences, whether the directors should have known of the insolvency or not.

Hayden v. Chemical Nat. Bank, 55 U. S. App. 420, 84 Fed. Rep. 875, 28 C. C. A. 548; *McDonald v. Chemical Nat. Bank*, 174 U. S. 610, 43 L. ed. 1106, 19 Sup. Ct. Rep. 787.

The Maryland insolvent laws have no application to the case.

The insolvency laws of Maryland have no application to corporations, as some of their provisions are inherently repugnant to such application.

Ellcott v. Search, 72 Md. 25, 18 Atl. 863.

Under § 264 it was necessary that the bill should have been filed for the purpose of dissolving the corporation. It was only when the bill was filed "for that purpose" and proof taken of insolvency under such bill, that the act of 1896, chap. 349, applied. This was a special statutory jurisdiction given to the court of equity, and is strictly construed.

Galpin v. Page, 18 Wall. 350, 21 L. ed. 959.

Messrs. William S. Bryan, Jr., and Martin Lehmayer, for appellees:

It is the privilege of the creditor, and not of the debtor, to select the forum, whether of law or equity.

Pinckney v. Lanahan, 62 Md. 451.

There is a remedy in equity to recover fraudulent preferences.

Bean v. Brookmire, 1 Dill. 151, Fed. Cas. No. 1,169; *Darby v. Boatman's Sav. Inst.* 1 Dill. 141, Fed. Cas. No. 3,571; *Goodman v. Wineland*, 61 Md. 449; *Trego v. Skinner*, 42 Md. 426; *Heighe v. Farmers' Bank*, 5 Harr.

& J. 68; *Bradshaw v. Klein*, 2 Biss. 20, Fed. Cas. No. 1,790; *Dulaney v. Hoffman*, 7 Gill & J. 171, 28 Am. Dec. 207.

In *Hoffman Steam Coal Co. v. Cumberland Coal & I. Co.* 16 Md. 456, 77 Am. Dec. 311, the court lays down in the strongest terms the incapacity of trustees, and also of any persons acting in a fiduciary capacity, to purchase the property of those for whom they are acting.

Fox v. Mackreth, 2 Bro. Ch. 400, 1 White & T. Lead. Cas. 105; *Aberdeen R. Co. v. Blaikie*, 1 Macq. H. L. Cas. 461; *Cumberland Coal & I. Co. v. Sherman*, 20 Md. 117; *Cumberland Coal & I. Co. v. Parish*, 42 Md. 605; *Wardell v. Union P. R. Co.* 103 U. S. 658, 26 L. ed. 511; *Baltimore Sugar Ref. Co. v. Campbell & Z. Co.* 83 Md. 36, 34 Atl. 369; *Boyce v. Grundy*, 3 Pet. 215, 7 L. ed. 657.

A court of law is not the proper tribunal to pronounce absolutely void, and to set aside, a sale made by a trustee or executor, merely on the ground that he was himself the purchaser; but it is a subject proper only for the cognizance of another forum,—a court of chancery.

Williams v. Marshall, 4 Gill & J. 380.

If Cahill suspected or feared that the bank would stop payment, and that his money would thus be jeopardized, it is sufficient. Actual knowledge of the fact was unnecessary.

Re George, 1 Low. Dec. 409, Fed. Cas. No. 5,323; *Arnold v. Maynard*, 2 Story, 349, Fed. Cas. No. 561; *Hayden v. Chemical Nat. Bank*, 55 U. S. App. 420, 84 Fed. Rep. 876, 28 C. C. A. 548; *McDonald v. Chemical Nat. Bank*, 174 U. S. 610, 43 L. ed. 1106, 19 Sup. Ct. Rep. 787.

Where a conveyance, by its terms, operates to hinder, delay, or defraud creditors, the intent to do so is imputed to the parties.

Whedbee v. Stewart, 40 Md. 424; *Haughey v. Albin*, 2 Bond, 248, Fed. Cas. No. 6,222; *Morse v. Cohannet Bank*, 3 Story, 364, Fed. Cas. No. 8,856; *Arnold v. Maynard*, 2 Story, 349, Fed. Cas. No. 561; *Re George*, 1 Low. Dec. 409, Fed. Cas. No. 5,323.

Intentions of the parties are to be judged by the legal effect of their acts.

Samson v. Burton, 5 Ben. 325, Fed. Cas. No. 12,285; *Campbell v. Traders' Nat. Bank*, 2 Biss. 423, Fed. Cas. No. 2,370; *Linkman v. Wilcox*, 1 Dill. 161, Fed. Cas. No. 8,374.

The question of the insolvency of the bank is *res judicata*.

Glenn v. Williams, 60 Md. 94; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; *Lycoming F. Ins. Co. v. Langley*, 62 Md. 196; *Castleman v. Templeman*, 87 Md. 546, 41 L. R. A. 367, 40 Atl. 275.

Actual knowledge of the bank's condition is, as matter of law, immaterial. It was Mr. Cahill's duty to know the condition of the financial institution of which he was an officer, and such knowledge will be imputed to him by an irrebuttable presumption of law.

Corbett v. Woodward, 5 Sawy. 404, Fed. Cas. No. 3,223; *McDaniel v. Harvey*, 51 Mo. App. 199; *Sicardi v. Keystone Oil Co.* 149 Pa. 148, 24 Atl. 164; *Lourey Bkg. Co. v. Em-49 L. R. A.*

pire Lumber Co. 91 Ga. 624, 17 S. E. 968; *Cook, Stock & Stockholders*, § 661; *Rison v. Knapp*, 1 Dill. 187, Fed. Cas. No. 11,861.

What was done by Mr. Cahill amounts to a preference.

Boone, Banking, § 301; 2 *Morse, Banks & Banking*, § 625; *Brouwer v. Harbeck*, 9 N. Y. 589.

If the payment by the insolvent bank is not made in the ordinary course of business, it is always a preference.

2 *Morse, Banks & Banking*, § 625.

The note was paid voluntarily before due. *Ibid.*; *Willison v. First Nat. Bank*, 80 Md. 190, 30 Atl. 749; *Goodyear Rubber Co. v. George D. Scott Co.* 96 Ala. 439, 11 So. 370.

The idea that a man is not insolvent because, if his creditors indulge him and give him further credit, he hopes to overcome his troubles and extricate himself, is not sound.

Hopkins's Appeal, 90 Pa. 69; *Sutton Mfg. Co. v. Hutchinson*, 24 U. S. App. 145, 63 Fed. Rep. 501, 11 C. C. A. 320; *Rouse v. Merchants' Nat. Bank*, 46 Ohio St. 493, 5 L. R. A. 378, 22 N. E. 293; *Richards v. New Hampshire Ins. Co.* 43 N. H. 263; *Corey v. Wadsworth*, 99 Ala. 68, 23 L. R. A. 618, 11 So. 350.

The directors cannot prefer themselves: being trustees or quasi trustees, they cannot make any personal gain at the expense of their *cestuis que trust*.

Drury v. Cross, 7 Wall. 302, sub nom. *Drury v. Mincawkee & S. R. Co.* 19 L. ed. 41; *Bradley v. Farwell*, Holmes, 433, Fed. Cas. No. 1,779; *Montgomery v. Phillips*, 53 N. J. Eq. 203, 31 Atl. 622; *Lippincott v. Shaw Carriage Co.* 25 Fed. Rep. 577; *Lourey Bkg. Co. v. Empire Lumber Co.* 91 Ga. 630, 17 S. E. 968; *Goodyear Rubber Co. v. George D. Scott Co.* 96 Ala. 439, 11 So. 370; *Hays v. Citizens' Bank*, 51 Kan. 535, 33 Pac. 318; *Olney v. Conanicut Land Co.* 16 R. I. 597, 5 L. R. A. 361, 18 Atl. 181; *Rouse v. Merchants' Nat. Bank*, 46 Ohio St. 493, 5 L. R. A. 378, 22 N. E. 293; *Hopkins's Appeal*, 90 Pa. 69; *Sventzel v. Penn Bank*, 147 Pa. 140, 15 L. R. A. 305, 23 Atl. 405, 415; *Roseboom v. Whittaker*, 132 Ill. 81, 23 N. E. 339; *Lamb v. Cecil*, 28 W. Va. 653; *Lamb v. Pannell*, 28 W. Va. 663; *Beach v. Miller*, 130 Ill. 162, 22 N. E. 484; *Haywood v. Lincoln Lumber Co.* 64 Wis. 639, 26 N. W. 184; *Smith v. Putnam*, 61 N. H. 634; *Corey v. Wadsworth*, 99 Ala. 68, 23 L. R. A. 618, 11 So. 350; *Richards v. New Hampshire Ins. Co.* 43 N. H. 263; *Northwestern Mut. L. Ins. Co. v. Cotton Exchange Real Estate Co.* 70 Fed. Rep. 160; 17 Am. & Eng. Enc. Law, p. 123; 2 *Morawetz, Corp.* § 787; *Kittel v. Augusta, T. & G. R. Co.* 78 Fed. Rep. 855; *Halpin v. Mutual Brewing Co.* 20 App. Div. 583, 47 N. Y. Supp. 412; *M. A. Seeds Dry-plate Co. v. Heyn Photo-Supply Co.* 57 Neb. 214, 77 N. W. 660; *Rowe v. Leuthold*, 101 Wis. 242, 77 N. W. 153; *Mayr v. Hodge & H. Co.* 78 Ill. App. 556; *Wyman v. Williams*, 53 Neb. 670, 74 N. W. 48; *Stough v. Ponca Mill Co.* 54 Neb. 500, 74 N. W. 868; *Tennant v. Appleby* (N. J. Eq.) 41 Atl. 110; *Finch Mfg. Co. v. Stirling Co.* 187 Pa. 596, 41 Atl. 204;

Savage v. Miller (N. J. Eq.) 36 Atl. 578; 29 Cent. L. J. 336; 1 Beach, Priv. Corp. § 241; *Sicardi v. Keystone Oil Co.* 149 Pa. 148, 24 Atl. 163.

A corporation in a failing condition cannot place part of its assets in the hands of a trustee to protect any of its directors as sureties on its bond.

Gray v. Taylor (N. J. Eq.) 38 Atl. 951; *Brown v. Morristown Co-Op. Stove Co.* (Tenn. Ch. App.) 42 S. W. 161; *Atlas Tack Co. v. Macon Hardware Co.* 101 Ga. 391, 29 S. E. 27.

An officer of an insolvent corporation cannot acquire a preference over its unsecured creditors by accepting its bonds on account of his claims against it, even though the officer does not actually know of its insolvency.

2 Cook, Stock & Stockholders, 3d ed. § 661; *Gaslight Improv. Co. v. Terrell*, L. R. 10 Eq. 175; *Maryland F. Ins. Co. v. Dairymple*, 25 Md. 266, 89 Am. Dec. 779; *Hoffman Steam Coal Co. v. Cumberland Coal & I. Co.* 16 Md. 456, 77 Am. Dec. 311; *Cumberland Coal & I. Co. v. Parish*, 42 Md. 598.

Fowler, J., delivered the opinion of the court:

The questions we are to consider grow out of the failure of the South Baltimore Bank, which, by a decree of the circuit court of Baltimore city, passed on the 1st of June, 1898, was declared insolvent, and dissolved. By the decree just mentioned the appellees Messrs. Colton and Schott were appointed receivers, with the usual powers given to such officers, and also with power to wind up, under the court's direction, the affairs of the bank, in conformity with the provisions of article 23 of the Code of Public General Laws in so far as the same apply to the liquidation of the affairs of insolvent corporations through the agency of receivers, and to that end they were authorized to exercise and have "all the title, power, and authority" which it is declared by the said provisions of article 23 shall be conferred upon or vested in receivers appointed by the court of the estate or effects of corporations. In the exercise of the powers thus conferred upon them they brought two suits in the same court by the decree of which they were appointed; one against the James Clark Company, a body corporate, and Winfield S. Cahill, and the other against Cahill, Norman H. Storey, and Walter L. Denny. The first bill asked that the payment of a check of the James Clark Company on the South Baltimore Bank for \$10,000 be declared a fraudulent preference, and the prayer of the second bill was to the same effect in reference to the payment of a note of said bank for \$5,000, held by the Citizens' National Bank, and indorsed by Cahill, Storey, and Denny. The defendants named in both bills answered, fully denying all fraud. Testimony was taken, and the court below found that both these payments were unlawful and fraudulent preferences. A decree was passed accordingly (the two cases having been consolidated by the agreement of 49 I. R. A.

all parties), and from that decree this appeal was taken.

There are but three questions in the case, only two of which require consideration, although at the hearing a number of other questions were discussed in a most interesting and able manner. The questions we are to consider are whether, under all the circumstances of this case, the payments above referred to were made by the South Baltimore Bank—that is to say, by its officers and agents—at a time when it was insolvent, and about to close its doors; secondly, whether the payments thus made, when the corporation was insolvent in fact, by such officers, of their own claims, to the exclusion of and to the detriment of other creditors of the bank are unlawful preferences within the meaning of the insolvent law; and, third, whether, apart from the insolvent law and §§ 264, 264a, art. 23, Code, the payments made under the circumstances these were made will be declared by a court of equity to be consistent with a fair, equitable, and just distribution of the assets of an insolvent corporation.

The first question is one entirely of fact, and is fully answered in the affirmative by the testimony. Indeed, it is conceded all the way through the case that the bank had been insolvent for several years. The evidence shows without contradiction that, in addition to this long-continued state of insolvency, the bank became hopelessly insolvent at the time when these payments were made, or immediately following thereupon. There is no denial of either condition of insolvency; but the officers, especially the defendants Cahill, Storey, and Denny, who got the benefit of the payments, place their defense on their denial of knowledge of the bank's insolvency. We are forced to the conclusion, however, that, if the bank is conceded to have been insolvent for years, its officers must have known it, and that, if it was hopelessly insolvent on the 23d, they knew, or ought to have known, it on the preceding business day, when the payments were made. We have not overlooked the fact that Mr. Cahill and his co-indorsers have denied that they had any knowledge of the insolvency of his bank at the time the payments were made. The fact that he was, as he said, only president in name, may, to some extent, account for his want of that accurate knowledge which he should have had. As president and director of such a financial institution, the law imputes the requisite knowledge, and neither he nor they can be given on account of their wilful ignorance a better standing that they would have had if they had performed their duties. *Corbett v. Woodward*, 5 Sawy. 416, Fed. Cas. No. 3,223; *McDaniel v. Harvey*, 51 Mo. App. 205; *Sicardi v. Keystone Oil Co.* 149 Pa. 148, 24 Atl. 164; *Lowry Bkg. Co. v. Empire Lumber Co.* 91 Ga. 624, 17 S. E. 968; *Roan v. Winn*, 93 Mo. 511, 4 S. W. 736.

2. It was urged with a good deal of force that the bill which was filed in the original case in which receivers were appointed and dissolution decreed, and under which pro-

ceedings were first commenced against the South Baltimore Bank, was not filed under the provisions of §§ 264, 264a, art. 23, relating to the dissolution and winding up of insolvent corporations; that, therefore, the court below had no jurisdiction to decree dissolution, and that the insolvent law has no application to this case. Section 264, just referred to, provides that "whenever any corporation in this state shall have been determined by legal proceedings to be insolvent, or shall be proven to be insolvent by proof offered under any bill filed under the provisions of this section, it shall be deemed to have surrendered its corporate rights, . . . and may be adjudged to be dissolved after hearing, according to the practice of courts of equity in this state, upon a bill filed for that purpose," etc. And § 264a, among other things, provides "that whenever such corporation shall have been adjudged to be dissolved as provided in the next preceding section of this article, all of its property . . . shall be distributed . . . in the same manner" as is required by our insolvent laws (Code Pub. Gen. Laws, art. 47). And this section further provides that the receivers so appointed of such corporations shall have the same powers to bring suits and to set aside transfers, payments, and preferences made by the corporation, or by any of its officers on its behalf, as the permanent trustee of a natural person who is an insolvent debtor has under the insolvent law of this state. It was contended that the bill in the original case does not specifically ask for dissolution, and that, therefore, it must be held not to have been filed either for that purpose or under the sections mentioned. It does, however, ask, not only for the appointment of receivers, but also that the bank (a corporation) be declared insolvent. It prays for the "winding up" of the corporation by the distribution of its assets among the stockholders should anything remain after the payment of debts, and for general relief. The act of 1896 (chapter 349) was passed to bring corporations within the provisions of the insolvent law, and to give courts of equity power to declare them insolvent, and dissolve them. But, as we have said, the decree shows the purpose of the bill. But, aside from any other view, it would seem to be beyond the power of these defendants in this case to deny the validity of the decree dissolving the South Baltimore Bank. It is true they do not make a direct attack upon the decree, nor deny the jurisdiction of the court to pass it. But the contention is that the bill was not filed for dissolution nor for winding up under §§ 264, 264a, art. 23, and that, therefore, the court was without jurisdiction to entertain this bill, and hence the insolvent law has no application. The decree, however, provides that the estate and assets of the bank shall be administered according to that law, and that the receivers shall have the same powers as to setting aside illegal preferences which are thereby given to permanent trustees. Now for the first time it is suggested that the dissolution

decree is not to have full force and effect. No such suggestion was made when that decree was before us in the case of *Colton v. Drover's Perpetual Bldg. & Loan Asso.* 90 Md. 85, 46 L. R. A. 388, 45 Atl. 23, and *Colton v. Mayer*, 90 Md. 711, 45 Atl. 874. On the contrary, the receivers relied upon that decree to show that the extent of their powers was the same as that of permanent trustees under the insolvent law; and in the former case the opinions of this court assume that the proceedings were under § 264a, and in the latter declare that the receivers were acting under that section. Indeed, ever since the date of that decree—June 1, 1898—declaring the South Baltimore Bank insolvent and dissolved, its affairs and estate have been administered by the receivers without objection from any quarter under the provisions of the insolvent law. It is perfectly obvious that all interested were in fact acting under the provisions of §§ 264, 264a. The decree is conclusive upon this point. It was passed without objection, if not with the implied consent of all parties. If the intention had been unquestioned to proceed under those sections, and counsel had been instructed so to file the bill, but had omitted to add the three words "they pray dissolution," can it be supposed for a moment that any serious difficulty would have arisen from this omission? If attention had been called to it in the court below, the bill would have been amended in that respect. No objection on the ground of defective averments of the bill, nor any objections based on want of jurisdiction, could have been taken in this court by the defendant. In addition to this, if the bill now before us be regarded, as we think it may be, as a bill filed to carry into execution the dissolution decree, the law of the latter is not examinable, and will be enforced unless attacked by bill of review. *Tomlinson v. McKaig*, 5 Gill. 256-278. We do not, therefore, feel inclined favorably to consider this question of jurisdiction, presented as it is in this collateral way at this late day, and by some of the parties, too, at whose instance the decree now objected to was passed. In *Hayes v. Brotzman*, 46 Md. 519, it was contended, as in the case at bar, that it did not appear from the record that the bill was filed under the provisions of the general incorporation law (Acts 1868, chap. 471), and that, therefore, the receivers could not rely upon § 195 of that act (now codified as § 274 of article 23, Code) for authority to sue; but this court said that the order of the circuit court appointing receivers of the property and effects of that corporation, being the order of a court of competent jurisdiction to pass it, carried with it the presumption of regularity. Unless, therefore, the decree appointing these receivers and declaring the bank insolvent be successfully attacked in some direct and proper way other than in this collateral manner, it must stand, and these appellees have a right to rely upon § 174, which expressly provides that receivers appointed as they were, and with the powers they have, shall have authority to sue in

their own names. In the case just cited it was held, therefore, that whether the order appointing the receivers authorized them to sue or not was immaterial, for their authority to do so is ample under § 195, chap. 471, of the act of 1868, which is the same as § 174 of article 23 of the Code. But, in addition to this, the decree we are considering declares they shall have "all the title, power, and authority" which, by the provisions of article 23, are conferred upon or vested in receivers appointed by the court of the estate or effects of corporations. See also § 239 of article 23. If, therefore, the decree stands, then, under § 264a, these receivers have authority to maintain suits to set aside preferences by insolvent corporations in the same manner and to the same extent as the insolvent law gives to the permanent trustee of a natural person who is an insolvent debtor. It can hardly be contended that the preferences which are here so earnestly defended would be held valid under the provisions of § 22 of article 47, which prohibits preferences of every kind made when insolvent or in contemplation of insolvency. The fact that the bank, which is conceded to have been insolvent for several years, and shown to have been hopelessly insolvent the day after the payments, had not actually suspended payment of its negotiable paper, and therefore had not committed that act of insolvency, has no tendency to prove that it had not made any of the unlawful preferences prohibited by law. The case of *Gaslight Improv. Co. v. Terrell*, L. R. 10 Eq. 175, bears directly upon this aspect of the case, for the English statutes in respect to unlawful preferences are very similar to the provisions of our insolvent law, which, as we have seen, are adopted by § 264a of article 23. In disposing of this case Lord Romilly, M. R., said: "The directors of the company think fit to pay themselves. It is to be observed that the directors of every company who are also creditors fill two distinct and antagonistic characters. In the first place, they are trustees for the benefit of the company, and are trustees for the creditors to this extent;—that they are bound to apply all the assets for the benefit of the creditors as far as they will extend. They themselves are also creditors, and have an interest to have their own debts paid. Now, if they had themselves passed a resolution . . . to pay A. B., who was not a director, but a stranger to the company, nobody, in my opinion, would be found to assert that that was not a fraudulent preference, the creditor having done nothing, having made no application for the payment. Is the case altered by the fact that the creditor is one of the directors? So far from that being the case, in my opinion it only adds a breach of trust to the fraudulent preference." It will be observed that the conclusion reached by Lord Romilly in the above case is not based on the so-called "trust-fund doctrine" as adopted in this state (*Fear v. Bartlett*, 81 Md. 435, 33 L. R. A. 721, 32 Atl. 322), by which it is held that when a corporation has been dissolved, or has committed an act

which by law is an act of insolvency, its entire property becomes a trust fund for the payment of its creditors in preference to the claims of stockholders.

3. This brings us to a consideration of the merits of the case. We are not willing to adopt the view, which was so forcibly presented, that the payments here attacked as fraudulent preferences are free from fraud, and should be protected by a court of equity. On the contrary, our view is that whether the estate of the insolvent bank be administered under the insolvent law or according to the rules which govern courts of equity is immaterial, for, in either case, as we have seen, the rule of distribution is the same, and that rule requires fairness and equality, and prohibits favor and preference. Assuming, therefore, that we have already shown that these payments were made to the officers of the bank when it was insolvent, and about to close its doors, and that, therefore, they are illegal preferences under the insolvent law, we will proceed to discuss the question whether, apart from the insolvent law, a court of equity will recognize them as fair and equitable payments. In the case of *Finch Mfg. Co. v. Stirling Co.* 187 Pa. 596, 41 Atl. 204, decided by the supreme court of Pennsylvania in 1898, the preferred creditor, as in the case before us, was a president and director in both the debtor and creditor corporations. The court said: "Although hampered by debts, it did not follow that the company was insolvent. Statutory insolvency is generally determined as an inability to pay debts when due or demandable; but the rule that an officer or director of an insolvent corporation cannot prefer his individual debt is based, not on statutory insolvency, but on the unfair and fraudulent character of the transaction. He is a trustee of the corporate property for the benefit of all creditors and stockholders, and has superior knowledge of the financial condition of his company. It would be highly unjust to permit him to use his position for his individual interest to the prejudice of others." Before proceeding further with the discussion of this branch of the case, it must be remembered that it is a conceded fact that when Mr. Schott examined the statement of the affairs of the bank on the afternoon of Wednesday, the 23d of February, he found it hopelessly insolvent. It is also conceded that it had been in an insolvent condition for several years. This being so, it is useless to consume time to show the condition of the bank when the payments were made, and it follows that its then condition must have been known to its officers when Mr. Cahill took care of himself and his friends and co-indorsers. Mr. Cahill was practically the owner of the James Clark Company, as he owned all except four shares of its stock, which four shares were in the hands of others in order to have a legal organization. If there was any difference as to the degree of insolvency of the bank between the 21st February, when the payments were made, and the succeeding business day, when it is con-

ceded to have been hopelessly insolvent, that difference must have been caused by the withdrawal of over \$15,000 by Mr. Cahill to make the payments just mentioned. In the case of *Fear v. Bartlett*, 81 Md. 435, 33 L. R. A. 721, 32 Atl. 322, it is said that, "so long as the company is a going concern, having the possession and management of its property, contracts made by and with the company are governed by the same principles of law as contracts between individuals." And again it is said that the trust-fund doctrine has no application until proceedings in insolvency have been instituted, or some act done that in law is regarded as an act of insolvency. If the conclusion we have already reached be correct, namely, that the bank was insolvent at the time the payments were made, such payments must, we think, be regarded as unlawful preferences, and therefore as acts of insolvency. As we have seen, it is conceded the bank was and had been insolvent for some years, yet it is denied that this condition was known to its officers, and that, therefore, it was impossible for them to have violated the law. But we think the evidence shows the very payments here objected to were made in contemplation of insolvency, not, perhaps, of the mild type of insolvency which appears to have been the normal condition of this bank, but in contemplation of that hopeless insolvency which supervened upon, and was doubtless caused by, the payments. In the case of *Van Wageningen v. Paterson Sav. Bank*, 10 N. J. Eq. 16, the chancellor says in regard to similar preferences: "If the legality of this transaction can be maintained, then it follows that, after a bank has become so hopelessly insolvent that the directors have been forced to the conclusion that it is incumbent upon them at once to close the doors of the bank, and abandon the objects for which the institution was incorporated, they may employ the last half hour of existence in parceling out to favorite creditors the few remaining assets of the bank still within their control. Nay, it follows that the cashier of the bank may, after the directors have declared the bank insolvent, and have determined to notify the public of its insolvency, before the directors can reach the door to post up such notice, dispose of the assets at his pleasure to the creditors of the bank. For this is not the case contended for by counsel that the cashier of a bank may lawfully meet all demands made upon it up to the moment the bank suspends payment. This he may do under ordinary circumstances. . . . But can he stand behind the counter, and, while he is dealing out to importunate creditors their legal demands with one hand, with the other place the assets of the bank in his pocket for absent friends and favorites?" Of course, the picture here drawn is not an exact representation of the situation now before us, but it clearly shows what may result if we sustain the positions which have been so ably supported by counsel for the appellants. Instead of equality among the creditors of a hopelessly insolvent corporation, we should

have the most glaring inequality; and not only the main object and purpose of our insolvent laws would be defeated, but, as we think, every rule of fair dealing would be violated. It was said in *Fitzgerald & M. Co. v. Fitzgerald*, 137 U. S. 110, 34 L. ed. 608, 11 Sup. Ct. Rep. 36, [*Richardson v. Green*, 133 U. S. 43, 33 L. ed. 521, 10 Sup. Ct. Rep. 280], speaking of loans made by an officer and stockholder to a corporation, that, "undoubtedly his relation as a director and officer or as a stockholder of the company does not preclude him from entering into contracts with it, making loans to it, and taking its bonds as collateral security; but courts of equity regard such personal transactions of a party in either of these positions, not perhaps with distrust, but with a large measure of watchful care; and unless satisfied by the proof that the transaction was entered into in good faith, with a view to the benefit of the company, as well as of its creditors, and not solely with a view to his own benefit, they refuse to lend their aid to its enforcement." In § 661 of 2 Cook, Stock. Stockholders & Corp. Law (page 938), the author, after quoting the foregoing sentence, says: "But, where the corporation is insolvent, an entirely different question arises. There has been a difference of opinion in the courts, but the weight of authority clearly and wisely holds that an insolvent corporation cannot pay a debt due to a director in preference to debts due others, either by turning over property or cash to him, or by giving him a mortgage on corporate assets." The contract doctrine, we know, has been held by a number of tribunals for which we have the highest respect, but we do not feel justified in extending this opinion to the length which would be required to cite and comment upon that line of cases. They will be found collected in the recent case of *Corey v. Wadsworth*, 118 Ala. 488, 44 L. R. A. 766, 25 So. 503. See also *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.* (Tex.) 22 L. R. A. 802, where the conflicting decisions are reviewed in a note to that case. In many of the cases which hold that an insolvent corporation may legally and fairly pay its officers as preferred creditors the well-known rule applicable to natural persons is adopted, —that is to say, unless there is some statutory prohibition, a corporation has the same right to prefer its friends and officers that an individual has to prefer his friends and relatives,—and that preference as applied to corporations as well as individuals is altogether a matter of favor, and is not based on any equitable principle whatever. We cannot assent to a doctrine fraught with such dangerous consequences. In our opinion, a much wiser and safer rule is that announced by the court in the case of *Sutton Mfg. Co. v. Hutchinson*, 24 U. S. App. 146, 63 Fed. Rep. 501, 11 C. C. A. 320 (Justice Harlan), that no preference will be allowed unless authorized by statute, or legally given by the corporation. As has been frequently said, a very large proportion of all the business of every kind in this country is done by cor-

porations, and their creditors are, like themselves, found everywhere. It requires but little foresight, however, to predict that, if it be announced by courts of equity that corporations insolvent, or in contemplation of insolvency, or in failing circumstances, may pay the debts of their officers as preferred creditors, neither general creditors nor stockholders will have any redress. With such protection as this view will afford the president, directors, and other officers, and stockholders who are creditors, secured as they will be by all the assets of the corporation, they may and will enter into fields of the wildest speculation without the fear of loss to themselves. They may loan, and have a right to loan, their money to the corporation, and in violation of their duty they may speculate with it in the corporate name. If losses result, the stockholders and creditors must bear them, for the president and directors either take the money of the corporation to make themselves whole, or secure themselves by transfers and assignments of corporate property. Such payments or transfers, unless void for some other reason, must, according to the contention of the defendants, be held good whether the corporation be solvent or insolvent. In our opinion, fairness and justice require that the officers should be placed on an equality, and no more than an equality, with the other creditors of the corporation. And so, in the case of *Sutton Mfg. Co. v. Hutchinson*, 24 U. S. App. 145, 63 Fed. Rep. 501, 11 C. C. A. 320, Harlan, J., says: "It is, we think, the result of the cases that, when a private corporation is dissolved, or becomes insolvent, and determines to discontinue the prosecution of business, its property is thereafter affected by an equitable lien or trust for the benefit of creditors. The duty in such cases of preserving it for creditors rests upon the directors or officers to whom has been committed the authority to control and manage its affairs. Although such directors and officers are not technical trustees, they hold, in respect to the property under their control, a fiduciary relation to creditors; and, necessarily, in the disposition of the property of an insolvent corporation, all creditors are equal in right, unless preference or priority has been legally given by statute or by the act of the corporation to particular creditors." We refer also to *Rouse v. Merchants' Nat. Bank*, 46 Ohio St. 493, 5 L. R. A. 378, 22 N. E. 293; *Richards v. New Hampshire Ins. Co.* 43 N. H. 263; *Drury v. Cross*, 7 Wall. 302, *sub nom. Drury v. Milwaukee & S. R. Co.* 19 L. ed. 40; *Bradley v. Farwell*, Holmes, 433, Fed. Cas. No. 1,779; *Montgomery v. Phillips*, 53 N. J. Eq. 203, 31 Atl. 622; *Corbett v. Woodward*, 5 Sawy. 417, Fed. Cas. No. 3,223; *Sicardi v. Keystone Oil Co.* 149 Pa. 148, 24 Atl. 164. See also 2 Morawetz, Priv. Corp. § 787, and notes for collection of authorities; 2 Cook, Stock, Stockholders, & Corp. Law, § 661, and notes.

In concluding what we have to say upon this question we will refer briefly to several of our own decisions which we think are

based upon the same salutary doctrine we adopt in this case. In the case of *Hoffman Steam Coal Co. v. Cumberland Coal & I. Co.* 16 Md. 456, 77 Am. Dec. 311, the then court (Le Grand, Ch. J.) rigorously applied to the officers of a corporation dealing with it the same rules that a court of equity will apply to the dealings between a trustee and his *cestui que trust*. *Maryland F. Ins. Co. v. Dalrymple*, 25 Md. 266, 89 Am. Dec. 779. And in *Cumberland Coal & I. Co. v. Parish*, 42 Md. 598, the strict rule is again applied to the officers of a corporation. "The affairs of corporations are generally intrusted to the exclusive management and control of the board of directors; and there is an inherent obligation, implied in the acceptance of such a trust, not only that they will use their best efforts to promote the interests of the shareholders, but that they will in no manner use their positions to advance their own individual interest as distinguished from that of the corporation, or acquire interests that may conflict with the fair and proper discharge of their duty." Certainly one of the interests of every corporation is that, while solvent, all its creditors should be fully paid, and, when insolvent, that all its assets should be equally divided, and not awarded by the president and directors or other officers to themselves and their friends. While the exercise of this right of preference by insolvent corporations has been justified by the fact that courts generally concede it to natural persons when not prohibited, yet there is no real analogy between the two cases. In the latter the individual freely and voluntarily confers the favor upon another, while in the former the persons by whom the corporation can alone act confer the favor upon themselves. There is nothing equitable in such preferences, whether exercised by an individual or by a corporation, and so long as it is not expressly conferred upon corporations, and is neither incident to nor necessary to the accomplishment of any of their ends, and is so productive of unfairness and fraud, it should not, in our opinion, be given to them by implication. But, again, is it not settled that so soon as the corporation becomes insolvent, and when it is contemplating insolvency, its directors become trustees for all the creditors? If this be so, how can these very officers forget their duties as trustees, and appropriate to their own use the fund which the law has wisely dedicated to the equal payment of the creditors? It would be folly to hold that the trust-fund doctrine has no application except where an act of insolvency has been committed and the powers of the insolvent court have been actually invoked. It seems clear to us that, if this doctrine is to have any efficacy, it must be held to apply to a case like this, where, as we have seen, the payments were made when the corporation was actually insolvent, and under circumstances which convince us that the directors knew or were bound to know the bank was hopelessly insolvent, and would, as it did, the very next business day

after the payments were made, close its doors, and deny admittance to its depositors who wished to withdraw their deposits.

The payment of the \$5,000 demand note of the South Baltimore Bank held by the Citizens' National Bank, and indorsed by Cahill, Denny, and Storey, it seems to us, was as much a breach of trust and violation of duty, so far as the indorsers are concerned, as was the payment of the \$10,000 note directly to Cahill. They were all directors, and if (as it was) their bank was then insolvent they held its assets as a trust fund to be fairly and equally distributed among all the creditors, and it was a clear breach of trust to pay this note in full, and thus relieve themselves from the obligation they had assumed. If the directors, the bank being insolvent and about to close its doors, had met, and passed a resolution to pay this note in order to relieve the indorsers from loss, can there be any doubt that such payment would be held a preference, as to them? As was said in *Mayer's Case*, 90 Md. 711, 45 Atl. 874, the receivers may sue for and recover assets, and may maintain suits to set aside preferences, even when the corporation could not do so, which have been disposed of contrary to law. We see no good reason, therefore, why they may not also sue the indorsers on a claim from which they have been illegally and fraudulently released. Under § 269, art. 23, apart from § 264a, they are vested with all the estate and assets belonging to the bank, and are declared to be trustees of the creditors and stockholders, with all the powers necessary to wind up the affairs of the corporation. In the case of *Willison v. First Nat. Bank*, 80 Md. 198, 30 Atl. 749, it was held that the payment of certain notes by the insolvent to relieve the indorser from his liability on them was an illegal preference as to him, and the insolvent trustee was allowed to recover from the indorser the amount of the notes so paid. It was contended that not only this note, but also the check for \$10,000 of the Clark Company, was paid in the ordinary course of business; but in the face of the facts which we think are established by the testimony this view cannot prevail. The check was paid by Cahill, as we have seen, to himself, when he was bound to know the bank was insolvent; and the demand note was paid without the asking, therefore without demand, and voluntarily, and before it was due. 2 Morse, Banks & Banking, § 625; *Willison v. First Nat. Bank*, 80 Md. 198, 30 Atl. 749. So far from this being a payment in the ordinary course of business, a payment forced from a debtor by an unfortunate creditor, it was a voluntary preference in favor of Cahill and the other indorsers. *Van Wagenen v. Pater-son Sav. Bank*, 10 N. J. Eq. 16.

It is unnecessary further to consider the question how far a court of equity, under its general jurisdiction, apart from § 264a, has power to appoint receivers to take possession of the assets, and wind up insolvent corporations. In *State v. Northern C. R. Co.* 18 Md. 193, it is said it is not against

public policy to appoint receivers for property of corporations when, through fraud or other cause, the property would otherwise be in imminent danger of loss to those interested. This same doctrine has been frequently announced by this court. Thus, in the recent case of *Davis v. United States Electric Power & Light Co.* 77 Md. 41, 25 Atl. 982, where insolvency was not alleged, it was held that, if the directors were pursuing a fraudulent policy, which would ruin the company, receivers would be appointed. But this question is not important, for, however defective the averments of the bill in the original case may be, as was said in *Hayes v. Brotsman*, 46 Md. 519, the decree in the case under which these receivers are acting, being a decree "of a court of competent jurisdiction to pass it, carried with it the presumption of regularity. It was not necessary, as contended by the appellee, that the appellant should have gone further, and offered proof that the circuit court had acquired jurisdiction to pass the order by proper averments in the bill." If, therefore, that decree be binding, the assets of this insolvent corporation will be distributed according to "the principles of equity," whether under the insolvent law, as provided by § 11, art. 47, or under the rules regulating a court of equity; in either case the rule of distribution being the same.

Affirmed, with costs.

Schmucker, J., concurring:

I concur in the conclusion reached by the majority of the court in this case because, in my judgment, the payment by the South Baltimore Bank of the \$10,000 to the James Clark Company, and that of the note for \$5,000, on which certain of its directors were sureties, were made at a time and under circumstances when its directors must, in equity, be treated as having become trustees for its creditors; and, as the payments were made to or for the benefit of certain of the directors, they constitute such preferences as should not be upheld. The cases which have discussed the trust-fund doctrine as applied to corporate assets have been so fully cited in the opinion of the majority of the court and the dissenting opinion of the learned Chief Justice that it would serve no good purpose to cite them again in this one. Many of these cases, in defining the doctrine, use broad language, and deny the right of directors of a corporation to take advantage of their position at any time to obtain preferences for themselves, or for their unsecured debts. Other cases define it more strictly, and say that only where a corporation has been lawfully dissolved, or has become insolvent, does its property become a trust fund in the hands of its directors for the payment of its debts; and that, so long as it is a going concern, having possession and management of its property, its transactions made bona fide in the ordinary course of its business will be upheld, whether they be made with its own directors or with strangers. The decided majority of the cases, when closely examined, will be found to sus-

tain the proposition that so long as the affairs of a corporation, even if its assets do not equal its liabilities, are in such condition that its creditors may fairly and reasonably expect it to continue its business, and become extricated from its difficulties, they may lawfully continue its current transactions, and pay its debts to themselves or to others as they fall due. But so soon as it becomes apparent that the corporation cannot longer safely conduct its business, the directors become trustees of its assets for all of the creditors, in so far, at least, that they cannot prefer themselves in their distribution. It would be both irrational and dishonest to say that the directors, after it has become plainly apparent that the corporation must stop, may keep it going for a few days longer, until they can procure its debts to themselves to be paid, and then defend their action upon the pretense that the corporation was a going concern at the time when the payments were made.

The main purpose of the present opinion is to state somewhat more fully than is done in the majority opinion the facts which seem to me to call for the application of the trust-fund doctrine to the assets of the South Baltimore Bank at the time when the controverted payments were made. The record plainly shows that the bank was then, and for several years prior thereto had been, actually insolvent. It also shows that the fact of this actual insolvency, if not apparent upon the face of the bank's books, was so easily ascertainable by a slight examination into its affairs, that the directors may fairly be held chargeable with knowledge of it, and its probable consequences. Monthly statements of the assets and liabilities of the bank were currently made, and several of the statements showing its condition at and about the time of the payments in question appear in the record. These statements are identical in their important items, and all of them show that the bank's capital of \$28,500 was impaired to the extent of more than one half. They further show that more than the entire remaining capital, amounting to \$12,053.91, was locked up in real estate, that a still larger sum was in mortgages, and that \$4,115.30 was represented by unsatisfied judgments. In fact, the only way the monthly statements were made to balance was by placing among the liabilities the capital stock at but \$12,053.61, instead of \$28,500, which was the true amount of stock then outstanding. A slight inquiry into the nature and value of the assets appearing upon these statements would have disclosed the utter insolvency of the bank. The real estate, which appeared thereon at \$13,213.54, was of little value, and brought but \$3,725 when sold. The mortgages, valued in the statement at \$14,654, yielded less than half that amount; and one of the judgments was against an insolvent. The record shows affirmatively that on the day after the two payments in question were made some, at least, of the directors were aware of the low value of these assets. Now, with the bank and its accounts in this condition, Simon P. Schott, who was the cash-

ier of the American National Bank, and an experienced bank officer, on February 19, 1898, met Cahill, the president of the South Baltimore Bank, at its office, by appointment, for the purpose of ascertaining the condition of that institution, in order to determine whether he would be justified in asking some of his friends to furnish it additional capital. At this interview Schott was furnished by the officials of the bank with statements of its condition, including one or more of the monthly statements already described in this opinion. About two hours was spent in this interview, as Schott says, "talking about the statement," which was at that time criticised by him. He called Cahill's attention to the erroneous character of the entry debiting the capital stock at but \$12,053.61, when there was \$28,500 of it outstanding, for which the bank had received par value in money, and warned him that the entry would not be passed by a bank examiner if the state should adopt a plan then under consideration of requiring a periodical examination of state banks. On the following Wednesday, February 23, in the afternoon, Cahill and others of the directors of the South Baltimore Bank called upon Schott, at his request, at his office, having with them a statement of the condition of the bank. Schott says that his purpose in requesting Cahill to bring the other directors with him was to verify the statement of the bank's condition as to the worth of the assets. He further says: "When we came together, I asked about the various securities, or, rather, the various sums of money appearing as assets in the form of real estate and judgments, and the answers received satisfied me conclusively that the bank was in a hopelessly insolvent condition, and so stated to the gentlemen present." Schott then expressed the opinion to the directors that they would be both morally and criminally liable if they continued the bank's business knowing that it was insolvent. The directors had another conference that evening, and as a result thereof they applied to the circuit court the next morning for the appointment of a receiver and a liquidation of the bank's affairs. As Sunday and Tuesday, the 22d of February, were holidays, there were but two business days between the meeting of Schott with Cahill on Saturday and his meeting with the directors on Wednesday afternoon. During those two business days the debt of \$10,000 to the James Clark Company, of which Cahill was substantially the sole owner, was paid, as was also the call loan of \$5,000, for which he and others of the directors were sureties. It is unnecessary to repeat in detail the steps by which these payments were accomplished. It is sufficient to say that they manifest an intelligent purpose, and show an active participation on the part of Cahill. Cahill, in the meantime, on either Monday or Tuesday had gone to the office of counsel, and given directions for the preparation of a general assignment by the bank for the benefit of its creditors. As over against the very pregnant circumstances which have just been

narrated it must be said that Cahill and several of his codirectors testify that they were ignorant of the bank's insolvency until informed of it by Schott on the afternoon of the 23d of February, and Schott says that he did not express any opinion to the directors as to the solvency of the bank until that afternoon. Cahill further says that he was influenced to give directions to counsel for the preparation of the proposed general assignment from the bank, not by its insolvent condition, but because he feared that the state was about to pass a law requiring banks to submit to examinations, and maintain a reserve; neither of which things his bank could do. The fact that Cahill, only two or three months before the bank's stoppage, bought its stock at \$20 per share, the par value being \$25 per share, and the further fact that he and the other directors were willing to indorse its \$5,000 note, indicate that prior to February 19, 1898, they did not properly appreciate the real condition of the bank. In view, however, of the purpose of the interview between Schott and Cahill at the bank on February 19, the time which it consumed, and the subject-matter of discussion during that time, and the alacrity with which the directors thereafter took steps to procure the payment of the debts due to them, or for which they were liable, I am unable to give my assent to the proposition that those payments were made bona fide in the ordinary course of business, or that they are in equity entitled to be protected. They seem rather to have been made after the attention of the directors, or some of them, had been called to the true condition of the bank, and in contemplation and upon the threshold of a stoppage of business and commercial insolvency. What we have said does not conflict with the rulings of this court in the cases of *Brant v. Ehlen*, 59 Md. 24, 25, and *Fear v. Bartlett*, 81 Md. 443, 33 L. R. A. 721, 32 Atl. 322. In those cases the question of the fiduciary relation of the directors of a corporation to its creditors, or of their right, if they also happen to be creditors, to prefer themselves, or to secure an advantage at the expense of the other creditors, was not before the court for consideration. In the cases of *Hoffman Steam Coal Co. v. Cumberland Coal & I. Co.* 16 Md. 456, 77 Am. Dec. 311, and *Cumberland Coal & I. Co. v. Parish*, 42 Md. 605, although the fiduciary character of the relation of the directors of a corporation to its stockholders was the subject directly under consideration, what was there said by the court as to the design of the rule then announced being to secure a faithful discharge of their duties by the directors, and at the same time to close the door, as far as possible, against all temptations to do wrong on their part, might with propriety be applied to the situation of the directors of the South Baltimore Bank in relation to its creditors at the time the payments in question were made.

McSherry, Ch. J., dissenting:

The controlling facts of these consolidated cases are either not disputed, or, if contro-

verted, they are free from difficulty; but there is a wide difference between the contending parties as to what are the legal principles which grow out of those facts, and which ought to govern the ultimate decision of this litigation. A brief outline of the circumstances disclosed by the record will present with sufficient clearness the pivotal points of the controversy. The South Baltimore Bank was incorporated by the general assembly of Maryland in 1868. On the 24th of February, 1898, a bill in equity was filed against it in circuit court No. 2 of Baltimore by certain creditors, and on the same day a receiver was appointed to take possession of its property and assets. In the bill of complaint it was alleged that the bank was insolvent, and this allegation was admitted by the bank in its answer. Later on, allusion will be made to this admission. The bill did not pray for a dissolution of the corporation; but on June 1st of the same year a decree was signed declaring the bank to be insolvent, and adjudging that the corporation be dissolved. The proceedings of February 24 were inaugurated at the instance of the board of directors of the bank, and this action of the board was taken late on the evening of February 23. The cause which induced the proceeding is of vital importance in this discussion, and fortunately it is devoid of doubt or dispute. The president of the bank, Mr. Cahill, who had been holding that position for about eleven months, was much interested in the success of the institution. He was anxious to expand and enlarge it, believing that it was in a sound and solvent condition. So fully was he impressed with this belief that he invited Mr. Schott, the cashier of the American National Bank, to whom he had been recently introduced, to join with him in an effort to increase the capital of the South Baltimore Bank. Mr. Schott, feeling an interest in Mr. Cahill's earnestness, promised to look into the condition of the bank with a view of assisting in an extension of its business. Neither Cahill nor any of the directors had at that time the slightest idea that the bank was not absolutely solvent. Mr. Schott, pursuant to his promise, called at the bank on February 19, and made a cursory examination of its statements, and, observing some entries which he did not think were in proper form, suggested that, if the bill was adopted which was said to be then pending before the legislature, providing for the appointment of a state bank examiner, and subjecting state banks to the same regulations and restrictions which, under the Revised Statutes of the United States, are applicable to national banks, the examiner would probably find fault with those entries. On the afternoon of February 23, about 5 o'clock, Mr. Schott, after discovering what Cahill and the other directors did not know,—that some of the securities carried by the bank among its assets were valueless, or nearly so,—informed Mr. Cahill that "the bank was in a hopelessly insolvent condition and said to him "that if he continued doing business after learning that his institution

was insolvent . . . he not only made himself morally but criminally liable." Thereupon Cahill sent notice to the directors to convene that evening at the Carrollton Hotel. When they assembled he disclosed to them the results of Schott's investigations, and Schott, being present, confirmed Cahill's statement; and the following morning, as a result of this meeting, and pursuant to the action there had, the bill for the appointment of a receiver was filed. Mr. Schott was appointed at once, and later on Mr. Colton was named a coreceiver. There is no pretense that either Cahill or any other director or officer of the bank had the slightest suspicion that the bank was insolvent until Schott informed them that it was, and so informed them after the close of business on the evening of February 23d. Proceedings of some sort, but not proceedings founded on an allegation of insolvency, or even involving the question of insolvency in any form, were undoubtedly contemplated by Mr. Cahill before the meeting of February 23. Possibly on Monday, the 21st, but at all events on Tuesday, the 22d, Mr. Cahill consulted Mr. Hazell, an attorney at law, with reference to a proceeding to wind up the bank if such a step should be deemed necessary by the directors in consequence of the supposed pending legislation at Annapolis. But there can be no doubt in the world that this contemplated action had relation to and was prompted solely by a consideration wholly different from a suspected insolvency. Mr. Cahill had been led to believe that a state law was pretty certain to be passed by the general assembly, under which the bank would be required to retain as a reserve fund 25 per cent of its deposits, and would be prohibited from lending to any one person more than 10 per cent of its capital; and he was convinced by the statements of Mr. Schott that, if the bank could not or would not comply with these provisions, its doors would be closed as soon as the law should be passed. Mr. Cahill seems to have been satisfied that it would be impossible for the bank, with its limited capital of \$28,500, and its comparatively small commercial deposits of about \$70,000 and its saving deposits of but a slightly larger amount, to continue business if this proposed law went into effect. This was explained to Mr. Hazell by Cahill, and Cahill further stated to Mr. Hazell that there would be a meeting of the directors to consider the consequences of this proposed legislation, and that he (Cahill) wanted to have such papers prepared as might be necessary in the event of the directors "deciding to do anything." But there was not the suggestion or a suspicion at that time of the bank being insolvent, or unable to pay its creditors in full; nor was a receivership mentioned. The whole conference with Mr. Hazell, and the papers which he was to prepare, had relation exclusively to the bank legislation which Schott had informed Cahill was then pending in the general assembly. The James Clark Company is a corporation of which Mr. Cahill is the president and treasurer, 49 L. R. A.

besides being the owner of all the capital stock with the exception of four shares. This company, through Cahill, had repeatedly lent to the South Baltimore Bank, without interest, considerable sums of money to meet the needs of the bank's customers. These loans are spoken of in the record as special deposits, and were purely for the accommodation of the bank. They differed from an ordinary deposit in this: that an ordinary deposit is made primarily for the convenience of the depositor, but these were taken from the James Clark Company's regular bank account with the Citizens' National Bank, and placed with the South Baltimore Bank, exclusively for the latter's benefit. On the 21st of February, 1898, the amount due by the bank to the James Clark Company on this loan or special deposit was \$10,545.77. It was subject to check whenever the James Clark Company needed the money. On the day just named the Clark Company, by Cahill, as treasurer, drew its check on the South Baltimore Bank for this sum, and deposited the check in the Citizens' National Bank, where, as stated a while ago, the Clark Company kept its regular bank account. This was done before Mr. Hazell had been conferred with, and before there was any thought of closing the bank; and it was done because Mr. Cahill needed the money to pay the bills of the Clark Company. The South Baltimore Bank was not a member of the Baltimore clearing house. It cleared through the Citizens' National Bank. To enable it to do this, it kept a deposit with the Citizens' National Bank, and against that deposit the checks cleared for it by the Citizens' Bank were charged each day. February 22 being a legal holiday, the banks were not opened; and so this particular check for \$10,545.77 appears in the transactions of February 23, upon which day it was charged against the account of the South Baltimore Bank. On February 21 the South Baltimore Bank paid the Citizens' National Bank a call-loan note of \$5,000. The money had been borrowed five days previously, as the amount of interest paid shows. This loan was evidenced by a note which Cahill, Storey, and Denny, directors, indorsed. They indorsed it, not because an indorsement was required, but because by furnishing security the South Baltimore Bank procured the loan at one half of 1 per cent less interest. On the same day,—February 21,—Cahill borrowed from the Citizens' National Bank for the South Baltimore Bank the sum of \$15,000, and pledged as collateral \$18,000 of the latter's commercial paper. This is not an unusual occurrence in the banking business. On the 4th of June, 1898, two bills in equity were filed by the receivers,—one against the James Clark Company and Cahill; the other against Cahill, Storey and Denny. Under the first the payment of the \$10,545.77 made by the South Baltimore Bank to the James Clark Company on the check drawn February 21 is assailed; and under the second the payment of the \$5,000 call-loan note on the same day is attacked.

Under the first the receivers seek to recover back from the Clark Company and from Cahill the money paid by the South Baltimore Bank on the check. Under the second they seek to recover from the indorsers of the call-loan note, but not from the Citizens' National Bank, the payee, the money paid by the South Baltimore Bank to the Citizens' National Bank. The two cases have been consolidated. The ground upon which recovery is sought in each case is the same, and that ground is that the payment of the check and of the note was a preference given to two creditors of the insolvent bank to the prejudice of all its other creditors, for whom and for whose benefit Cahill and the other directors were, in virtue of their office as directors, trustees; and as trustees they were prohibited from preferring themselves at the expense of their *cestuis que trust*. Did these transactions, under the conditions and circumstances stated, constitute prohibited preferences? A preference is an advantage, and to be a prohibited preference it must either be one which contravenes some equitable principle, or violates some positive statutory provision. In neither instance can it exist if there is no insolvency, because if there is no insolvency, there can be no inequality in the payment of creditors, and without inequality there is no advantage. At the foundation of the investigation, therefore, lies the inquiry whether, on February 21, when these payments were made, the South Baltimore Bank was insolvent. But before this inquiry can be answered accurately or intelligently, it is necessary that there should be a clear understanding of what is meant by the term "insolvency." If insolvency means a condition where liabilities are greater than the value of assets, then the bank was, as subsequent events showed, not only insolvent on February 21, 1898, but it had been equally and continuously so for four years antecedently thereto. Such a test of insolvency, however, would wreck a large proportion of flourishing enterprises. What railroad or city passenger railroad company, for instance, could possibly exhibit available assets equal in actual cash value to its bonded and other indebtedness? But, if insolvency means merely an inability to pay debts when and as they mature in the ordinary course of business, then the bank was not insolvent, and its doors should not have been closed. There is a difference between a bank which has something less of assets than of liabilities and a bank which has assets equivalent to or greater than its liabilities, if those assets are unavailable, or cannot be converted into money. But the advantage is on the side of the former. The one, having less assets than liabilities, may be able to continue its business, while the other, having more assets than liabilities, might be forced to suspend because of its inability to meet the demands made on it in the usual and ordinary course. The first, though having a deficiency of assets, would be commercially solvent; the second, though having an excess of assets, would be commercially in-

solvent. The relation of the assets to the liabilities cannot, therefore, be the ultimate test of solvency.

The meaning of insolvency in its legal sense is not now open to debate in Maryland. Following the definition laid down by the Supreme Court in *Toof v. Martin*, 13 Wall. 40, 20 L. ed. 481, this court distinctly and categorically adjudged that insolvency must be taken to mean "an inability of the debtor to pay his debts as they become due in the ordinary course of business." *Castleberg v. Wheeler*, 68 Md. 277, 12 Atl. 3. Now, it is clear from the evidence that the bank was in better condition when it suspended business than it had been in for four years previously. There is nothing in the record to show that it was unable to pay its debts as they became due in the ordinary course of business. On the contrary, it had paid them as they matured in the past. It was not without ample funds, and it had facilities for procuring ready money if emergencies required that it should have more than its vaults contained. No bank that is not utterly stagnant and lifeless ever carries as much cash as it owes its depositors. Its ability to meet the demands made upon it as they mature in the due and ordinary course of business, and not the amount of cash on hand, or the isolated fact that its assets are equal to its liabilities, is the test of its solvency and the measure of its duty to its creditors. The South Baltimore Bank had the confidence of the people of South Baltimore; and Mr. O'Connell, cashier of the Citizens' National Bank, and a totally disinterested witness, testified: "I believed it to be solvent then, and do yet, and I think it was in a great deal better financial condition than thousands of people who make fortunes and die rich. They had credit, character, standing, confidence, and some money." "They never ought to have made an assignment." At the close of business on February 21, after the payment of the \$5,000 call-loan note, and after crediting the \$15,000 borrowed on collateral, the bank had in its vaults and on deposit with the Citizens' National Bank, a balance of \$31,409.50; and on the 23d, at the close of business, after paying the \$10,545.77 check, it had a balance of \$23,295.13, while its liabilities to depositors aggregated about \$140,000. It thus had quite as large a reserve as is required to be held by national banks outside of New York, Baltimore, and a few other cities. U. S. Rev. Stat. § 5191. Even if the \$15,000 had not been borrowed, both the note and the check could have been paid, and there would have been a balance of \$8,295.13 still left in cash. But the \$15,000 was procured, so Cahill says, to have a fund for customers who might wish to borrow; and this is not disputed or denied. During these same two days the deposits received—both commercial and savings—aggregated \$24,608.50. If we turn to the statements, and compare that of January 30, 1897, with that of January 31, 1898, it will be found that the commercial deposits rose from \$45,380.39 to \$71,610.91, and the savings deposits rose from \$65,152.02 to \$72.-

671.51. The loans and discounts swelled from \$71,924.74 to \$94,865.75. These figures indicate a growth, a development, and an activity, rather than degeneracy or decline; and, as there is nothing in the record to show that the bank could not have continued in the usual, ordinary course other than the single fact that it did not continue because of being misled, there is no evidence of an insolvency in the legal sense of the term. Now, if there is any credence to be placed in human testimony, not an officer or a director of the bank had any knowledge that the bank was insolvent in either sense of the term. Their acts are more emphatic and more significant than their words. Though the capital stock was carried on the statements at less than 50 per cent of its par value of \$25 per share, both Cahill and Storey bought shares at \$20, or 80 per cent of par, shortly before the collapse, and that, too, though the stock thus bought, as well as that which they previously held, was subject to the double-liability clause prescribed by § 39, art. 3, of the state Constitution and by § 18 of the bank's charter. On February 17, Cahill, Storey, and Denny indorsed the call-loan note for \$5,000, and Storey made deposits as late as February 23. It is simply incredible that these men would have purchased stock at nearly twice the value estimated in the statements, would have exposed themselves to this double-liability burden, would have assumed responsibility as indorsers, and deliberately deposited their money up to the last moment the bank's doors were open, if they had not honestly believed the bank to be solvent. If they are to be charged with knowing what they ought to have known, but did not know, then they could be charged with knowledge that the assets were less than the liabilities; but that would not be knowledge that the bank was insolvent.

While there can be no prohibited preference where there is no insolvency, there may be insolvency, in the popular sense, and still be no preference which contravenes any equitable principle, though a payment has been made to one creditor, who is also a director, to the exclusion of other creditors. The trust-fund doctrine, which is the equitable principle relied on to invalidate these payments, is said to have had its origin in *Wood's Case*, 3 Mason, 308, Fed. Cas. No. 17,944. But that was a contest between stockholders and creditors of a bank, where the stockholders appropriated the assets to the exclusion of the creditors. "But, whatever may have been the origin of the doctrine," said this court in *Fear v. Bartlett*, 81 Md. 443, 33 L. R. A. 721, 32 Atl. 323, "it means, and can only mean, that when a corporation has been lawfully dissolved, or has become insolvent, its entire property, including unpaid subscriptions to its capital stock, becomes a trust fund for the payment of its debts, and that creditors are entitled in equity to have their debts paid out of the assets of the company before there can be any distribution among the stockholders. . . . But it is only when the company has been dissolved or has become insolvent that this 49 L. R. A.

equitable doctrine arises. So long as the company is a going concern, having the possession and management of its property, contracts made by and with the company are governed by the same principles of law as contracts between individuals." Other cases might be cited to the same effect, but they would make the principle no more apparent, though I may refer to *Comfort v. McTeer*, 7 Lea, 652. This trust-fund doctrine has never been pushed as far in this state, as it is now attempted to carry it. When a corporation has ceased to be a going concern, when it has been dissolved, when it has no longer the possession and management of its property, or when it has become insolvent in the sense that it is unable to pay its debts as they mature in the usual and ordinary course of business, it may well be that all its assets and property become a trust fund, and that its officers and directors become trustees for the benefit of its creditors. But this doctrine has no existence during the time the corporation is a going concern, or while it has not been dissolved, or when it is not insolvent in the legal sense. Notwithstanding this, the specific contention with respect to the check is that, if the depositor in a bank draws his check upon that bank, and the check is paid in the usual and ordinary course while the bank is a going concern, the payment of that check is a prohibited preference if two days afterwards the bank closes its doors, and goes into liquidation, and if the drawer of the check was a director or an officer of the bank. And the specific contention with respect to the call-loan note is that if such a note is paid in the usual course of business, and the debtor bank suspends operations a few days afterwards, the indorsers of that note, if they happen to be directors, must pay to the receivers of the debtor bank the money paid out of the funds of the debtor to the creditor bank in settlement of the call-loan note. These contentions, if sustained, make the directors trustees for the creditors while the bank is a going concern, and while it is still solvent; and, besides that, they stand directly in antagonism to the principle which the Supreme Court applied in *McDonald v. Chemical Nat. Bank*, 174 U. S. 610, 43 L. ed. 1106, 19 Sup. Ct. Rep. 787. The Capital National Bank of Nebraska for some years carried on a large business intercourse with the Chemical National Bank of New York. The Capital Bank transacted the usual and ordinary business of a national bank up to the close of banking hours on January 21, 1893. On the next day a bank examiner took possession of it, and on February 6 a receiver was appointed. It appeared in evidence that on January 18, 1893, the account of the Capital Bank with the Chemical Bank was overdrawn to the amount of \$84,486.19, and that by sundry remittances made the overdraft was cut down to \$25,515.32 on January 21. It also appeared that on January 18 the Schuster-Hax National Bank of St. Joseph, Missouri, remitted by mail \$2,000 to the Chemical Bank for the credit of the Capital Bank; that on January 19 the Packers' National

Bank of South Omaha remitted to the Chemical Bank \$5,000 for the credit and advice of the Capital Bank; that on January 20, two days before it was closed, the Capital Bank remitted by mail to the Chemical Bank \$735, in small items, and a package amounting to \$2,935.60, and on the 21st (the last day the bank was open) another package, amounting to \$833.64. On January 23—after the Capital Bank's doors had been closed by the examiner—the Chemical Bank received the remittance of \$2,000 of the 18th, and those of \$5,000 of the 19th, and of \$2,935.60 and of \$735 of the 20th; and on the 24th it received the remittance of \$833.64 of the 21st. The receiver of the Capital Bank filed a bill against the Chemical Bank to recover from it the moneys received by it after the suspension of the Capital Bank. The relief sought was denied. In the course of its judgment the Supreme Court said: "Nor can a finding that the payments and remittances made to the Chemical National Bank on the dates above mentioned were made in contemplation of insolvency, and with an intent to prefer that bank, be based on the mere allegation that the Capital National Bank was actually insolvent, and that its insolvency must have been known to its officers. It is matter of common knowledge that banks and other corporations continue, in many instances, to do their regular and ordinary business for long periods, though in a condition of actual insolvency, as disclosed by subsequent events. It cannot surely be said that all payments made in the due course of business in such cases are to be deemed to be made in contemplation of insolvency, or with a view to prefer one creditor to another. There is often the hope that, if only the credit of the bank can be kept up by continuing its ordinary business, and by avoiding any act of insolvency, affairs may take a favorable turn, and thus suspension of payments and of business be avoided. In the present instance there was not only no allegation of payments made in contemplation of insolvency, or with a view to prefer the Chemical National Bank, but there was no evidence that, up to the closing hours of January 21, 1893, the Capital National Bank had failed to pay any depositor on demand, or had not met at maturity all its obligations. And the evidence fails to disclose any intention or expectation on the part of its officers to presently suspend business. It rather shows that up to the last the operations of the bank and its transactions with the Chemical National Bank were conducted in the usual manner. It may be that those of its officers who knew its real condition must have dreaded an ultimate catastrophe, but there is nothing to justify the inference that the particular payments in question were made in contemplation of insolvency, or with a view to prefer the defendant bank. The Chemical National Bank was no more preferred by these remittances several days before suspension than were the depositors whose checks were paid an hour before the doors were closed." The trust-fund doctrine does not apply because the

point of time at which, as respects creditors, it arises, if it arises at all, had not come to pass when the payments were made. There was no legal insolvency and the bank was a going concern, and had not suspended when the check was drawn and paid, and when the call-loan note was settled. Both were paid in the usual and ordinary and accustomed course of business, and at a time when there was no doubt in the minds of the directors and officers that the bank was solvent, and when there was no thought of discontinuing its business. Under the most rigid and extreme application of the trust-fund doctrine the directors do not become trustees for the creditors, however they may stand towards the stockholders, until the corporation ceases to be a going concern, or is insolvent in the sense of being unable to meet its obligations as they mature in the ordinary course of business. If this were otherwise, then no one could venture to be a depositor in a bank of which he was a director; and then, too, the very depositors for whose benefit the receivers are prosecuting these suits would be bound to pay back some \$96,000 of funds drawn out by them within the four months prior to the suspension of the bank, if they happened to be directors or officers of the bank. For if it be a preference to pay two days before suspension, it is equally a preference to pay four months anterior thereto. The mere proximity of the time of payment to the actual suspension can make no difference in the legal principle, if it be a legal principle, that such payments as these are preferences. The trust-fund doctrine, as heretofore applied in Maryland, has never been stretched to the length of declaring that the payment by a bank of the check of a depositor drawn by him in good faith, and in the usual course, was a preference if the depositor happened to be a director and the bank was a going concern and was believed to be perfectly solvent, though it closed its doors a few days afterwards, not because it was unable to continue business, but because its officers were misled in supposing that it was insolvent when in fact it was commercially solvent. Nor has it ever yet been held in this state that the payment by a going bank of a call-loan note to another bank in the usual and ordinary course of business was such a preference as would hold the indorsers of that note liable to the receivers of the bank which made the note, merely because, after the payment of the note, the debtor bank closed its doors, and turned out to be insolvent in the sense that the actual, but not the nominal, value of its assets was less than the aggregate of its liabilities.

But there is another view of this question, which ought not to be overlooked. In the discussion thus far the situation has been treated from the standpoint that the check for \$10,545.77 was drawn by a depositor who was also a director, but the fact is that the depositor and the director were not one and the same. The depositor was a corporation, and the person who was the president of that corporation was the director. It was the

check of the corporation which was drawn and paid, and the precise question is this: Does the circumstance that the president of the depositing corporation was a director of the bank prohibit that corporation from withdrawing the money it had on deposit if the bank's assets were less than its liabilities? That question, presented under circumstances of conceded and known insolvency, arose in the very recent case of *O'Brien v. East River Bridge Co.* 164 N. Y.—, 56 N. E. 74. In that case a director of a bank, being also the president of the bridge company, became aware of the impending insolvency of the bank, whereupon the check of the bridge company for the sum of \$50,000, being the balance to its credit in the bank, was drawn and was signed by the president of the bridge company, who was also a director in the bank. The full amount was secured in payment of the check on the same day that the bank was closed. It was held, in a suit by the receivers of the bank against the bridge company, that the transaction was not void under the stock corporation law (§ 48), which prohibited an insolvent corporation, its officers and directors, from making any assignment or payment with intent to give a preference to a particular creditor, since there was nothing in that provision to prevent a depositing corporation from withdrawing its money on information of the bank's insolvency received by its president in his capacity as director in the bank. It is not necessary for the decision of the case at bar to go that length. If the receivers had sued the Citizens' National Bank to recover from it the \$5,000 paid to it in settlement of the call-loan note, would they not have been confronted with and defeated by the case of *McDonald v. Chemical Nat. Bank*, 174 U. S. 610, 43 L. ed. 1106, 19 Sup. Ct. Rep. 787? If the payment was made in the ordinary course of business, it was not a preference, and the money could not have been recovered from the Citizens' Bank. Upon what principle, then, can the indorsers be made to pay to the receivers the money which was lawfully paid to the Citizens' Bank, and which the latter, if sued by the receivers, could retain as against them? If the Citizens' Bank could retain the money, it is because the payment to it was lawful; and, if the payment to it was lawful, how can the indorsers of the note, who were only responsible to all, in the event that the note was not paid by the South Baltimore Bank, be made liable to the receivers because the note was paid, and lawfully paid, by the South Baltimore Bank? If the payment was lawful, the indorsers cannot be held liable upon the theory that it was unlawful. *Sanford Fork & Tool Co. v. Howe, B. & Co.* 157 U. S. 312, 39 L. ed. 713, 15 Sup. Ct. Rep. 621. Undoubtedly there are cases to be found in the books where directors of an insolvent corporation, who are also indorsers of its paper, have been denied preferences secured by themselves at the expense of other creditors; and in many of the opinions delivered in those cases very broad language has been used. But those cases could not be applied 49 L. R. A.

in this state without departing from or greatly extending the trust-fund doctrine as understood in Maryland. It must be borne in mind that, while there are vague allegations of fraud, there is not the slightest evidence to support them; and the proof is clear and conclusive that not a person connected with the South Baltimore Bank had a suspicion that it was insolvent until Schott so informed Cahill at 5 o'clock on the evening of February 23, long after these impeached transactions had occurred, and had been closed. Not even Schott pretends that the bank was insolvent in the commercial sense of the term. The answer of the bank to the bill for a receiver admits insolvency, but obviously in the same sense that Schott understood it; because that is the kind of insolvency charged in the bill,—a deficit in the assets, but not an inability to pay demands in the ordinary course of business as they fell due. It would be impossible, in the limits of an opinion, to review all the cases cited in the brief of the learned counsel for the appellees. To a great extent they involve different principles from the one now under discussion. For example, *Hoffman Steam Coal Co. v. Cumberland Coal & I. Co.* 16 Md. 456, 77 Am. Dec. 311, did not present a question of preference, but a question of fraud. It did not involve the relation of a director towards a creditor, but the relation of a director towards the company. It concerned, not the payment by the company to a director of a bona fide debt, but the fraudulent acquisition of the company's property by the director. The question there and the question here are not analogous, but depend on entirely different principles. In *Sventzel v. Penn Bank*, 147 Pa. 140, 15 L. R. A. 305, 23 Atl. 405, 415, the money was drawn after the bank had suspended payment. In *Brown v. Morristown Co-op. Store Co.* (Tenn. Ch. App.) 42 S. W. 161, the corporation was insolvent when it sold all of its assets to its secretary in payment of a debt. Before the sale the directors had determined to quit the business because of insolvency, and the secretary knew this. Of course, the sale, in such circumstances, was invalid. Cases not in line with the doctrine laid down in *Fear v. Bartlett*, 81 Md. 443, 33 L. R. A. 721, 32 Atl. 322, would not be followed in Maryland, and need not be discussed.

If the two transactions assailed in these proceedings are not invalid because not in conflict with the trust-fund doctrine, are they void because contravening some positive statute? Section 14, art. 47, of the Code, as amended by Act 1896, chap. 446, declares that "no deed, or conveyance executed, or lien created, by any person being insolvent or in contemplation of insolvency . . . shall be lawful or valid if the same shall contain any preferences, . . . and all preferences . . . shall be void, howsoever the same be made; provided" the party creating them be proceeded against in a certain way, and within a certain time, and be declared, or becomes "under the provisions of this article, an insolvent." This provision of the

insolvent law would have had no application to a corporation (*Ellicott v. Search*, 72 Md. 25, 18 Atl. 863) had it not been for act 1896, chap. 349. By that act a new section, known as "section 264a," was added to article 23 of the Code, relating to corporations. It provides that, "whenever any corporation mentioned in section 264 of this article . . . shall have been determined or proven to be insolvent as in said section 264 stated, all payments, conveyances and assignments of money, property, debts or claims of said corporation and all preferences howsoever made by it, or by any of its officers on its behalf, which would be void or fraudulent if the same had been made by a natural person who had become an insolvent under article 47 of the Code, . . . shall to the like extent and with like remedies, be fraudulent and void when made by such corporation or by any of its officers on its behalf, and whenever any such corporation shall have been adjudged to be dissolved as provided in the next preceding section, . . . all of its property and assets of every description shall be distributed to the creditors of said corporation; . . . and the receiver of such corporation shall have the same power and authority to maintain suits and proceedings to set aside preferences . . . as the permanent trustee of an insolvent debtor has under article 47 of the Code, . . . and the date of the filing of the bill against such corporation, upon which it may be dissolved, shall be taken and treated for the purpose of determining the validity of preferences . . . as the date of the filing of the petition in insolvency by or against a natural person." Section 264 of article 23, referred to in the above provision, declares, as amended by act 1894, chap. 263, that "whenever any corporation in this state shall have been determined by legal proceedings to be insolvent, or shall be proved to be insolvent by proof offered under any bill filed under the provisions of this section, it shall be deemed to have surrendered its corporate rights, privileges, and franchises, and may be adjudged to be dissolved after the hearing, according to the practice of the courts of equity in this state, upon a bill filed for that purpose" in the proper tribunal. This collocation of the statutes discloses two things: First. That while a corporation cannot be proceeded against under the insolvent laws, its transactions may be dealt with when it is proceeded against according to the terms of the act of 1896,—that is, § 264a,—precisely as the same transactions of an individual may be treated if he were proceeded against under the insolvent laws. Secondly. That the provisions of the act of 1896 or § 264a can only be availed of when the proceedings against the corporation have been taken under § 264 of article 23 of the Code as amended by the act of 1894. Now, as to the application of these two propositions, in their inverse order, to the pending cases. What is the proceeding for which § 264 makes provision? Its terms furnish the most satisfactory answer: "Whenever any corporation shall have been determined by

legal proceedings to be insolvent, or shall be proved to be insolvent by proof offered under any bill filed under the provisions of this section, it . . . may be adjudged to be dissolved . . . upon a bill filed for that purpose." When either of these two things occurs,—that is, when a corporation has been determined by legal proceedings to be insolvent, or when it has been proved to be insolvent under a bill filed under this section,—then it may be adjudged to be dissolved upon a bill filed for that purpose. Obviously, then, there must be a bill filed for the purpose of having it dissolved, and that relief can only be granted when insolvency has been established in one or the other of the two modes indicated. When the dissolution prayed for—when the dissolution which is the purpose for which the bill has been filed—has been decreed, then, by the express terms of the act of 1896 or § 264a, the assets shall be distributed "and the receiver . . . shall have the same power . . . to maintain suits . . . to set aside preferences . . . as the permanent trustee of an insolvent debtor has under article 47 of the Code," but not until such a decree has been passed. Now, the bill which was filed against the South Baltimore Bank, and under which the receivers were appointed, nowhere prays for a dissolution of the corporation. It was not "a bill filed for that purpose;" and, as it was not a bill filed for that purpose, the subsequent decree dissolving the corporation under a bill which did not pray for that relief at all does not bring the assailed preferences within the terms of the act of 1896, and they are not, therefore, such preferences as that act denounces, or such as the receivers may assail. The jurisdiction conferred by the act of 1896 is special, and must be strictly pursued. 12 Am. & Eng. Enc. Law, p. 277, note 1. But, even if the statute of 1896 (§ 264a) were applicable, are these payments preferences within the meaning of § 14 of article 47 of the Code,—the article relating to insolvency? Any transfer made by a debtor, and, of course, any payment made by him, he "being then actually insolvent, or contemplating such state of insolvency, with a view to secure his property, or any part of it, to one or more creditors, and thus prevent an equal distribution among all his creditors, is a transfer [or a payment] in fraud of the insolvent law." *Castleberg v. Wheeler*, 68 Md. 277, 12 Atl. 3. There must be insolvency, or a contemplation of insolvency, and there must be a transfer or payment with a view—that is, with an intent—to secure a particular creditor to the detriment of other creditors. When a debtor who knows that he is insolvent makes a payment or a transfer which operates to prevent an equal distribution of his assets among all his creditors, he is, in law, presumed to have intended to create a preference, because a preference is the natural and necessary result of such an act; and he is held to have intended to bring about the natural and the necessary consequence of the act which he deliberately did. But, if a debtor honestly believes himself to

be solvent, he rebuts the presumption of intent to prefer which arises from the fact of actual insolvency. *Toof v. Martin*, 13 Wall. 40, 20 L. ed. 481. An intent to prefer cannot be predicated of a payment made in total ignorance of insolvency. So it comes to the question: Was the bank insolvent within the meaning of act 1896, chap. 349, and of § 264, art. 23, of the Code, when the payments were made? The decree of June 1 does not answer that inquiry. The question is not whether Cahill and the directors had actual knowledge, or were bound to know, and therefore were chargeable with constructive knowledge, that the value of the assets was less than the sum of the liabilities; for, as already pointed out, that is not the test of insolvency under the insolvent law, and it ought not to be the test under the act of 1896 and § 264 of article 23 of the Code. By the national banking act of 1864 it was provided that all payments of money made by a national banking association to its shareholders or creditors after the commission of an act of insolvency, or when in contemplation of insolvency, with a view to the preference of one creditor to another, "shall be utterly null and void." It was held in *Case v. Citizens' Bank*, 2 Woods, 23, Fed. Cas. No. 2,489; *Morse, Banks & Banking* 576,—that the word "insolvency" in this statute had the same meaning as in the national bankrupt act, and that it meant a present inability to pay in the ordinary course of business. Obviously, by analogy the same meaning should be given to the word "insolvency" in the act of 1896 and in § 264 of article 23 as this court ascribed to it in the insolvent law, for the act of 1896, though amendatory of the general corporation law, is in fact supplementary to the insolvent system. Was the bank, then, unable to pay its debts when due, in the ordinary course of business? This question has been already answered in the negative in defining what was meant by insolvency, and it need not be repeated here. It is sufficient to say that there is not a particle of evidence in the record to show that it was unable to continue in business, or to meet every demand made on it in the usual course; and there is

absolutely nothing from which it could be inferred that these payments were made in contemplation of insolvency, for they were not made in contemplation of stopping business because of insolvency. 3 Am. & Eng. Enc. Law, 2d ed. p. 785. There is, however, most abundant evidence to prove that its officers honestly believed it to be perfectly solvent until misled by Schott late on the afternoon of February 23d. It would be an exceedingly harsh and a hitherto untried construction of the insolvent law and of the act of 1896 to hold, because subsequent efforts to realize the cash from some of the investments showed a shrinkage in the value of the assets below the aggregate of the indebtedness, that, therefore, though the same condition had existed for four years previously, the bank, notwithstanding it was a going and apparently a prospering concern, was insolvent when these payments were made, and that the directors ought to have known that it was. As there was no such insolvency when the receiver was appointed as the statute takes cognizance of, the payments made were not preferences which the insolvent law denounces; and, as there is no other statute prohibiting them, it follows that they were not made in contravention of any legislative enactment. These payments, then, not having been made in breach of any settled equitable principle, and not having been made in violation of any statute, were not prohibited preferences, and the receivers ought not to be allowed to recover them. It results, therefore, that the decree below which directed the James Clark Company and Cahill in the one case, and Cahill and Denny (Storey being dead) in the other case, to pay over to the receivers the money claimed under the bills filed against them respectively is wrong, and ought to be reversed, and that the bills ought both to be dismissed. This is the conclusion which a careful examination of the case has forced upon me, and I do not see how, entertaining the views I have expressed, I can escape dissenting from the judgment of the majority of my brothers. There are many other cases I might cite, but it is not necessary.

PENNSYLVANIA SUPREME COURT.

Ellen C. CORBIN, *Appt.*,

v.

City of PHILADELPHIA.

(195 Pa. 461.)

1. A municipal corporation which leaves in a public street near a play

ground trenches filled with deadly gas, with easy means of access to the bottom, without notice or warning of the danger, may be liable for injury inflicted by the gas upon persons who go into a trench for a ball accidentally there, although the particular consequences of the negligence were not, and could

NOTE.—Voluntarily incurring danger to save life of another person, as contributory negligence.

I. General rules.

II. Illustrations.

III. Exceptions.

IV. Effect of previous contributory negligence.

V. Summary.

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I. General rules.

Persons are justified in assuming greater risks to protect human life than would be sanctioned under other circumstances. *Schroeder v. Chicago & A. R. Co.* 108 Mo. 322, 18 L. R. A. 527, 18 S. W. 1094.

And it is not contributory negligence *per se* for one voluntarily to risk his own safety or life in attempting to rescue another from

not by any ordinary prudence have been, anticipated.

2. Going into a trench filled with deadly gas, negligently left in a public street by a municipality, to rescue one who, having gone there to recover an article accidentally dropped, has been overcome by the gas, is not, as a matter of law, such negligence as will relieve the municipality from liability for the rescuer's death in case he also is overcome and dies.

(*Mitchell and Fell, JJ., and Green, Ch. J., dissent.*)

(April 17, 1900.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas, No. 4, for Philadelphia County in favor of defendant in an action brought to recover damages for

impending danger. *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 13 L. R. A. 190, 28 N. E. 172; *Peyton v. Texas & P. R. Co.* 41 La. Ann. 561, 6 So. 690; *Louisville & N. R. Co. v. Orr*, 121 Ala. 489, 26 So. 35; *CORBIN v. PHILADELPHIA*.

Unless the effort is made under such circumstances as to constitute recklessness and rashness in the judgment of men of ordinary prudence. *Louisville & N. R. Co. v. Orr*, 121 Ala. 489, 26 So. 35; *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 13 L. R. A. 190, 28 N. E. 172.

And one who voluntarily incurs peril caused by the negligence of another, in order to save the lives of persons imperiled by such negligence, is not debarred from recovery for injuries received therefrom on the ground of contributory negligence. *Maryland Steel Co. v. Marney*, 88 Md. 482, 42 L. R. A. 842, 42 Atl. 60.

And where a man, acting as a reasonable man would ordinarily act under the circumstances, voluntarily places himself in a position of danger in the hope of saving his property from probable injury, and of preventing probable injury to lives or person or property of others, and sustains injury himself, the person whose negligent act has brought about the dangerous situation is responsible in damages. *Connell v. Prescott*, 20 Ont. App. Rep. 49.

The proximate cause of injury to one who voluntarily interposes to save the lives of persons in peril by the negligence of another is the negligence which causes the peril, and not the act of interposition to save lives. *Maryland Steel Co. v. Marney*, 88 Md. 482, 42 L. R. A. 842, 42 Atl. 60.

And an injury received by one who risks his own safety or life in attempting to rescue another from impending danger, if he does not rashly and unnecessarily expose himself to danger, should be attributed to the party who negligently or wrongfully exposed to danger the person who required assistance. *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 13 L. R. A. 190, 28 N. E. 172.

The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. *Eckert v. Long Island R. Co.* 43 N. Y. 503, 3 Am. Rep. 721; *Condiff v. Kansas City, Ft. S. & G. R. Co.* 45 Kan. 256, 25 Pac. 562.

And the knowledge of one workman of the incompetency of another does not make his interposition to save life endangered by the negligence of the incompetent workman, negligence 49 L. R. A.

the alleged negligent killing of plaintiff's son. *Reversed.*

The facts are stated in the opinion.

Mr. Rudolph M. Schick, for appellant:

Whenever the standard of duty shifts, not according to any fixed rule, but with the facts and circumstances developed at the trial, the question of negligence cannot be determined by the court, but must be submitted to the jury. Negligence is the absence of care according to the circumstances, and is always a question for the jury when there is a reasonable doubt as to the facts, or as to the inferences to be drawn from them.

Pennsylvania R. Co. v. Peters, 116 Pa. 215, 9 Atl. 317.

The holes were dug under a contract with the city. The city is therefore chargeable with notice.

per se. *Maryland Steel Co. v. Marney*, 88 Md. 482, 42 L. R. A. 842, 42 Atl. 60.

Risking one's life in an effort to save the life of another cannot be said to be a rash or reckless act if the appearances justify a belief that he can effect a rescue, even though he shall also have reason to believe, and in fact does believe, that he may fail and receive grievous injury himself. *Louisville & N. R. Co. v. Orr*, 121 Ala. 489, 26 So. 35.

And the courts will not scan closely the grounds of hope a person may have in going into danger in order to save others, risking himself in the effort, where the exigency demands instantaneous decision and action. *Central R. Co. v. Crosby*, 74 Ga. 737, 58 Am. Rep. 463.

While one who rashly and unnecessarily exposes himself to danger cannot recover damages for injuries thus brought upon himself, where another is in great and imminent danger, one who attempts a rescue may be warranted by surrounding circumstances in exposing his limbs or life to a very high degree of danger; and in such cases he should not be charged with the consequences of errors of judgment resulting from the excitement and confusion of the moment. *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 13 L. R. A. 190, 28 N. E. 172.

The question whether one who voluntarily risks his own safety or life in attempting to rescue another from impending danger is chargeable with contributory negligence, in an action brought by him to recover damages for injuries received in attempting the rescue, is one of mixed law and fact, and should be submitted to the jury upon the evidence, with proper instructions from the court. *Ibid.*

And when an exposure to danger is for the purpose of saving human life, it is for the jury to say, from all the circumstances of the case, whether the conduct of the person injured is to be deemed rash and reckless so as to bar a recovery for injuries received. *Condiff v. Kansas City, Ft. S. & G. R. Co.* 45 Kan. 256, 25 Pac. 562.

A different rule, however, has been laid down in Michigan and in Canada, in *Blair v. Grand Rapids & I. R. Co.* 60 Mich. 124, 26 N. W. 855, and *Anderson v. Northern R. Co.* 25 U. C. C. P. 301, *infra*, II. But see also, as to the Canada rule, *Connell v. Prescott*, 20 Ont. App. Rep. 49, *infra*, II.

II. Illustrations.

An engineer in charge of a train laden with passengers is not bound to leap from his engine to escape impending danger; and in case of a collision, if he believes his duty requires him

Morrill, City Neg. p. 17; *Brusso v. Buffalo*, 90 N. Y. 679.

The city was negligent in not having filled or covered the holes, and in permitting them to remain in that dangerous condition, unguarded.

Corbin was not guilty of contributory negligence.

It is impossible to say what was Corbin's knowledge of the conditions, but we have, first, the absence of evidence that he knew of the presence of gas in the trench, and the presumption that he would not have entered the trench if he had seen that he would certainly meet his death there. This presumption throws the burden on defendant of proving that he was reckless in going.

Weiss v. Pennsylvania R. Co. 79 Pa. 387.

We have, second, the fact that a number of other persons are proved to have gone into

that trench and come out without injury, before and at the time he lost his life. Therefore it was fair for him to presume, if he had any knowledge of the gas, that he could do the same. The necessity for prompt decision, and want of opportunity to make a full investigation of the circumstances, are held in all the cases to be an element in determining this question.

Eckert v. Long Island R. Co. 43 N. Y. 503, 3 Am. Rep. 721; *Spooner v. Delaware, L. & W. R. Co.* 115 N. Y. 22, 21 N. E. 696; *Gibney v. State*, 137 N. Y. 1, 19 L. R. A. 365, 33 N. E. 142; *Peyton v. Texas & P. R. Co.* 41 La. Ann. 861, 6 So. 690; *Linnehan v. Sampson*, 126 Mass. 506, 30 Am. Rep. 692; *Donahoe v. Wabash, St. L. & P. R. Co.* 83 Mo. 560, 53 Am. Rep. 594; *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 13 L. R. A. 190, 28 N. E. 172; *Shearm. & Redf. Neg. §*

to do what he can to save those under his charge, and he braves death in discharge of that duty by remaining upon the engine, he is not guilty of contributory negligence which will bar a recovery for injuries received. *Pennsylvania Co. v. Roney*, 89 Ind. 453, 46 Am. Rep. 173; *Central R. Co. v. Crosby*, 74 Ga. 737, 58 Am. Rep. 463; *Cottrill v. Chicago, M. & St. P. R. Co.* 47 Wis. 634, 32 Am. Rep. 796, 3 N. W. 376.

Though in the above case, it was said that leaving his post. *Cottrill v. Chicago, M. & St. P. R. Co.* 47 Wis. 634, 32 Am. Rep. 796, 3 N. W. 376.

Though in the above case, it was said that cases may possibly arise in which the common prudence of an engineer might require him to leave his engine to escape danger, but such cases will be rare exceptions and depend upon very peculiar circumstances.

But if it was not thus necessary to remain, and he knew it, or ought to have known it, and he still remained, no recovery can be had. *Central R. Co. v. Crosby*, 74 Ga. 737, 58 Am. Rep. 463.

So, one who sees a small child upon a railroad track, who, if not immediately rescued, must be inevitably crushed by a rapidly approaching train, is in duty bound to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety; and he is not guilty of contributory negligence which will bar a recovery for an injury to himself where he goes to the child and seizes it and throws it clear of the track on the opposite side, but is himself struck by the engine or tender, where from appearances he believed that he could save the child, though believing that possibly he might fall and receive injury himself. *Eckert v. Long Island R. Co.* 43 N. Y. 503, 3 Am. Rep. 721, Affirming 57 Barb. 553; *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 13 L. R. A. 190, 28 N. E. 172.

And a girl at a railway station, who sees smaller children playing upon the track, and sees a train at a station about half a mile away coming toward them, knowing that it is coming, and knowing that it moves swiftly, and that the little children playing on the track are in danger, who goes upon the track in a humane effort to save the younger children from danger, is not a trespasser; and where her foot is caught and fastened between the rail and the planks at a crossing, and she is injured, her act in going upon the track is not contributory negligence which will bar a recovery for the injury. *Spooner v. Delaware, L. & W. R. Co.* 115 N. Y. 22, 21 N. E. 696, 49 L. R. A.

And an instruction in an action against a railroad company for running over and killing a person who went upon the track to save the life of a child, which required or tended to require the jury to find the deceased guilty of contributory negligence, though they might also have believed that she was at no fault in going upon the track, is improper as tending to mislead the jury. *Louisville & N. R. Co. v. Orr*, 121 Ala. 489, 26 So. 35.

And a replication in such an action to a plea of contributory negligence, that the deceased was killed in an effort to save a child on a railroad track, is not insufficient for not showing that the attempt of the deceased to save the life of the child was not so rash or reckless that a prudent man would not have made it, as against a general demurrer. *Ibid.*

And an instruction in such an action, that if the jury believes from the evidence that the child which was in company with the deceased was of such mental and physical vigor as to be able to avoid danger without the aid or assistance of the deceased, and that deceased saw defendant's engine and train before she reached the track, the verdict should be for the defendant, is improper as being abstract, in the absence of evidence in the case that the child was of sufficient mental and physical development to avoid the danger to which it was exposed. *Ibid.*

So, one who went upon a railroad track at a temporary station and pushed a friend in an inebriated condition in dangerous proximity to an approaching train, off the track, and was himself struck by the pilot-beam of the locomotive and injured thereby, is not guilty of contributory negligence which will bar a recovery for such injuries, where he was a man of more than ordinary strength, and believed that he could save the man and avoid injury himself, and could have done so had the train been running at a reasonable and proper rate of speed. *Peyton v. Texas & P. R. Co.* 41 La. Ann. 861, 6 So. 600.

Nor is a mother guilty of such negligence in going to the rescue of her child whom she discovers in contact with a live electric wire, by reason of which she is injured, however dangerous and desperate the act may have been. *Walters v. Denver Consol. Electric Light Co.* 12 Colo. App. 145, 54 Pac. 960, 5 Am. Neg. Rep. 5.

And the act of a woman in catching in her arms a young child with whose care she had not been intrusted, which had been playing upon or near a railroad track with her own child, upon the approach of a train, for the purpose of protecting it, and then trying to seize her

85; Wharton, Neg. § 308; Pollock, Torts, 5th ed. p. 452; Beach, Contrib. Neg. §§ 42, 43.

Persons who have gathered a dangerous substance on their land are bound to keep it there, and are responsible for all damage it may cause if it escapes.

Wood, Nuisances, § 111; *Hauck v. Tide-water Pipe Line Co.* 153 Pa. 366, 20 L. R. A. 642, 26 Atl. 644; *Deane v. Clayton*, 7 Taunt. 523.

The question of negligence was for the determination of the jury.

Barthold v. Philadelphia, 154 Pa. 109, 26 Atl. 304; *Schilling v. Abernethy*, 112 Pa. 437, 56 Am. Rep. 320, 3 Atl. 792; *Hydraulic Works Co. v. Orr*, 83 Pa. 332.

This case should have gone to the jury.

McCully v. Clarke, 40 Pa. 399, 80 Am. Dec. 584; *Fritsch v. Allegheny*, 91 Pa. 226; *Hydraulic Works Co. v. Orr*, 83 Pa. 332; *Gil-*

lespie v. McGowan, 100 Pa. 144, 45 Am. Rep. 365; *Norristown v. Moyer*, 67 Pa. 355; *Gramlich v. Wurdt*, 86 Pa. 74, 27 Am. Rep. 684; *Oil City Gas Co. v. Robinson*, 99 Pa. 1.

Messrs. E. Spencer Miller and John L. Kinsey, for appellee:

The city is exempt from liability for the negligence of its servants in the performance of duties which are not in the nature of remunerative business.

Rodgers v. Lees, 140 Pa. 475, 12 L. R. A. 216, 21 Atl. 399; *Westerberg v. Kinzua Creek & K. R. Co.* 142 Pa. 471, 21 Atl. 878; *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365; *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. 375, 84 Am. Dec. 457; *Flower v. Pennsylvania R. Co.* 69 Pa. 210, 8 Am. Rep. 251; *Cauley v. Pittsburgh, C. & St. L. R. Co.* 98 Pa. 498; *Duff v. Allegheny Valley R. Co.* 91 Pa. 458, 36 Am. Rep. 675; *Heston-*

own child who avoided her, when, in following it, her foot was caught in the rail and she was thrown down and struck by the train and killed, and the arm of the child was seriously injured, though negligence, is not contributory negligence which will discharge the railroad company, which had been negligent in running at a high rate of speed without a proper outlook, from liability for injury to the child. *North Pennsylvania R. Co. v. Mahoney*, 67 Pa. 187.

So, an unsafe bridge is in a legal and judicial sense the cause of the drowning of a father, as well as his child, where the father was drowned while trying to save the child, which had fallen into the water in consequence of a defect in the bridge. *Gibney v. State*, 137 N. Y. 1, 19 L. R. A. 365, 33 N. E. 142.

And where parents accompanied by a small child stop to talk with an acquaintance upon a bridge, and the child remains within a few feet of them, but suddenly falls through an opening in the railing of the bridge into the canal below, and the father, as soon as he discovers that the boy is gone, plunges into the canal to rescue him and both father and son are drowned, the death of both the child and the parent is the proximate consequence of the negligence of the state in permitting the bridge to remain in an unsafe condition, as the peril to which the father exposed himself was the natural consequence of the situation. *Ibid.*

And a mother who, in her efforts to protect her four-year-old child, who had slipped on a sidewalk and fallen in front of a hatch-way, herself fell into the hatch-way, cannot be deemed to have been guilty of contributory negligence in having gone upon the unprotected side of the hatch-way in order to catch the child, though the hatch-way was properly constructed and protected on all sides except next to the curb, where ordinarily it would have been negligence to go. *Clark v. Famous Shoe & Clothing Co.* 16 Mo. App. 463.

So, the exposure of life by an employee of a railroad company or other employer to save life is neither wrongful nor negligent when attempted within the scope of the employee's duty, and if made under such circumstances as not to constitute rashness in the judgment of prudent persons. *Condif v. Kansas City, Ft. S. & G. R. Co.* 45 Kan. 256, 25 Pac. 562.

And the act of a skilled workman in a foundry in which iron castings are made, having charge of the furnace from which the metal is drawn through an orifice called a tap hole whenever required for the molder, who attempts to prevent the consequences of the negligence of the person in charge of the tap hole by himself

attempting to stop it, and who is burned while so doing, does not constitute contributory negligence, which will bar a recovery against the owners of the furnace for the injury, where there are other workmen in close proximity to the furnace who will be seriously injured, if not killed, as the result of the failure of the incompetent workman to properly stop the tap hole. *Maryland Steel Co. v. Marney*, 88 Md. 482, 42 L. R. A. 842, 42 Atl. 60.

So, in *Schroeder v. Chicago & A. R. Co.* 108 Mo. 322, 18 L. R. A. 827, 18 S. W. 1094, a workman assisting in running a hand car was held not to be guilty of contributory negligence so as to bar a recovery, where, upon seeing a train approaching, the persons in charge stopped the hand car and began to lift it from the track, but did not get the car off, and when the engine was about 60 feet from them the foreman called to the men to get out of the way, and all escaped except the plaintiff, who stumbled and fell near the track, and, on rising to his feet, was struck by the hand car as the latter was thrown one side by the passing locomotive, and both his legs were broken.

The question, however, whether a person injured by an approaching train in an effort to get a hand car off the track had reason to suppose that if the hand car was left upon the track it would throw the train off the track, and whether he knew that there was anyone upon the train who was likely to be injured in consequence of such occurrence, so as to warrant his remaining upon the track in order to save life, is one of fact for the jury, in an action for the injuries received. *Roll v. Northern C. R. Co.* 15 Hun, 496, Affirmed in 80 N. Y. 647.

And the question of the contributory negligence of one who, hearing cries for help, turns a corner and sees a man on his back in the roadway, holding a bull by a rope attached to a ring in his nose, the bull attempting to gore him, himself goes near the bull, but not attempting to assist the man, when the bull rushes upon and gores him, is properly left to the jury, in an action against the owner of the bull for the injury. *Linnehan v. Sampson*, 126 Mass. 506, 30 Am. Rep. 692.

So, the act of the owner of a team, which is placed in charge of another, and is frightened by a negligent explosion while the owner is some distance away, in running toward the team when he sees that the person in charge is unable to control them, for the purpose of aiding in their control, to conserve both his own pecuniary interests and the safety of other persons generally who would be endangered by a

ville Pass. R. Co. v. Connell, 88 Pa. 520, 32 Am. Rep. 472; *Moore v. Pennsylvania R. Co.* 99 Pa. 301, 44 Am. Rep. 106; *Baltimore & O. R. Co. v. Schwindling*, 101 Pa. 258, 47 Am. Rep. 706; *Oil City & P. Bridge Co. v. Jackson*, 114 Pa. 321, 6 Atl. 128; *McMullen v. Pennsylvania R. Co.* 132 Pa. 107, 19 Atl. 27.

A deliberate resolve, upon the part of any individual, to do that which is not according to the proper use or treatment of things, breaks the causal connection between the existing conditions which such individual makes the means or location of his act and the accident, so that those conditions are not the proximate cause of any ensuing injury to such individual.

The plaintiff voluntarily assumed the danger, when it was obvious and palpable, to rescue another whose peril was incurred by

going where he knew his presence was necessarily outside of all contemplation by the parties in charge.

An injury incurred by a chance rescuer, in the effort to achieve that object, is not the proximate result of the original negligence, but of the positive intent of such individual. Such a person is entitled to the plaudits of the community if the attempt is not a reckless one, but not to exact damages for that which he courted by his act.

Gramlich v. Wurst, 86 Pa. 74, 27 Am. Rep. 684; *Donahoe v. Wabash, St. L. & P. R. Co.* 83 Mo. 560, 53 Am. Rep. 594; *Clark v. Famous Shoe & Clothing Co.* 16 Mo. App. 463; *Spooner v. Delaware, L. & W. R. Co.* 115 N. Y. 22, 21 N. E. 696; *Peyton v. Texas & P. R. Co.* 41 La. Ann. 861, 6 So. 690; *Linnehan v. Sampson*, 126 Mass. 506, 30 Am. Rep. 692; *Cottrill v. Chicago, M. & St. P. R. Co.* 47

run-away team, will not bar a recovery for an injury received in trying to stop the horses, though in seeking to lay hold of them he exposed himself to danger, and though the position he left was one of safety. *Connell v. Prescott*, 20 Ont. App. Rep. 49.

In the above case *Anderson v. Northern R. Co.* 25 U. C. C. P. 301, *infra*, was distinguished, and said to be of no authority, whether rightly or wrongly decided, in the case at bar, as an outsider or stranger rushing into imminent danger to save life or property cannot be likened to a case in which the owner, according to his duty, endeavored to stop his own run-away team of which he was in charge.

In *Blair v. Grand Rapids & I. R. Co.* 60 Mich. 124, 26 N. W. 855, however, it was held that a person not connected with the railroad company in any way, who went upon request of a watchman to stop a construction train which was soon to arrive, and inform the conductor of a broken rail, while the watchman went in the opposite direction to stop a train from that direction, and, after giving the proper signal a number of times in plain view of the conductor, and believing that the conductor was not going to stop, but was going on to the place of danger, he undertook to get onto the forward platform of the car for the purpose of giving information of the danger, and was violently thrown down and injured, is guilty not only of want of ordinary care, but gross negligence amounting to extreme rashness and recklessness, which would prevent a recovery.

And in *Anderson v. Northern R. Co.* 25 U. C. C. P. 301, it was held that the act of a man passing along a wharf in a safe position, upon which were laid three railroad tracks occupying nearly the whole surface of the wharf, in hurrying to the rescue of a woman who, passing down the wharf and stepping aside to avoid meeting a number of men, stepped in front of an approaching train upon one of the tracks, and would have been run over but for his assistance, who was himself struck by the train and killed, was the direct and proximate cause of his death, and that whatever sympathies it and its melancholy results may appeal to, it was a negligent act which would bar a recovery of damages therefor, though the persons operating the train were also negligent.

In the above case, *Eckert v. Long Island R. Co.* 43 N. Y. 502, 3 Am. Rep. 721, *supra*, was criticised by Strong, J., saying that he felt constrained to say that the legal reasoning of the dissenting minority commends itself much more strongly to his mind than that contained in the judgment of the court; and also by 49 L. R. A.

Draper, Ch. J., saying that the court could not perceive what bearing the observation made in the case, that the deceased owed a duty to the child to rescue it from its extreme peril if he could do so without incurring great danger to himself, had on the case, unless legal obligation was meant; and again, that the obligation is limited by the condition "without incurring great danger to himself," and that in the opinion of the court the loss of life proves the great danger incurred; and it would seem to follow that the condition attaching to the obligation was annulled, so that in voluntarily running the risk the deceased became contributory to the loss of his life.

III. Exceptions.

Voluntarily incurring danger is justifiable so as not to constitute contributory negligence only when it is for the purpose of saving life; if the purpose is to save property only, the rule does not apply.

Thus, a foreman upon a hand car, who refuses to leave the track or the hand car upon the approach of a locomotive, is guilty of contributory negligence which will bar a recovery for injuries received, unless it appears that his motive was to save life, and not merely to protect property, and that his efforts to do so were not such as to constitute rashness on his part in the judgment of prudent persons. *Condliff v. Kansas City, Ft. S. & G. R. Co.* 45 Kan. 256, 25 Pac. 562.

And one of several persons in charge of a hand car, who sees a train approaching, cannot recover if he remains on the track in an effort to get the hand car off of the track, until he is struck by the approaching train, if his object was simply to save the property of the company for which he worked; but the rule would be different if he did it for the purpose of saving human life, or some human being from injury. *Roll v. Northern C. R. Co.* 15 Hun, 496, Affirmed in 80 N. Y. 647.

But see *Connell v. Prescott*, 20 Ont. App. Rep. 49, *supra*, II.

So, responsibility for an injury received by one who voluntarily incurs danger to save another attaches only when the peril of the person sought to be saved was caused by negligence.

And in order to prevent the act of a person who places himself in a position of peril to rescue another who is in danger, from constituting contributory negligence on his part which will bar a recovery for an injury received by him in so doing, it must appear that the party

Wis. 634, 32 Am. Rep. 796, 3 N. W. 376; *Pennsylvania Co. v. Roney*, 89 Ind. 453, 46 Am. Rep. 173; *Central R. Co. v. Crosby*, 74 Ga. 737, 58 Am. Rep. 463.

One who has been guilty of negligence cannot be held responsible for any and every succession of events, however extraordinary, which may happen to follow from the act which he has done.

Hoag v. Lake Shore & M. S. R. Co. 85 Pa. 293, 27 Am. Rep. 653; *Haverly v. State Line & S. R. Co.* 135 Pa. 50, 19 Atl. 1013; *Schaeffer v. Jackson Twp.* 150 Pa. 145, 18 L. R. A. 100, 24 Atl. 629; *Kieffer v. Hummelstown*, 151 Pa. 304, 17 L. R. A. 217, 24 Atl. 1060; *Cage v. Franklin Twp.* 11 Pa. Super. Ct. 533.

Contributory negligence is a bar, because the plaintiff, by intervening, breaks the causal connection between the injury received by himself and the defendant's negligence.

Wharton, Neg. 2d ed. § 132; Whittaker's Smith, Neg. 373; *Thomas v. Quartermaine*, L. R. 18 Q. B. Div. 697; *Jaggard*, Torts, p. 960; *Webb's Pollock*, Torts, p. 566.

Brown, J., delivered the opinion of the court:

The son of plaintiff lost his life in going to the rescue of an imperiled fellow being. He bravely descended into danger, and found awaiting him the death from which he would have saved another. The endangered boy came back from his peril and lived. And we must now determine whether the mother

of the deceased can be pecuniarily compensated for the loss she has sustained, or must be content with the consolation that her son died a heroic death. She makes a claim against the city of Philadelphia, alleging that its negligence was responsible for the damages she has suffered; and, unless sufficient proof to sustain her allegation was submitted to the jury, she cannot recover. The primary question involved is the alleged negligence of the city; for, if it was "guiltless of all wrong," it is not liable to her, and, no matter how heroically her son may have given up his own life in going down into danger to save another, her appeal to the law to compel the appellee to compensate her is in vain. The learned trial judge, after the testimony on each side had been submitted to the jury, directed a verdict for the defendant; giving no reasons for so taking the case from their consideration. His judgment may have been that there was no sufficient evidence to establish the negligence of the defendant, or he may have thought that, even if the city was negligent, the rescuer's conduct was such as to prevent a recovery. To properly dispose of this appeal, we must pass upon both these questions, and first take up what we have said is the primary one: reviewing the evidence, in the light of which must be found the right of the plaintiff, or the immunity of the defendant.

In the summer of 1896 the city of Philadelphia had dug several trenches on the north side of Clearfield street, west of Fifth street, in an attempt to locate an old sewer that had

against whom recovery is sought was guilty of negligence by reason of which the person was placed in peril. *Hirschman v. Dry-Dock, E. B. & B. R. Co.* 61 N. Y. Supp. 304.

And a railroad company injuring a mother while she was attempting to rescue her child, which was upon the railroad track in front of an approaching train, is not chargeable with her injury unless it was guilty of negligence with respect to the child before the mother attempted its rescue, or with respect to the mother or the child after her efforts to save the child commenced. *Donahoe v. Wabash, St. L. & P. R. Co.* 83 Mo. 560, 53 Am. Rep. 594.

To hold a railroad company liable for an injury received in an effort to rescue a child from being run over by an approaching engine it must appear that the child was in danger of being run over and injured, and such danger was caused by the negligence of the railroad company, and that in making the effort to rescue the child the rescuer was not guilty of contributory negligence. *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 13 L. R. A. 190, 28 N. E. 172.

The negligence of railroad operatives in not seeing a child on its track upon which an engine was approaching, as to the child in danger, is imputed to the company with respect to him who attempts the rescue, and if not guilty of negligence as to such person, then it is only liable for negligence occurring with regard to the rescuer after his efforts to rescue the child had commenced. *Donahoe v. Wabash, St. L. & P. R. Co.* 83 Mo. 560, 53 Am. Rep. 594.

And a mother, whose small child ran unexpectedly upon a street-car track, and so close to a rapidly approaching car that the driver had no opportunity to take any steps to stop the car or to save the child from injury, who

ran after the child, and, being unable to reach it, seized the horses by their heads and attempted to stop them, and was thrown down and seriously hurt, is not entitled to go to the jury upon the question as to whether or not her act constituted contributory negligence, in the absence of any evidence which might have warranted the jury in concluding that the driver of the car was guilty of any negligence. *Hirschman v. Dry-Dock, E. B. & B. R. Co.* 61 N. Y. Supp. 304.

So, in *Gramlich v. Wurst*, 86 Pa. 74, 27 Am. Rep. 684, a recovery for the death of a person who approached a vault in the process of construction to aid another person who had fallen into it in response to his cries for help, and himself fell into it and was killed, was refused, where the vault was within the lines of the owner's property upon which it was situated, and the undisputed facts proved him to have been guiltless of all wrong.

And in *Evanville & C. R. Co. v. Hiatt*, 17 Ind. 102, a young man who was walking along a railway track with his father and others, and who stepped off the track on the approach of a train, but, seeing that his father did not step off, hastened back and seized him and took him off, but failed to clear the track himself, and was struck by the train, and one of his legs was fractured so badly that it had to be amputated, was held not entitled to recover for his injuries, where the railroad operatives, after they discovered the condition of the persons on the track, were guilty of no neglect in trying to avoid a collision.

IV. Effect of previous contributory negligence.

The rule has been laid down that the contributory negligence of parents in permitting

been constructed many feet below the surface of the street. After having excavated to the depth of 23 feet, according to the testimony of John Abel, called as a witness by the city, the effort to find the sewer was abandoned, because the gas had become so strong at that depth that workmen could no longer remain at the bottom of the trenches. The clear preponderance of the testimony is that, for several days before Corbin went down to his death in one of these trenches, work had been abandoned by the city, for the reason stated; and it seems to be equally clear that the ordinary safeguards to protect the passing public from falling into these holes had not been provided, though the absence of such protection is not material in determining the questions that confront us. The plaintiff makes no claim that she lost the supporting arm of her son because he had fallen into a hole or ditch negligently left unguarded by the city, with no notice to the passer-by that a pitfall was before him; but her complaint is that, though these trenches were open and notorious, avoidable by all who traveled the street, no sign had been made, no warning given, of the death which the city knew lurked below, and to which at any time the unsuspecting might descend. These trenches had been dug in a street in a populous portion of the city. A church attended by six or seven hundred children was within 100 feet of them, and a public school house within a square. At the time Corbin met his death it was vacation, and the school building was closed; but the

lot on the north side of Clearfield street, immediately north of these trenches, extending a whole square, from Fifth street to Sixth street, was open, having no buildings on it, and was used as a playground. Boys were constantly playing ball upon it, and on Saturdays, after the factories had closed, hundreds of tired men and boys went to it for the recreation found in their innocent games. Under these admitted conditions, the trenches were dug, and work finally suspended upon them on account of the deadly gas that had accumulated at the bottom. This the city knew, and, apparently, for days; but it gave no notice to the passer-by of the danger in these holes, and the hundreds who congregated on the adjoining playground had no warning that it might mean to go down to death, to go after a ball which in their sports might be accidentally batted or thrown into the trenches. On the afternoon of August 5, 1896, boys were playing ball on this vacant lot, and their ball rolled down into one of these trenches. Corbin, the deceased, who, with a companion, was near, said, "Let us get the ball for the poor boys," and walked over to the trench. Before reaching it, however a boy named Walker had gone down to get the ball; there having been crosspieces of wood in the trench, from side to side, making practically a ladder to the bottom. The boy Walker, after reaching the bottom, got the ball, and started to ascend; but, when he had reached the first crosspiece, fell back, with his face to the ground. Corbin then went down to his

a child to be on a railroad track in front of an approaching train will not prevent a recovery of damages for an injury to the mother, inflicted while she was attempting the rescue of the child. *Donahoe v. Wabash, St. L. & P. R. Co.* 83 Mo. 560, 53 Am. Rep. 594.

And where the engineer upon a railroad train saw women and children near the track from a point one fourth of a mile distant, and immediately afterwards he saw the women go upon the track and run towards the train waving their hands and a red shawl, and after seeing this could have stopped or so checked the speed of the train that the mother of the child upon the track in front of the approaching train could have rescued the child and not herself been struck by the engine, the parents are entitled to recover whether they were guilty of contributory negligence in permitting the child to be upon the track or not, provided the mother was not guilty of rashness in the attempt to save the child. *Ibid.*

But in *DeMahy v. Morgan's Louisiana & T. R. & S. S. Co.* 45 La. Ann. 1329, 14 So. 61, in which a mother and her child of two years and eleven months were upon a car left standing with others on a side track, and the child, after passing out upon the platform of the car, was thrown off between that and the next car by a jolt caused by coupling other cars with the ones thus standing, when the mother jumped to the ground and thrust her arm under the still moving cars to reach and protect the child, pushing it off of the rail, and in so doing her arm was caught and badly broken by one of the wheels, it was said that in her efforts to guard and save her child she was not to blame, and that her conduct commanded the highest admiration; but a recovery for the injury done to the mother was denied upon the ground of

contributory negligence on her part in allowing the child to go upon the platform.

The wantonness and wilfulness of a person, however, in exposing himself to danger in going upon a railroad track to rescue a child, is no defense to a charge that the railway company's employees wantonly and wilfully ran over and killed her. *Louisville & N. R. Co. v. Orr*, 121 Ala. 489, 26 So. 35.

And an instruction, in an action against a railroad company for killing a person who was attempting to rescue a child upon the track, that if the jury believes from the evidence that the deceased was endeavoring to rescue the child from being run over by the approaching train under such circumstances as to constitute rashness or recklessness in the judgment of a prudent person, and was in such endeavor struck and killed by the train, her actions would amount to contributory negligence, is improper as requiring a verdict on contributory negligence, even though the defendant was guilty of wantonness. *Ibid.*

V. Summary.

The general rule is that voluntarily incurring danger to save the life of another is not contributory negligence, at least not *per se*, if not recklessly or rashly done, though there is a contrary holding in Michigan and in Canada. The design must have been to save life, however, as distinguished from an attempt to save property, and there must have been negligence causing the peril from which the imperiled person is sought to be saved. The question of contributory negligence, as well as of rashness or recklessness, is one of fact for the jury.

F. H. B.

rescue, but was overcome by the gas and died. Walker revived, came to the top unassisted, and walked away.

It is insisted that the city of Philadelphia was not bound to anticipate the descent of anyone into this danger, and, therefore, not negligent in failing to adopt proper means for the exclusion of all persons from these holes. We cannot sustain this view. If the city was negligent, it was liable for the consequences of its neglect, though those consequences were not, and could not by any ordinary prudence have been, anticipated. *Oil City Gas Co. v. Robinson*, 99 Pa. 1. These trenches were across a public street, along which men and women daily passed, and with no notice or warning of the deadly danger below; and, with the easy means of descent, can it be seriously questioned that the city ought not to have anticipated that what did happen might happen? Ought it not reasonably to have been anticipated that, if the hat of a passer-by should be carried by the wind from his head to the bottom of one of these holes, he would most naturally go or send someone down to recover it? The veil or handkerchief of a passing woman might be blown into the trench, and he who would not anticipate her clamor that someone go down and get it for her, and that chivalrous response would be instantly made, knows little of human nature. Under the circumstances, the city ought to have anticipated descents into these holes; but we need not conjecture what its anticipations ought to have been, for, before Walker went down to get the ball, others had been down. Stromen testifies that he went down to get a ball on the Tuesday before Corbin's death, and Roth states that he had seen a boy go down for a ball, "to the last round, and get the ball." Stromen says he did not stay long, on account of the gas; that a funny feeling came over him, and he had a "hard time" getting up. Emil Hagan says he saw a boy go down before August 5. Why should Stromen and these boys not have gone down for the ball? The amusement and recreation of playing ball were lawful, and the probabilities that the ball might be knocked or thrown into the trench were great; but the city had given no warning of the danger, and perhaps death, which, according to the testimony submitted, it must have known were at the bottom of the hole. If it is true, as has often been said, that circumstances beget duties, the duty of the city, after discovering the dangerous gas in the trenches, and its effect upon the workmen, was, clearly, to give notice and warning of it to the public, and to promptly take steps to prevent a descent into it, not unlikely to occur at any time, from causes already suggested, and others that might be mentioned.

In *Hydraulic Works Co. v. Orr*, 83 Pa. 332, there was a platform in a private alley communicating with a public street. This platform was raised and lowered for the convenience of the company in receiving and shipping goods, and, when not in use, was kept in place by inclining against the wall,

without any fastening. At the entrance to the alley were gates, which were opened and shut, as necessity required, and upon them was posted: "Private. No admittance;" and yet, a child having strayed into this private alley, and having been caught under the platform, which tilted over on it, in an action brought by the parents to recover damages for its death it was held that the negligence of the company was properly submitted to the jury. It was there said by Chief Justice Agnew: "But it has been often said duties arise out of circumstances. Hence, where the owner has reason to apprehend danger, owing to the peculiar situation of his property and its openness to accident, the rule will vary. The question then becomes one for a jury, to be determined upon all its facts of the probability of danger, and the grossness of the act of imputed negligence. Such was the nature of this case. This building was a factory in which several kinds of business were carried on in different stories, requiring the use of a hoisting apparatus above, and an inclined plane below, for the easy carriage of heavy articles, machinery, etc., into and out of the factory. These appliances were approached by means of a private opening or cartway shut in by a gate, which their use required to be often opened for the ingress of wagons and hands engaged in the business. The gate and passageway opened out upon a public and much frequented street, where persons were passing and children playing. Unlike an ordinary private alley, this passage was often open, and therefore liable to the incursions of children, and even grown persons, from thoughtlessness, accident, or curiosity. Now, the inclined way which did the injury was a dangerous trap. It was a heavy platform, weighing eight or nine hundred pounds, attached by hinges within eighteen or twenty inches of the wall, and when lowered it fell across the cartway. When not lowered, it stood upright against the wall, leaning so little beyond the center of gravity that a jar or a slight pull would cause it to fall forward. Its fall in this instance caught four children beneath it. One had his back broken, another his hands mashed, and two escaped under the cavity. It was held up by no hook or other fastening, but merely rested by its own slight weight beyond the equipoise,—ready, therefore, to catch children, like mice, beneath a deadfall. When wagons passed, it was often held up by hand, and a witness saw it fall against the wheels. Now, can it be righteously said that the owner of such a dangerous trap, held by no fastening, so liable to drop, so near a public thoroughfare, so often open and exposed to the entries of persons on business, by accident, or from curiosity, owes no duty to those who will be probably there? The common feeling of mankind, as well as the maxim, *Sic utere tuo ut alienum non lædas*, must say this cannot be true; that this spot is not so private and secluded as that a man may keep dangerous pits or deadfalls there without a breach of duty to society. On the con-

trary, the mind, impelled by the instincts of the heart, sees at once that in such a place, and under these circumstances, he had good reason to expect that one day or other some one, probably a thoughtless boy in the buoyancy of play, would be led there, and injury would follow,—especially, too, when prompted by knowledge that a fastening was needed.” In *Schilling v. Abernethy*, 112 Pa. 437, 56 Am. Rep. 320, 3 Atl. 792, following the case just cited, it is said that circumstances may beget duties which under ordinary circumstances cannot be implied, and when such circumstances are shown to exist the question arising therefrom is not for the court, but for the jury.

Abel, the city's inspector of the sewer, and called as its witness, testifies that work had been abandoned on account of the gas; and if it be true, as testified by several witnesses called by plaintiff, that no workmen had been about the trenches for several days before Corbin's death, how can it be righteously said that the city was not derelict in its duty? On the other hand, he states that workmen were on the premises until 12 o'clock of that day; and another witness, called by the plaintiff, testifies that immediately after the death a watchman was placed at the trenches, which were filled up the next day. Abel, evidently having felt that some precaution ought to be taken by the city to guard against this danger, said that when he left the work, at 2 o'clock, about two hours before the death of Corbin, he ordered Jim January to remain at the trenches until 6 o'clock, and then light a lamp. These directions were disregarded, for no watchman was on the premises at the time of the accident. Under the facts developed on this trial, the jury should have passed upon the question of the city's negligence; and, if the learned trial judge was of the opinion that sufficient had not been submitted to sustain plaintiff's allegation that it was culpable, he was in error.

Assuming the city to have been guilty of negligence, was the conduct of Corbin such, in going to the rescue of Walker, as to prevent a recovery by the plaintiff? In other words, is she debarred from recovery because her son was guilty of contributory negligence in voluntarily incurring peril in an effort to save the life of Walker, which had been endangered by the negligence of the city? This is an interesting and most important question, but free from difficulty, in the light of reason and the thoughtful consideration it has received from many high tribunals. A rescuer—one who, from the most unselfish motives, prompted by the noblest impulses that can impel man to deeds of heroism, faces deadly peril—ought not to hear from the law words of condemnation of his bravery, because he rushed into danger to snatch from it the life of a fellow creature imperiled by the negligence of another; but he should rather listen to words of approval, unless regretfully withheld on account of the unmistakable evidence of his rashness and imprudence. This, conscience

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and reason approve, and the best judgment of thoughtful and intelligent judges has declared it to be the law of the land. Relying, as we safely can, upon the considerate judgment of other courts on this important question raised before them, we cannot better dispose of it than by calling attention to what they have said; adding in every case our approval of what was declared to be the reason of the law as announced.

We first call attention to *Eckert v. Long Island R. Co.* 43 N. Y. 503, 3 Am. Rep. 721,—fairly regarded as the leading case upon the subject,—and extend our indorsement to it, as well as to the authorities subsequently cited. We quote at length from this case, as follows: “The important question in this case arises upon the exception taken by the defendant's counsel to the denial of his motion for a nonsuit, made upon the ground that the negligence of the plaintiff's intestate contributed to the injury that caused his death. The evidence showed that the train was approaching in plain view of the deceased, and had he, for his own purposes, attempted to cross the track, or, with a view to save property, placed himself voluntarily in a position where he might have received an injury from a collision with the train, his conduct would have been grossly negligent, and no recovery could have been had for such injury. But the evidence further showed that there was a small child upon the track, who, if not rescued, must have been inevitably crushed by the rapidly approaching train. This the deceased saw, and he owed a duty of important obligation to this child, to rescue it from its extreme peril, if he could do so without incurring great danger to himself. Negligence implies some act, of commission or omission, wrongful in itself. Under the circumstances in which the deceased was placed, it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If, from the appearances, he believed that he could, it was not negligence to make an attempt so to do, although believing that possibly he might fail, and receive an injury himself. He had no time for deliberation. He must act instantly, if at all, as a moment's delay would have been fatal to the child. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in a mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence, which will preclude a recovery for an injury so received; but, when the exposure is for the purpose of saving life, it is not wrongful, and therefore not negligent, unless such as to be regarded either rash or reckless. The jury were warranted in find-

ing the deceased free from negligence under the rule as above stated. The motion for a nonsuit was therefore properly denied. That the jury were warranted in finding the defendant guilty of negligence in running the train in the manner it was running, requires no discussion."

Approving this case, the same court, in *Spooner v. Delaware, L. & W. R. Co.* 115 N. Y. 22, 21 N. E. 696, held that, if the plaintiff stepped upon the track of the railroad company in the humane effort to save younger children from danger, she was not a trespasser; and the verdict in her favor for the injury she suffered in trying to save the little children was sustained.

In *Gibney v. State*, 137 N. Y. 1, 19 L. R. A. 365, 33 N. E. 142, plaintiff, with her husband and infant son, was crossing a bridge over the Erie canal. The son fell into the canal through an opening in the railing of the bridge, which had been left unguarded. The father plunged into the canal to rescue him, and both were drowned. Plaintiff recovered for the damages she had sustained, and, in affirming the judgment of the lower court, it was held that, while the immediate cause of the peril to which the father naturally and instinctively exposed himself was the peril of the child, the cause of the peril in both cases might be attributed to the culpable negligence of the state in leaving the bridge in a dangerous condition. In this case *Eckert v. Long Island R. Co.* was again approved.

It was held in *Peyton v. Texas & P. R. Co.* 41 La. Ann. 861, 6 So. 690, that the law has so great a regard for human life that it will not impute negligence to an effort to preserve it, if the effort is made with a reasonable regard for the rescuer's own safety, and, where negligence on the part of the defendant is shown, the negligence of the person in danger cannot be imputed to the rescuer.

In the case before us, under the clearly-established facts, no negligence can be imputed to Walker.

The question of the contributory negligence of a rescuer is considered in *Linnehan v. Sampson*, 126 Mass. 506, 30 Am. Rep. 692, where it was contended on behalf of the defendant that the calls of humanity did not excuse him. It was held, however, that the question whether the plaintiff's conduct on the occasion of the injury was wanting in reasonable prudence and caution, in view of all the circumstances, was properly submitted to the jury as a question peculiarly for them to decide. "They were to consider all the circumstances, and, among other things, that the life of a fellow creature was in extreme danger; but they must have understood that reasonable prudence and caution were elements in the case which plaintiff must prove. . . . The emergency was sudden, allowing but little time for deliberation. Some allowance might well be made for the confusion of the moment. . . . The law does not require cowardice or absolute inaction in such a state of things. Neither does it require, in such an emer-

gency, that the plaintiff should have acted with entire self-possession, or that he should have taken the wisest and most prudent course, with a view to his own self-preservation, that could have been taken. He certainly may take some risk upon himself, short of mere rashness and recklessness."

In *Donahoe v. Wabash, St. L. & P. R. Co.* 83 Mo. 560, 53 Am. Rep. 594, it was ruled that the negligence of the company as to the person in danger was to be imputed to the company, with respect to him who attempted the rescue. It is not negligence, *per se*, for one to voluntarily risk his own safety or life in attempting to rescue another from impending danger. The question whether one so acting should be charged with contributory negligence, in an action brought by him to recover damages for injuries received in attempting the rescue, is one of mixed law and fact, and should be submitted to the jury, upon the evidence, with proper instructions from the court. While one who rashly and unnecessarily exposes himself to danger cannot recover damages for injuries thus brought on himself, yet, where another is in great and imminent danger, he who attempts a rescue may be warranted by surrounding circumstances in exposing his limbs or life to a very high degree of danger. In such case he should not be charged with the consequences of errors of judgment resulting from the excitement and confusion of the moment; and if he did not act rashly, and unnecessarily expose himself to danger, and is injured, the injury should be attributed to the party that negligently or wrongfully exposed to danger the person who required assistance. *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 13 L. R. A. 190, 28 N. E. 172. The late and well-considered case of *Maryland Steel Co. v. Marney*, 88 Md. 482, 42 L. R. A. 842, 42 Atl. 60, sustains the views expressed in the foregoing authorities; and by their "aid" it was again ruled that one who voluntarily incurs peril, caused by the negligence of another, in order to save the life of one imperiled by the same negligence, is not debarred from recovery upon the ground of his own contributory negligence. Recognizing the manifest correctness of the views expressed in the foregoing and other cases, the best text writers have properly adopted them as the law for guidance of courts and juries. When one risks his life, or places himself in a position of great danger, in an effort to save the life of another, or to protect another who is exposed to a sudden peril or in danger of great bodily harm, such exposure and risk for such a purpose are not negligent. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness, in the judgment of prudent persons. *Beach, Contrib. Neg.* § 15. One who imperils his own life for the sake of rescuing another from imminent danger is not chargeable, as a matter of law, with contributory negligence; and, if the life of the rescued person was endangered by the defendant's negli-

gence, the rescuer may recover for the injuries which he suffered from the defendant in consequence of his intervention. Shearm. & Redf. Neg. § 85.

In view of what we have said, and in the light of the authorities approvingly cited, this case was improperly disposed of by the court below, and must be sent back for another trial, that a jury may pass upon the question of the city's negligence, and determine whether Corbin, under the circumstances, acted with a due regard for his own safety, or so rashly and imprudently that his surviving mother cannot recover for the loss she has suffered. In passing upon this latter question, it will be remembered, on the one hand, that, looking down and seeing the prostrate and motionless form of Walker, he may have been sufficiently warned not to descend into the danger, and his conduct may have been so rash and imprudent that, in the judgment of a jury, there ought not to be a recovery. On the other, it will not be forgotten that he had no time for deliberation, and was bound to act, if at all, instantly, as a moment's delay might have made his going down too late. And it will be still further remembered that, shortly before the day of his death, others had gone down into the trenches and returned unharmed; that the very boy whom he would have saved came back unaided from the bottom of the hole; and that those who went down for him came up uninjured. What the verdict of the jury should be, it is not for us to say, and we do not pretend to intimate. Our duty is simply to direct that, intelligently instructed, they pass upon the questions involved. Theirs will be to render a just finding.

It is finally contended on behalf of the city that it is not liable, because the alleged negligence was that of an independent contractor. As to this defense, it need only be said that, under the evidence offered by the city itself, it is without merit.

For the reasons given, *the judgment is reversed*, and a *venire facias de novo* awarded.

Mitchell, J., dissenting:

I cannot see that the city was guilty of any negligence that contributed to the accident. It had obstructions around the ditch sufficient to indicate that the place was dangerous. If one had fallen in at night, the obstructions might be held insufficient; and it may even be admitted, so far as this case is concerned, that if one going down in daytime, with only the apparent risk of the descent before him, had ignorantly encountered the gas, he might have had an action for negligence in failing to warn him of the concealed danger. But any such negligence is wholly irrelevant to this case. Corbin saw the danger from the condition of the boy Walker, went into it knowingly, and would not have been deterred by a warning placard, however specific. There is, therefore, in my view, only one question in the case, and that is whether the circumstances exonerated Corbin from the ordinary legal consequences of his act. I cannot see how the goodness or humanity of his motives can either exempt him, or transfer the risk he ran to the city. It is a clear case for the application of the principle, *Volenti non fit injuria*. If a known danger is encountered in the performance of a specific duty, as in the case of risks taken by a fireman or a policeman, a different question is presented; but there was nothing of this kind here, for Corbin was a pure volunteer. I have read the opinions cited by my brother Brown with close attention, to discover from them some recognized principle of law to sustain the results arrived at. But I find nothing beyond an emotional basis of admiration for heroism, very creditable to human nature, but having no proper place in the administration of justice. I would therefore affirm this judgment, both on the absence of any negligence by the city which contributed to the accident, and on the voluntary character of Corbin's assumption of a known risk.

Green, Ch. J., and **Fell, J.**, join in this dissent.

MASSACHUSETTS SUPREME JUDICIAL COURT.

John K. HAYWARD, Receiver, etc., of East Tennessee Land Company,

v.

Joseph R. LEESON.

SAME

v.

John HOPEWELL, Jr.

(.....Mass.....).

1. It is a fraud for promoters to undertake to decide for the future stockholders in the corporation to be organized

that one third of the whole capital stock is a fair remuneration for their services, to issue that amount to themselves as such remuneration, and then to invite the public to subscribe to the stock without disclosing that fact and getting the subscribers' consent to the payment of that remuneration.

2. A vote by all the stockholders of a corporation at a time when none but promoters or their nominees are stockholders, authorizing the issuance of paid-up stock to the promoters for their services, is not sufficient to validate such issuance.

3. Promoters of a corporation cannot

NOTE.—For duties and liabilities of promoters of corporations, see *note* to *Yale Gas Stove Co. v. Wilcox* (Conn.) 25 L. R. A. 90; *Seymour v. Spring Forest Cemetery Assn.* (N. Y.) 26 L. 49 L. R. A.

R. A. 859; *Hooper v. Central Trust Co.* (Md.) 29 L. R. A. 262; and *Milwaukee Cold Storage Co. v. Dexter* (Wis.) 40 L. R. A. 837.

honestly take any remuneration for their services as such, unless a full statement thereof is incorporated in the prospectus, or unless it is voted to them after all the stock has been taken by the public.

4. **Return of the property is not a condition precedent** to the maintenance of an action against promoters for secret profits in the sale of the property to the corporation in fraud of the rights of future stockholders, if the property is no longer in the condition in which it was when the corporation took it, or it did not originally belong to the promoters, but to strangers.
5. **Stock taken by promoters for services**, in fraud of the rights of future stockholders, may be followed by the corporation, and the shares or their proceeds recovered in the promoters' hands, or damages for their loss.
6. **Expenses of organization** paid by promoters may be deducted by them in accounting for stock fraudulently taken by them in payment for services as promoters.
7. **The value of stock fraudulently taken by promoters** for services, for which they are required to account to the corporation, is to be fixed, not as of the time of the taking, when it had no value, but at the time when, by the launching of the corporation, its value was established.
8. **A receiver of an insolvent corporation** cannot maintain an action in his own name for secret profits of promoters, if the claims have not been assigned to him.
9. **The appointment of a receiver** to "collect, take possession of, preserve, and care for" the property of an insolvent corporation does not transfer to him the title to choses in action, so that he can sue thereon in his own name.
10. **That suits to recover secret profits** from promoters are prosecuted by a receiver of the corporation for the exclusive benefit of part only of the creditors is immaterial, if they alone contributed to the expenses of the suit.
11. **Persons for whose benefit a suit is prosecuted** to recover secret profits made by promoters of a corporation, by a receiver appointed for it in another jurisdiction, need not be shown to be creditors of the corporation to maintain the jurisdiction of the court in which the suit is brought, since that is a question for the court which appointed the receiver and directed the bringing of the suit.

(June 15, 1900.)

REPORT by the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court of questions arising in actions by the receiver of the East Tennessee Land Company to enforce the liability of defendants as stockholders for debts of that corporation. *Decrees in complainant's favor.*

The facts are stated in the opinion.

Messrs. George W. Easley, William Hepburn Russell, William Beverly Winslow, and Lewis G. Farmer, for complainant:

Persons occupying fiduciary relations cannot make profits at the expense of their *cestuis que trust* through contracts not disclosed by such fiduciaries.

Taylor, Corp. 4th ed. §§ 82, 629, 638; 3 49 L. R. A.

Thomp. Corp. §§ 4024, 4027; Alger, Promoters of Corp. §§ 21-23; *Parker v. Nickerson*, 112 Mass. 195; *Boston v. Simmons*, 150 Mass. 461, 6 L. R. A. 629, 23 N. E. 210; *Wardell v. Union P. R. Co.* 103 U. S. 651, 26 L. ed. 509; *Re Olympia* [1898] 2 Ch. 153; *Tyrrell v. Bank of London*, 10 H. L. Cas. 48, 2 English Ruling Cases, 496, and note.

Promoters of a corporation, who, while promoting it, become its incorporators and directors, occupy a fiduciary relation toward it from the time they agree to become incorporators and directors.

Alger, Promoters of Corp. §§ 13, 14, 63, 64, 74-76; 3 Thomp. Corp. §§ 4038, 4039; 2 Cook, Corp. 4th ed. § 651; *Re Olympia* [1898] 2 Ch. 153; *Fountain Spring Park Co. v. Roberts*, 92 Wis. 345, 66 N. W. 399.

By their execution, on or about April 13, 1889, of the contract between the Syndicate of Ten and the Phoenix Land Company, known as the contract of March 25, 1889, defendants Leeson and Hopewell became promoters, and agreed to become incorporators and directors, of the East Tennessee Land Company.

Alger, Promoters of Corp. §§ 13, 14; 1 Thomp. Corp. § 415; *Yale Gas Stove Co. v. Wilcox*, 64 Conn. 101, 25 L. R. A. 90, 29 Atl. 303; *Bosher v. Richmond & H. Land Co.* 89 Va. 455, 16 S. E. 360.

By signing the application for the charter of the East Tennessee Land Company, and becoming incorporators and directors of that company, defendants Leeson and Hopewell established their fiduciary relationship to that corporation, and their obligations as fiduciaries relate back to the time they affixed their signatures to the contract of March 25, 1889, the organization of the East Tennessee Land Company being by such contract expressly provided for.

Alger, Promoters of Corp. §§ 51-53, 55, 57; *Pittsburg Min. Co. v. Spooner*, 74 Wis. 307, 42 N. W. 259; Shannon's Code (Tenn.) 1896, § 2056.

Defendants Leeson and Hopewell, in view of their relationship to the East Tennessee Land Company, and its organization, and their fiduciary obligations to it and to its future stockholders and creditors, were precluded from making or sharing in any profit derived from the sale of lands, contracts, and options by the Phoenix Land Company to the East Tennessee Land Company under the terms of the contract of June 11, 1889, between the two corporations, and any advance agreement between them and the Phoenix Land Company, by which the latter company was to divide its profits with them, was constructively fraudulent as between defendants and the East Tennessee Land Company.

Parker v. Nickerson, 112 Mass. 195; *Boston v. Simmons*, 150 Mass. 461, 6 L. R. A. 629, 23 N. E. 210; *Emery v. Parrott*, 107 Mass. 95; Alger, Promoters of Corp. §§ 21-23; 1 Thomp. Corp. §§ 456, 457, 458; 3 Thomp. Corp. §§ 4027, 4038, 4039, 4052, 4053; *Campbell v. Cypress Hills Cemetery*, 41 N. Y. 34; *Bird Coal & I. Co. v. Humes*, 157 Pa. 278, 27 Atl. 750.

The existence of such a contract, and the relations of the parties, being shown, the burden of proving its fairness rests upon the defendants.

Taylor, Corp. 4th ed. § 630; 1 Beach, Mod. Eq. Jur. §§ 114, 128, 130, 133, 134; *Greenfield Sav. Bank v. Simons*, 133 Mass. 415; *Van Cleve v. Berkey*, 143 Mo. 109, 42 L. R. A. 593, 44 S. W. 743; *Coleman v. Howe*, 154 Ill. 458, 39 N. E. 725; *Munson v. Syracuse, G. & C. R. Co.* 103 N. Y. 58, 8 N. E. 355; *Rutland Electric Light Co. v. Bates*, 68 Vt. 579, 35 Atl. 480; *Sage v. Culver*, 147 N. Y. 241, 41 N. E. 513; *Farmers' Loan & T. Co. v. New York & N. R. Co.* 150 N. Y. 410, 34 L. R. A. 76, 44 N. E. 1043.

Defendants Leeson and Hopewell are directly accountable in equity to the East Tennessee Land Company, or its receiver, for any sums, or the market value of any stock of the company, received by them from the secretary of the East Tennessee Land Company upon the orders of the Phoenix Land Company, constituting a part of the agreed profits of that company and the defendants under the terms of the contract of March 25, 1889, between the Phoenix Land Company and the Syndicate of Ten, of which defendants were members.

Parker v. Nickerson, 112 Mass. 195; *Yale Gas Stove Co. v. Wilcox*, 64 Conn. 105, 25 L. R. A. 90, 29 Atl. 303; *Re Olympia* [1898] 2 Ch. 153; *Brewster v. Hatch*, 122 N. Y. 349, 25 N. E. 505; *Alger, Promoters of Corp.* §§ 55-59, 64, 65, 70, 71; 1 *Thomp. Corp.* § 465; 3 *Thomp. Corp.* § 4053.

When a charge of fraud involves the consideration of principles applicable to fiduciary and trust relations, equity has jurisdiction over it, as "fraud" has a more extensive signification in equity than it has in law.

Kilbourn v. Sunderland, 130 U. S. 505, 32 L. ed. 1005, 9 Sup. Ct. Rep. 594.

It matters not that in the case at bar the trial court has found and reported that the defendants did not intend to perpetrate a fraud. This is a mere conclusion of law, upon undisputed facts, and is in this case, an error of law.

Getty v. Devlin, 54 N. Y. 403; *Arrowsmith v. Glason*, 129 U. S. 86, 32 L. ed. 630, 9 Sup. Ct. Rep. 237.

Whenever a case cognizable under the jurisdiction of the court of chancery is presented in the Federal courts by a sufficient bill, their jurisdiction to appoint receivers and administer the estate is unquestionable.

Union Trust Co. v. Illinois Midland R. Co. 117 U. S. 434, 29 L. ed. 963, 6 Sup. Ct. Rep. 809; *Sage v. Memphis & L. R. R. Co.* 125 U. S. 361, 31 L. ed. 694, 8 Sup. Ct. Rep. 887; *Bosworth v. Terminal R. Asso.* 174 U. S. 182, 43 L. ed. 941, 19 Sup. Ct. Rep. 625; *Graham v. La Crosse & M. R. Co.* 102 U. S. 148, 26 L. ed. 106; *Mellen v. Moline Malleable Iron Works*, 131 U. S. 352, 33 L. ed. 178, 9 Sup. Ct. Rep. 781; *Ogilvie v. Knox Ins. Co.* 22 How. 380, 16 L. ed. 349; *Hatch v. Dana*, 101 U. S. 205, 25 L. ed. 885; *Savvyer v. Hoag*, 17 Wall. 610, 21 L. ed. 731; *Handley v. Stutz*, 49 L. R. A.

139 U. S. 417, 35 L. ed. 227, 11 Sup. Ct. Rep. 530; *Sanger v. Upton*, 91 U. S. 60, 23 L. ed. 222; *White v. Ewing*, 159 U. S. 36, 40 L. ed. 67, 15 Sup. Ct. Rep. 1018.

The plaintiff becomes receiver in a Federal court under the laws of the United States. He is, in effect, a Federal officer, judicially appointed. The laws of the United States and the courts of the United States are not those of a foreign jurisdiction in any state.

Claffin v. Houseman, 93 U. S. 130, 23 L. ed. 833; *Lathrop v. Drake*, 91 U. S. 516, 23 L. ed. 414.

Defendants and their associate members of the Syndicate of Ten, by the agreement of March 25, 1889, with the Phoenix Land Company, made a contract constructively fraudulent as against the East Tennessee Land Company and its subsequent stockholders and creditors.

Alger, Promoters of Corp. § 58; *Fountain Spring Park Co. v. Roberts*, 92 Wis. 345, 66 N. W. 399; *Boston v. Simmons*, 150 Mass. 461, 6 L. R. A. 629, 23 L. ed. 210.

These defendants must account in equity to the plaintiff for the sum or sums received by them, or for the full market value of the stock, as it may be shown by the evidence.

Alger, Promoters of Corp. §§ 4, 43, 53, 63, 64, 76, 77; 3 *Thomp. Corp.* § 4027.

The duty rested upon the defendants and their associates in the Syndicate of Ten to disclose to subsequent stockholders and creditors of the East Tennessee Land Company the existence, terms, and conditions of their contract of March 25, 1889.

Re Olympia [1898] 2 Ch. 153; *Alger, Promoters of Corp.* §§ 25, 28, 30, 38; *Plaque-mines Tropical Fruit Co. v. Buck*, 52 N. J. Eq. 219, 27 Atl. 1094; 2 *Cook, Corp.* 4th ed. § 650; 1 *Thomp. Corp.* § 456; 3 *Thomp. Corp.* §§ 4024, 4025; *Venezuela R. Co. v. Kisch*, L. R. 2 H. L. 99, 6 English Ruling Cases, 759; *Erlanger v. New Sombrero Phosphate Co.* L. R. 3 App. Cas. 1218, 6 English Ruling Cases, 777.

Merely spreading of record in the minutes of a stockholders' meeting the subsequent contract of June 11, 1889, between the two corporations, and a resolution regarding the issue of stock and the payment of stock subscriptions, was not notice or disclosure of the agreement of March 25, 1889, and will not suffice to relieve the defendants from liability, or to ratify the contract of March 25, 1889.

Re Olympia [1898] 2 Ch. 153; *Plaque-mines Tropical Fruit Co. v. Buck*, 52 N. J. Eq. 219, 27 Atl. 1094; 2 *Cook, Corp.* 4th ed. 650; *Franklin Min. Co. v. O'Brien*, 22 Colo. 129, 43 Pac. 1016; *Davis Improved Wrought Iron Wagon Wheel Co. v. Davis Wrought Iron Wagon Co.* 22 Blatchf. 221, 20 Fed. Rep. 699.

No rescission of the contract of June 11, 1889, between the Phoenix Land Company and the East Tennessee Land Company is necessary.

Re Olympia [1898] 2 Ch. 153; *Parker v. Nickerson*, 112 Mass. 195; *Alger, Promoters of Corp.* §§ 42, 83, 93; 1 *Thomp. Corp.* §§ 462, 465; *Taylor, Corp.* 4th ed. §§ 629, 631.

The bill of complaint is properly brought by the receiver in his own name, because it alleges express authority conferred on the receiver in the premises by the court in which he was appointed, and pleads the directions of the court to the receiver to sue.

Ewing v. King, 169 Mass. 97, 47 N. E. 597; *Fort Payne Coal & I. Co. v. Webster*, 163 Mass. 134, 39 N. E. 786; *Wilson v. Welch*, 157 Mass. 77, 31 N. E. 712; *Toronto General Trust Co. v. Chicago, B. & Q. R. Co.* 123 N. Y. 37, 25 N. E. 198; *Peters v. Foster*, 56 Hun, 607, 10 N. Y. Supp. 389; *Clafin v. Houseman*, 93 U. S. 130, 23 L. ed. 833; 3 Thomp. Corp. § 4121; *Sunflower Oil Co. v. Wilson*, 142 U. S. 313, 35 L. ed. 1025, 12 Sup. Ct. Rep. 235; *Porter v. Sablin*, 149 U. S. 473, 37 L. ed. 815, 13 Sup. Ct. Rep. 1008; *White v. Ewing*, 159 U. S. 36, 40 L. ed. 67, 15 Sup. Ct. Rep. 1018; *Howe v. Barney*, 45 Fed. Rep. 608; *Andrus v. Bacon*, 38 Fed. Rep. 777; *Dayton v. Borst*, 31 N. Y. 434; *Boulevard v. Davis*, 90 Ala. 207, 9 L. R. A. 601, 8 So. 84; *Buswell v. Supreme Sitting, O. of I. H.* 161 Mass. 224, 23 L. R. A. 846, 36 N. E. 1065; *Witters v. Globe Sav. Bank*, 171 Mass. 425, 50 N. E. 932; *Merchants' Nat. Bank v. McLeod*, 38 Ohio St. 178; 4 Thomp. Corp. §§ 4472, 4675.

The receiver's right to prosecute these actions in the courts of Massachusetts and in his own name as receiver cannot, at this day, be denied.

Davis v. Gray, 16 Wall. 217, 21 L. ed. 452; *Wilson v. Welch*, 157 Mass. 77, 31 N. E. 712; *Ewing v. King*, 169 Mass. 97, 47 N. E. 597.

Where there are no domestic creditors whose rights are to be protected, and no local interests adverse to the suit, the courts of a state will recognize a nonresident receiver, and permit him to prosecute an action therein.

2 Beach, Mod. Eq. Jur. § 747; *Hurd v. Elizabeth*, 41 N. J. L. 1; *Rogers v. Haynes*, 90 Ala. 586; High, Receivers, 3d ed. §§ 241, 242; 6 Thomp. Corp. §§ 7337, 7339; *Castleman v. Templeman*, 87 Md. 546, 41 L. R. A. 367, 40 Atl. 275; *Boulevard v. Davis*, 90 Ala. 207, 9 L. R. A. 601, 8 So. 84; *Bidlack v. Mason*, 26 N. J. Eq. 230; *Rogers v. Riley*, 80 Fed. Rep. 760; *Gilman v. Ketcham*, 84 Wis. 60, sub nom. *Gilman v. Hudson River Boot & Shoe Co.* 23 L. R. A. 52, 54 N. W. 395; *Johnston v. Rogers*, 19 Ky. L. Rep. 1272, 43 S. W. 234; *Hale v. Haddon*, 95 Fed. Rep. 747, 37 C. C. A. 240; *Parsons v. Charter Oak L. Ins. Co.* 31 Fed. Rep. 305; *Buswell v. Supreme Sitting, O. of I. H.* 161 Mass. 224, 23 L. R. A. 846, 36 N. E. 1065.

The receiver takes title by operation of law, and is an instrument of the court which appointed him.

White v. Ewing, 159 U. S. 36, 40 L. ed. 67, 15 Sup. Ct. Rep. 1018; *Peters v. Foster*, 56 Hun, 607, 10 N. Y. Supp. 389; *Clafin v. Houseman*, 93 U. S. 130, 23 L. ed. 833.

When directors make profits for themselves out of contracts with third parties which they cause the corporation of which they are directors to enter into, they must account to the corporation or its receiver for 49 L. R. A.

such profits; the remedy of the corporation is in equity, and rescission of the contract with the third party is not necessary to a recovery of the profits from the delinquent directors.

1 Thomp. Corp. §§ 461, 462; *Bispham, Eq.* 6th ed. § 239, p. 346; *Re Olympia* [1898] 2 Ch. 153; *Densmore v. Searle*, 7 App. Div. 45, 39 N. Y. Supp. 948; *Alger, Promoters of Corp.* §§ 64, 65, 71-73, 75, 77, 93, 97, 99, 100; *Emery v. Parrott*, 107 Mass. 96; *Getty v. Devlin*, 54 N. Y. 403; *McDowell v. Joice*, 149 Ill. 124, 36 N. E. 1012; *Panama & S. P. Teleg. Co. v. India Rubber, Gutta Percha, & Teleg. Works Co. L. R.* 10 Ch. 526; 1 Reid, Corporate Finance, § 188; 3 Thomp. Corp. §§ 4024, 4029, 4037, 4038; *Bird Coal & I. Co. v. Humes*, 157 Pa. 278, 27 Atl. 750.

A corporation may, upon discovering the fact, compel one of its officers or directors to account for any profit or commission he has made upon a corporation contract.

Rutland Electric Light Co. v. Bates, 68 Vt. 579, 35 Atl. 480, 904; *Lloyd v. Preston*, 146 U. S. 630, 36 L. ed. 1111, 13 Sup. Ct. Rep. 131; *Sage v. Culver*, 147 N. Y. 241, 41 N. E. 513; *Sauyer v. Hoag*, 17 Wall. 610, 21 L. ed. 731; *Ogilvie v. Knox Ins. Co.* 22 How. 380, 16 L. ed. 349; *Hatch v. Dana*, 101 U. S. 205, 25 L. ed. 885; *Scoville v. Thayer*, 105 U. S. 143, 26 L. ed. 968; *Camden v. Stuart*, 144 U. S. 104, 36 L. ed. 363, 12 Sup. Ct. Rep. 585; *Sanger v. Upton*, 91 U. S. 60, 23 L. ed. 222; *Handley v. Stutz*, 139 U. S. 427, 35 L. ed. 234, 11 Sup. Ct. Rep. 530; *Chubb v. Upton*, 95 U. S. 665, 24 L. ed. 523; *Franklin Min. Co. v. O'Brien*, 22 Colo. 129, 43 Pac. 1016; *Davis Improved Wrought Iron Wagon Wheel Co. v. Davis Wrought Iron Wagon Co.* 22 Blatchf. 221, 20 Fed. Rep. 699.

The distinction between a voluntary transfer and a transfer by operation of law is a mere legal fiction.

Smith, Receivers, p. 113, note.

The receiver "takes title by operation of law and as an instrument of the court which appointed him.

White v. Ewing, 159 U. S. 36, 40 L. ed. 67, 15 Sup. Ct. Rep. 1018; 3 Thomp. Corp. §§ 3536, 3537; 5 Thomp. Corp. § 6962; 1 Cook, Corp. 4th ed. § 208; *Dayton v. Borst*, 31 N. Y. 435; *Wincock v. Turpin*, 96 Ill. 135; *Big Creek Stone Co. v. Seward*, 144 Ind. 205, 42 N. E. 464; *South Bend Toy Mfg. Co. v. Pierre Fire & Marine Ins. Co.* 4 S. D. 173, 56 N. W. 98; *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37, 46 N. W. 310; *Bausman v. Denny*, 73 Fed. Rep. 69; *Bausman v. Kinnear*, 48 U. S. App. 312, 79 Fed. Rep. 172, 24 C. C. A. 473.

Messrs. Long & Hemenway and I. R. Clark for defendants.

Loring, J., delivered the opinion of the court:

These two cases were heard together in the superior court, certain findings on the material facts were made, which are set forth in a report, and the questions of law arising thereon were reserved for this court.

The suits were begun by the receiver of

the East Tennessee Land Company, an insolvent corporation, to recover from the defendants secret profits made by them as promoters of that company. By a confidential circular dated March 25, 1889, the Phoenix Land Company proposed to the defendants and eight other persons that they should associate themselves together as the Syndicate of Ten, to advance to the Phoenix Land Company from \$15,000 to \$30,000, which should be used in obtaining options on some 225,000 to 300,000 acres of land in three specified counties in the state of Tennessee. These lands were stated in the circular to be underlaid in part with iron and in part with coal, to be well wooded, to have a soil of fair agricultural value, and to have the most healthful average climate of the South, and therefore appropriate for a health resort for the South in summer and for the North in winter; that the price for which they could be obtained was about \$800,000, to which should be added \$100,000 for possible expenses, and that they were really worth \$1,500,000, showing a profit of \$600,000. It was proposed that options on these lands should be obtained in the name of the Phoenix Land Company, and when the options were obtained a thorough investigation should be made, and the opinion of an expert obtained as to their value; that the Phoenix Land Company and the Syndicate of Ten should then organize a corporation, and, through subscriptions to its capital stock made by the public and secured by means of a prospectus, the corporation would be able to, and should, buy the options at a price fixed by the two parties to the enterprise, the Phoenix Land Company, and the Syndicate of Ten, and the net profits, after paying all actual expenses incurred, should be divided between the two. The Phoenix Land Company was a corporation organized under the laws of the state of Tennessee on March 15, 1889,—just ten days before the date of the circular mentioned above,—by Frederick Gates, his son, R. W. Gates, his two partners in the real-estate business at Chattanooga, A. W. Sidebottom and O. F. Jaynes, together with one Alphonso A. Hopkins, of Elmira, in the state of New York. These five men were all the incorporators, directors; or subscribers to stock in said corporation, and "it does not appear that any stock of said Phoenix Land Company was actually issued, or that it had any paid-up capital stock at any time, or that it owned any land." The defendants, together with eight other persons, accepted this proposal, and an agreement between the Syndicate of Ten and the Phoenix Land Company was completed May 6, 1889. This agreement is spoken of in the report as "Paper No. 31," and as the "Agreement of March 25, 1889," and it included a paper referred to in the report as the "Plan More in Detail." The plan laid out in this agreement was substantially carried into effect. It was departed from in this: that the parties organized the corporation, which was to purchase the options from them at an advance when they had ob-

tained options on about one third of the lands which they proposed the company should ultimately own, in place of waiting until options on all the lands had been secured. The certificate of incorporation of the new company was issued on May 25, 1889, and its name was the East Tennessee Land Company. The purchase price of the land on which the parties had then secured options was \$322,694, of which the Phoenix Land Company had paid \$6,008, leaving \$316,686 to be paid. On June 6 the incorporators of the Phoenix Land Company subscribed individually to shares in the East Tennessee Land Company to the amount of \$250,000, par value. The members of the Syndicate of Ten also subscribed to shares to the same amount, and the Phoenix Land Company, in its corporate name, subscribed to shares to the amount of \$200,000, par value. In addition, shares amounting to \$10,000 were subscribed by one Mason, in whose name some of the options subsequently secured were taken. There were thirteen incorporators of the East Tennessee Land Company. Gates and one of his associates were two. Ten of the members of the Syndicate of Ten, together with the said Mason, made the thirteen. It appears that one of the original members of the Syndicate of Ten divided his interest in two, so that there were ultimately eleven members in the Syndicate of Ten; two of them having a half share each. On June 10, 1889, the first meeting of the stockholders of the East Tennessee Land Company was held, and all the incorporators and stockholders were present in person or by proxy. At this meeting it was voted that the corporation should make a contract with the Phoenix Land Company whereby, in consideration of the Phoenix Land Company's assigning all options then held or thereafter acquired by it, and of its agreeing to secure further options at the expense of the East Tennessee Land Company during the ensuing six months, the East Tennessee Land Company agreed (1) to pay all expenses of the Phoenix Land Company in procuring further options under the contract; (2) to pay all sums due as purchase money under the options assigned to it, whether then owned or thereafter acquired; and (3) to issue to the Phoenix Land Company paid-up shares in its capital stock to the amount of \$700,000. This contract was executed on the next day, June 11, 1889. The stockholders also passed a resolution instructing the secretary, on this contract being executed by the Phoenix Land Company, to issue to it paid-up shares to the amount of \$200,000, par value, and to issue such shares to the amount of \$500,000, par value, to persons presenting orders therefor from the Phoenix Land Company, charging the same to the Phoenix Land Company. On or about July 3, 1889, Gates and his associates in the Phoenix Land Company presented orders from the Phoenix Land Company for shares to the amount of \$250,000, and certificates therefor were issued to them. At the same time the defendants, with their associates in the Syndicate of Ten, presented

orders for the issue to them of shares to the amount of \$250,000, and certificates therefor were issued to them. The Phoenix Land Company did not originally take out certificates for the \$200,000 of shares which were to be issued to it, but they were subsequently issued from time to time to persons to whom they were sold by it. In December, 1889, the East Tennessee Land Company issued a prospectus inviting subscriptions to the capital stock of the corporation. In this prospectus it is stated, among other things, that "the capital stock of this company represents actual value, without inflation, but does not approximate the entire value of the properties on which it is based. It was the intention of the projectors and incorporators to shape this enterprise so that its stock should be as solid as that of a national bank. Over half a million dollars of its capital were subscribed before the company's organization, at par. Subscriptions for the remainder are now solicited." And no other reference was made to the fact that the \$700,000 of paid-up shares in question had been subscribed for, and no statement was made as to the way in which those \$700,000 of shares had been paid for and issued. "Large tracts of land were, in 1889, 1890, 1891, 1892, purchased by the East Tennessee Land Company, . . . and during said years it had laid out and made streets on such lands purchased by it, erected buildings, and started manufacturing industries; so that, where there was a population of less than one hundred, and three or four poor buildings, on June 1, 1889, there was on June 1, 1893, a population of about four thousand, and several hundred buildings." "The amount of stock issued by the East Tennessee Land Company, in all, to subscribers and purchasers, was approximately \$2,000,000, par value, including the \$700,000 issued" under the contract of June 11. The East Tennessee Land Company also issued its mortgage bonds, dated October 1, 1890, to the amount of \$1,000,000. On November 18, 1893, one Schumacher filed a bill in equity in the circuit court of the United States for the southern division of the eastern district of Tennessee, in behalf of himself and all other unsecured creditors of the East Tennessee Land Company, alleging that the company was insolvent, and praying that its property might be realized, and the proceeds distributed among its creditors. In this suit receivers were appointed to take possession of all the property of the corporation. The Central Trust Company of New York, the trustee named in the mortgage given to secure the bonds of the East Tennessee Land Company, filed a bill to foreclose that mortgage on March 11, 1894, the two causes were consolidated, and the receivership was extended to the consolidated cause. The consolidated cause was referred to a master. Upon the coming in of the master's report a decree was entered on February 27, 1897, establishing 49 L. R. A.

the validity of the mortgage, ascertaining the debts thereby secured and the other debts of the corporation, directing the property of the corporation to be sold, and decreeing the order of distribution of the proceeds derived therefrom. By this decree it was found that the debt of the East Tennessee Land Company at that time was as follows: (1) Mortgage debt, \$1,164,836.58; (2) vendors' lien on company's land, \$165,233.81; (3) secured debt, \$202,409.09, and unsecured debt, \$224,818.04; amounting to \$1,757,297.52. and, in addition, \$9,631.10 due on receiver's certificates issued to raise money to pay taxes. The report on which this case comes up from the superior court states that the gross sum realized by the sale of the property of the East Tennessee Land Company under the decree of February 27, 1897, was \$125,372.50. On May 20, 1895, an order was made in the consolidated cause directing the receivers to institute certain proceedings, and, among others, the two suits now before this court. The prosecution of these suits was subsequently suspended by order of the court, but on July 1, 1897, an order was made directing the receiver to proceed with the prosecution thereof.

Stripped of the surroundings which tend to obscure its real nature, the transaction in which the defendants took part was this: Gates and his four associates, and the defendants and their nine associates, believing that a tract of some 225,000 to 300,000 acres of land in Tennessee had natural resources which could be developed at a great profit, agreed to join themselves together to secure options on the land, and then organized a corporation which was to buy the options of them at a profit. This profit, after paying all actual expenses incurred in procuring the options and organizing the corporation, was to be divided equally between Gates and his associates, operating under the name of the Phoenix Land Company, and the defendants and their associates, operating as the Syndicate of Ten. In this joint adventure Gates and his associates contributed their information as to the land, and the defendants and their associates contributed the money (\$15,000 to \$30,000 to be advanced for the expenses of the enterprise, until the corporation to be organized was organized and was in funds, when these advances were to be repaid by it. It was stated in the agreement providing for this joint adventure that the profit which they would secure from the corporation for the transfer of these options would be some \$700,000; the cost of the lands being estimated to be \$900,000, including \$100,000 for expenses, and the value of the lands to the corporation being stated to be \$1,500,000. If the \$100,000 of expenses included in the \$900,000 were repaid to them, the difference between the two (that is to say, the net profit to the promoters of the corporation) would be \$700,000. It was also agreed that "at least five sixths of its

net profits shall be taken by each of these two contracting parties in the stock of the new corporation." The only particulars in which the promoters departed from this plan, in carrying it into effect, were that they organized the corporation when only one third of the options contemplated had been secured, and that they then issued to themselves \$700,000 of paid-up stock of the corporation, as the net profits which they were to make in the transaction. Nominally, this \$700,000 of paid-up stock was issued in payment for options then owned by the Phoenix Land Company, on which it had paid \$6,000, and the agreement of that company to secure further options, during a period of six months, at the expense of the new corporation. Really, this \$700,000 of paid-up stock was issued to the promoters as remuneration for their services as promoters, or, as it is termed in the report of the superior court, for the net profits which it was arranged in the agreement between the Phoenix Land Company and the Syndicate of Ten should be divided equally between the two. The twenty-first finding of the superior court is explicit on this point. It is, so far as material here, as follows: "The sum named, \$700,000, was not arrived at by any appraisal or attempted appraisal or valuation of any property, options, or contracts, or title bonds, etc., which the Phoenix Land Company had. . . . Said large sum was named as a consideration that it might be enough to include the 'profits' mentioned or contemplated in said paper marked 'No. 31,' and especially in clause 3 of the Plan More in Detail; and the shares received by all the said syndicate members and some others on July 3d were then really understood to be the profits or 'net profits' mentioned in the ninth clause of said paper marked 'No. 31,' and in the third and sixth clauses of the Plan More in Detail, annexed thereto, which by that agreement were to be divided between the ten syndicate members and the Phoenix Land Company; and this, also, was known to all the then stockholders of the East Tennessee Land Company, to wit, the thirteen directors of the East Tennessee Land Company and the officers of the Phoenix Land Company." The paper referred to in the report as paper marked "No. 31," and the Plan More in Detail, annexed thereto, make up the agreement between Gates and his associates and the defendants and their associates, which was finally completed on May 6, 1889.

The defendants rely in this connection upon two of the findings set forth in the report, namely: (1) That the vote authorizing the contract of June 11 was passed, "and the contract executed by which the East Tennessee Land Company agreed to pay said \$700,000 for the lands, options, contracts, and title bonds of the Phoenix Land Company, with and upon the theory and belief, under advice of competent counsel practising 49 L. R. A.

in Tennessee to that effect, that it would satisfy the laws of Tennessee, both as to the payment in of the capital of said corporation, and would, by orders of the Phoenix Land Company, be a proper way and method of settling for the shares of stock which each of the defendants and others subscribed for and got." And (2) "I do not find that the defendants, or either of them, in signing the paper marked 'No. 31,' or in signing the subscription for stock on June 6th, and in becoming directors of the East Tennessee Land Company on June 10th, and in voting for the making of the contract with the Phoenix Land Company, and in taking, each, 250 shares of stock, intended any actual fraud, or intended to defraud or cheat either the corporation or the future stockholders or creditors of the East Tennessee Land Company. They did not anticipate the failure or insolvency of the company. Whatever those who originated the project expected, these defendants, when they became parties to it, believed (and, I think, not without some reason, with proper management) that it would succeed, and result in building up a prosperous town or city at Harriman." And the defendants contend that the stock issued to them was lawfully issued for interests in land and for services rendered or to be rendered; that under these findings there was no fraudulent overvaluation in the issuing of the \$700,000 of shares of stock; that the issue of this stock was voted for by the defendants and others as stockholders, and that stockholders are under no fiduciary relation to anybody, and can do as they will with their own; and, moreover, that it was consented to by all the stockholders and incorporators of the East Tennessee Land Company, and consequently cannot now be made the basis of any complaint by the corporation or anybody else. But this argument omits from the case the fact that the defendants, together with their associates in the Syndicate of Ten, and Gates, with his associates in the Phoenix Land Company, were promoters of the East Tennessee Land Company, and that these suits are instituted to charge them with secret profits made by them as such promoters, and not on the ground that the stock subscribed for by them has not been paid for under the laws of Tennessee. Whether it was or was not properly issued as paid-up stock, so far as a compliance with Tennessee statutes is concerned, is not material, and we express no opinion upon that point. See *McKay's Case*, L. R. 2 Ch. Div. 1, 6, 8. Moreover, it is not sought in these suits to charge the defendants because they voted, as stockholders, to issue the \$700,000 of stock, but it is sought to charge each defendant because he, with others, was a promoter of the East Tennessee Land Company; because, as a promoter, he stood in a fiduciary relation to the future shareholders of that corporation, and by reason thereof he could not receive any remuneration for

his services as a promoter of that corporation without making a full disclosure thereof, and obtaining the consent of these shareholders thereto. *McKay's Case*, L. R. 2 Ch. Div. 1; *Bagnall v. Carlton*, L. R. 6 Ch. Div. 371; *Emma Silver Min. Co. v. Grant*, L. R. 11 Ch. Div. 918; *Emma Silver Min. Co. v. Lewis*, L. R. 4 C. P. Div. 396; *Whaley Bridge Calico Printing Co. v. Green*, L. R. 5 Q. B. Div. 109; *Lydney & W. Iron Ore Co. v. Bird*, L. R. 33 Ch. Div. 85; *Bland's Case* [1893] 2 Ch. 612; *Archer's Case* [1892] 1 Ch. 322; *Hichens v. Congreve*, 4 Russ. Ch. 562, 1 Russ. & M. 150, note; *Beck v. Kantorowicz*, 3 Kay & J. 230; *Pearson's Case*, L. R. 5 Ch. Div. 336; *Phosphate Sewage Co. v. Hartmont*, L. R. 5 Ch. Div. 394; *Yale Gas Stove Co. v. Wilcox*, 64 Conn. 105, 29 L. R. A. 90, 29 Atl. 303; *Plaquemines Tropical Fruit Co. v. Buck*, 52 N. J. Eq. 219, 27 Atl. 1094; *Chandler v. Bacon*, 30 Fed. Rep. 538. See also *Emery v. Parrott*, 107 Mass. 95. That a promoter stands in a fiduciary relation to the future shareholders, see *Venezuela R. Co. v. Kisch*, L. R. 2 H. L. 99; *New Sombbrero Phosphate Co. v. Erlanger*, L. R. 5 Ch. Div. 73; *Erlanger v. New Sombbrero Phosphate Co.* L. R. 3 App. Cas. 1218; *Densmore Oil Co. v. Densmore*, 64 Pa. 43; *Bosher v. Richmond & H. Land Co.* 89 Va. 455, 460, 461, 16 S. E. 360; *Pittsburg Min. Co. v. Spooner*, 74 Wis. 307, 42 N. W. 259; *Burbank v. Dennis*, 101 Cal. 90, 98, 35 Pac. 444; *South Joplin Land Co. v. Case*, 104 Mo. 572, 16 S. W. 390.

If the fullest effect is given to the finding of the court that the defendants intended no actual fraud in taking 250 shares each, and did not intend to defraud or cheat either the corporation or the future stockholders or creditors of the East Tennessee Land Company, all that the finding means is that the defendants honestly believed that the natural resources of the lands in question were so great that shares amounting to \$700,000, par value, would be a fair remuneration to be paid to them and their associates for their services as promoters. But even if they did so believe, and their belief was honest, and there was a foundation for that honest belief, they none the less were guilty of a fraud. It is a fraud for promoters to undertake to decide for the future stockholders in the corporation to be organized that one third of the whole capital stock of that corporation is a fair remuneration for their services as promoters, to issue one third of the capital stock to themselves as such remuneration, and then to invite the public to subscribe to the stock of the corporation, without disclosing that fact to the subscribers, and without getting their consent to the payment of that remuneration. The defendants say that they did disclose the fact to the East Tennessee Land Company, and that they did get the consent of the East Tennessee Land Company to the payment of this \$700,000 of stock to them for their remuneration as promoters, and that is not only enough, but it is final. It is true that the vote authorizing the issue

of this stock to them, as the profits which they were to have out of the organization of the company, was voted unanimously by all the incorporators of the East Tennessee Land Company, and all who were then subscribers to its capital stock; that is, by all the persons who then had any interest in that corporation. That is to say, it is true that the fact that the promoters were to receive \$700,000 of paid-up capital stock as remuneration for their services was disclosed and consented to by all the persons who then had any interest in the corporation. But it is also true that at that time no person except the promoters had any interest in the corporation, barring one Mason, in whose name some of the options were subsequently taken, and who was plainly a mere nominee of the promoters, and that at that time no capital stock of the corporation had been issued to the public. Payment to promoters of remuneration for their services is not made valid by a vote passed by the corporation, when the corporation is in the sole control of the promoters, before the capital has been issued to the public. *New Sombbrero Phosphate Co. v. Erlanger*, L. R. 5 Ch. Div. 73; *Erlanger v. New Sombbrero Phosphate Co.* L. R. 3 App. Cas. 1218; *Re Olympia* [1898] 2 Ch. 153; *Re British Seamless Paper-Bar Co.* L. R. 17 Ch. Div. 467, 471, 472. The persons to whom the promoters owe the duty which they owe by reason of their fiduciary relation are the persons who put their money into the enterprise at the invitation of the promoters; that is to say, the future stockholders. It is to the future stockholders that the promoters must make the disclosure of the remuneration which is or is to be paid to them, and it is the consent of the future stockholders that must be obtained to make that payment valid; and if the promoters undertake to make to themselves remuneration for their services as promoters without making a full disclosure of the fact to the future stockholders, their principals, and getting their consent, they are guilty of a fraud. Promoters can make the necessary disclosure of the remuneration they stipulate for, by including in the prospectus a full statement thereof. If such a statement is not made therein, they cannot honestly take any remuneration for promoters' services unless it is voted by the stockholders after all the stock has been taken by the public.

In this case it is found that "neither of the defendants personally did anything to conceal the paper marked 'No. 31,'—the agreement of March 25,—or took any part in concealing or keeping it from the knowledge of future stockholders or creditors of the corporation. I find, however, that as a fact it was kept from the knowledge of the stockholders, other than the thirteen directors aforesaid, and of future creditors, probably by the original inventors of the scheme, the officers of the Phoenix Land Company, until after the failure of the East Tennessee Land

Company." That finding is conclusive of the defendants' liability, but there is a further finding which gives to the defendants' actions a more serious character, and that finding is this: "The prospectus made an exhibit to the deposition of A. A. Hopkins was issued with the consent and approval of the defendants Leeson and Hopewell, and was widely circulated among the general public." That prospectus contains the following statement: "The capital stock of this company represents actual value, without inflation, but does not approximate the entire value of the properties on which it is based. It was the intention of the projectors and incorporators to shape this enterprise so that its stock should be as solid as that of a national bank. Over half a million dollars of its capital was subscribed before the company's organization, at par. Subscriptions for the remainder are now solicited." The defendants, therefore, not only did not disclose to their principals the fact that stock to the amount of \$700,000, par value, was issued to them and their associates as remuneration for promotion services, but a prospectus containing an incorrect and misleading, if not false, statement was issued with their consent and approval.

The defendants' next contention is that the action cannot be maintained until the East Tennessee Land Company tenders back to the Phoenix Land Company the lands acquired by it under the contract of June 11. But this is not a suit to recover damages from promoters for fraud in a sale of their property to the corporation organized by them as promoters. If it were, it is clear that it could be maintained without returning the lands which had been bought. If at the time when a fraud is discovered, which was perpetrated by promoters in a sale to the corporation of property owned by them, the property is no longer in the condition in which it was when the company took it, the company may, keeping the property, sue the promoters for the secret profits which it was their duty not to make without notifying the company thereof. *Re Olympia* [1898] 2 Ch. 153. In the case at bar the Phoenix Land Company has never been anything but a paper corporation, with five of the promoters of the East Tennessee Land Company as its incorporators, without capital stock, and without property. The lands bought by the East Tennessee Land Company were bought by that company from strangers who owned them. The suggestion that the East Tennessee Land Company must turn over to the Phoenix Land Company the lands which it bought of strangers means that the East Tennessee Land Company must turn over its lands to the promoters of the East Tennessee Land Company. The Phoenix Land Company was merely the paper corporation under whose shelter the promoters sought to obscure the real nature of their transactions. That the corporation may sue for the secret profits made by a promoter who secured a

sale of lands for a third person to the corporation without returning the lands obtained by means thereof, is well settled. *Emery v. Parrott*, 107 Mass. 95; *Lydney & W. Iron Ore Co. v. Bird*, L. R. 33 Ch. Div. 94; *Emma Silver Min. Co. v. Lewis*, L. R. 4 C. P. Div. 396.

In case of such a fraud by promoters, the corporation is entitled to follow the shares taken by the promoters, or the proceeds thereof, in the hands of the promoters, and to recover them specifically, or to recover damages for the loss thereof. *Carling's Case*, L. R. 1 Ch. Div. 115, 126, 127; *Nant-y-glo & B. Ironworks Co. v. Grave*, L. R. 12 Ch. Div. 738, 747, 748; *Eden v. Ridsdals Railway Lamp & Lighting Co.* L. R. 23 Q. B. Div. 368, 371, 372; *Pearson's Case*, L. R. 5 Ch. Div. 336, 341; *Chandler v. Bacon*, 30 Fed. Rep. 538. Promoters who have wrongfully taken remuneration for their services, and have paid the promoters' expenses and the expenses of organizing the corporation, are entitled to deduct those expenses in accounting to the corporation. *Bagnall v. Carlton*, L. R. 6 Ch. Div. 371, 400, 403, 407, 408; *Emma Silver Min. Co. v. Grant*, L. R. 11 Ch. Div. 918, 939; *Metropolitan Coal Consumers' Asso. v. Sorringour* [1895] 2 Q. B. 604. In this case it appears, by the seventeenth finding, that all payments made in procuring the options after June 11, 1889, were repaid by the East Tennessee Land Company, but it does not appear that the \$6,008 prepaid purchase money expended under options held by the Phoenix Land Company on June 10, 1889, has been repaid; and there may be other expenses incurred by the promoters, in the name of the Phoenix Land Company or otherwise, in organizing the company, which, if not heretofore repaid to them, should be deducted by them in accounting to the company.

The plaintiff claims that, under the twenty-fifth finding of the superior court, he is entitled to a decree against each defendant for \$25,000 and interest, less his share of the expenses, which we have already dealt with. If the balance of this stock, amounting to \$1,300,000, par value, had been subsequently issued for cash, at par, the plaintiff would be entitled to such a decree. Ordinarily the damages are to be assessed as of the date of the taking; yet when, as in this case, the property taken had no value at that time, because it was stock of a corporation not then launched into being, the date must be carried forward to the date when the value of the stock was fixed. See *Carling's Case*, L. R. 1 Ch. Div. 115, 126; *McKay's Case*, L. R. 2 Ch. Div. 1; *Pearson's Case*, L. R. 5 Ch. Div. 336; *De Ruvigne's Case*, L. R. 5 Ch. Div. 306; *Eden v. Ridsdals Railway Lamp & Lighting Co.* L. R. 23 Q. B. Div. 368; *Chandler v. Bacon*, 30 Fed. Rep. 538. For cases in this commonwealth where the value at some date other than the date of the wrongful conversion has been taken in actions to recover

damages for the wrongful conversion of personal property, see *Fowle v. Ward*, 113 Mass. 548, 18 Am. Rep. 534; *McKim v. Hubbard*, 142 Mass. 422, 8 N. E. 152. But we are of opinion that the twenty-fifth finding ought not to be acted on as a finding warranting that decree. It is not, in terms, a finding as to the market value of the stock, neither is it, in its terms, a satisfactory finding; and it was not made in the light of the principles which it is now established govern the defendant's liability. The case, therefore, must stand for a hearing as to what the net profits are for which these defendants must severally account. At that hearing the plaintiff may follow the shares or the proceeds, or recover damages, as he may elect. The defendants must account for the shares, with the dividends received by them, or the proceeds, with interest from the date when the proceeds were received by them, or for the fair market value of the stock, with interest from the date when the market value may be found to have been established, as the plaintiff may have elected to proceed; and in any event the plaintiff must repay to the defendants, or deduct from the sum due them, the defendants' share of the expenses of the formation of the corporation, paid by them, and not heretofore repaid to them.

By the frame of the bills in equity in these two cases, and from the scope of the argument made in behalf of the plaintiff, the relief which the plaintiffs seeks to recover from each defendant is limited to the 250 shares issued to him; and the plaintiff does not seek to recover the one tenth of one half of the 200 shares of stock originally subscribed for by the Phoenix Land Company, to which each defendant was entitled under the agreement between the Phoenix Land Company and the Syndicate of Ten, by providing that all profits should be divided equally between the two contracting parties, the Phoenix Land Company and the Syndicate of Ten. Nor does the plaintiff seek to recover the 50 shares received by each of the defendants, being one tenth of one half of the 100,000 shares issued to the Phoenix Land Company under the adjustment of May 6, 1890, referred to in finding 34. And, lastly, from the frame of the bills, the plaintiff seeks to charge each defendant severally, and not to charge the defendants as jointly and severally liable with the other promoters, for all secret profits received, whether received by them, or their associates. *Bagnall v. Carlton*, L. R. 6 Ch. Div. 371, 390, 411; *Bland's Case* [1893] 2 Ch. 612; *Emery v. Parrott*, 107 Mass. 95, 103. For these reasons, we do not express any opinion on these matters, and we have limited the matters on which the case is to stand for hearing under the present bills as above stated.

The last objection made by the defendants is that the plaintiff, as receiver, cannot bring the suit in his own name, and we think that this objection is well taken. The final 49 L. R. A.

order directing the receiver to prosecute these suits is as follows: "Said John K. Hayward, receiver, be, and is hereby, directed to proceed with said causes in the courts of Massachusetts, either in his own name as receiver, or in the name of the East Tennessee Land Company, or jointly in his name as receiver and in the name of the East Tennessee Land Company, as he may be advised by counsel to be proper, and in accordance with the rules of practice in the courts in which such cases are being prosecuted." This order does not operate as an assignment to the receiver of these choses in action. Neither did the previous orders under which this receiver was acting operate as an assignment of them. The plaintiff was appointed a receiver by order dated April 20, 1897, providing that he should "possess the power and authority conferred by former orders" on the receivers. The original order appointing receivers under the general creditors' bill provided that the receiver should "collect, take possession of, preserve, and care for all of the property, real, personal, and mixed, bonds, notes, bills, drafts, and other choses in action of the defendant wherever found, as well as of the accounts, books, and papers of the defendant, and . . . hold and dispose of the same under the order of this court." There is nothing in the original order under which the bills in equity in the cases at bar were filed which in any way affects this question. The plaintiff, as receiver, by virtue of these orders has the powers usually conferred by a court of equity upon a receiver to preserve property pending litigation, and nothing more. Mr. Justice Gray, speaking for the Supreme Court of the United States of the powers of a receiver under a similar order, said: "The utmost effect of his appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title or even the right of possession in the property." *Union Nat. Bank v. Bank of Kansas City*, 136 U. S. 223, 236, 34 L. ed. 341, 10 Sup. Ct. Rep. 1013. That such a receiver cannot sue in his own name to enforce a right of action of the corporation is settled. *Wilson v. Welch*, 157 Mass. 77, 31 N. E. 712.

There is nothing in the objection that, by the terms of the orders of the United States circuit court for the southern division of the eastern district of Tennessee, these suits are now being prosecuted for the benefit of the Harriman Land Company and one Rhodes, to the exclusion of other creditors, if any, of the East Tennessee Land Company, and the further objection that it was not proved in the suits now before the court that the Harriman Land Company and Rhodes were creditors of the East Tennessee Land Company. This is a fact, and the fact came about in the following way: The receivers of the East Tennessee Land Company were

originally appointed under the general creditors' bill. When a bill was filed to foreclose the mortgage of the East Tennessee Land Company, the two causes were consolidated, and the receivership was extended to the consolidated cause. The bill to foreclose was terminated by a decree directing a sale of the property, and after that decree had been carried into effect the trustee of the mortgage filed a motion asking that the receiver should be discharged, or that it (the trustee) be absolved from costs of the receivership thereafter incurred. On this motion the court entered an order directing that the costs and expenses of the receiver thereafter incurred should in no event be taxed to the plaintiff, the trustee of the mortgage, and directing that the funds theretofore realized should not be used to pay those costs and expenses. The order then recited that, as the receivership was continued to enforce claims for secret profits, which claims would inure to the benefit of the general creditors, to the exclusion of the trustee of the mortgage, who disclaimed any interest therein, the receivership should continue only if the general creditors should give security for the payment of the receiver's expenses in those suits, and that the proceeds of those suits should be divided among those creditors who gave that security. In a general creditors' bill, only those creditors who come in under the decree and contribute to the suit are entitled to the fruits of the litigation; and the order of the circuit court in this connection was, under the circumstances, the only order which it could pass. Whether the Hariman Land Company and Rhodes are creditors of the East Tennessee Land Company is a question for the United States circuit court for the southern division of the eastern district of Tennessee, and not for this court. *McCarty's Appeal*, 110 Pa. 379, 4 Atl. 925. And the decision of that court on that point could not be raised collaterally in these suits.

Upon substituting the East Tennessee Land Company as plaintiff in place of John K. Hayward, the causes are to stand for hearing as to what the net profits are which the defendants have respectively received, or as to what the damages are which the plaintiff has suffered, as the plaintiff shall elect to proceed for the property or its proceeds, on the one hand, or for damages, on the other hand.

Decree accordingly.

Elizabeth BUCKNAM

v.

George C. BUCKNAM, *Appt.*

(.....Mass.....)

That a wife is living in the same house

NOTE.—As to separation of husband and wife while living in the same house, see also *Fritts v. Fritts* (Ill.) 14 L. R. A. 685, and *note*.
49 L. R. A.

with her husband, and performing some of the duties of a wife, will not prevent her maintaining a suit for separate maintenance under a statute permitting such suit "when the husband fails, without just cause, to furnish suitable support for his wife," where the contingency of the parties living apart is made a separate ground for the suit.

(May 18, 1900.)

A PPEAL by respondent from an order of the Superior Court for Middlesex County directing respondent to pay to petitioner money for her separate support. *Affirmed*. The facts are stated in the opinion.

Messrs. Hamilton & Eaton, for appellant:

At common law a husband is liable for the support of his wife and minor children, and whoever supplies either with necessities is entitled to be repaid by the husband. The remedy of the wife is clear, and Mass. Pub. Stat. 147, § 33, does not take away the common-law remedy. If a wife needs food, clothing, or a physician, she may buy the food or clothing on her husband's credit, or call in a doctor, and the husband is liable for the amounts reasonably expended for these necessities.

Mayhew v. Thayer, 8 Gray, 172; *Wood v. O'Kelley*, 8 Cush. 406; *Raynes v. Bennett*, 114 Mass. 424.

It is not possible for separate maintenance to be furnished to a woman who is living with her husband.

Fraser, Husb. & W. 839, 842.

Proceedings under this statute are designed to secure the temporary support of the wife who has separated from her husband for just cause, while the marriage relation exists and the cause for separation continues.

Doole v. Doole, 144 Mass. 278, 10 N. E. 811; *Barney v. Tourtellotte*, 138 Mass. 106.

Mr. Francis S. Hesselstine, for appellee:

The statute gives three distinct grounds for petition by the wife against the husband. Mass. Stat. chap. 147, § 33.

This petition is brought upon the first ground. A husband and wife may live separate and apart, within the sound construction of the act, while they continue under the same roof.

Anshutz v. Anshutz, 16 N. J. Eq. 163; *Stein v. Stein*, 5 Colo. 55; *Magrath v. Magrath*, 103 Mass. 577, 4 Am. Rep. 579.

Knowlton, J., delivered the opinion of the court:

This is a petition filed in the probate court under Pub. Stat. chap. 147, § 33, alleging that the respondent fails, without just cause, to furnish suitable support for the petitioner, who is his wife, and asking that the court make an order for her support. The only question before us is whether the court has power to make such an order while the wife is living in the same house with her husband, and is performing some of the duties of a

wife. The statute enumerates three classes of cases in which the court may make an order concerning the support of a wife: It may be done "when a husband fails, without just cause, to furnish suitable support for his wife, or has deserted her, or when the wife for justifiable cause is actually living apart from her husband." There would be no reason for the first class of cases if the power of the court to make an order was intended to be limited to cases in which the husband and wife are living apart from each other. In most, if not all, of the cases which have arisen hitherto, the husband and wife were living apart. Doubtless there will seldom be occasion for an order of the court in behalf of a wife who continues in enjoyment of marital relations with her husband. But to hold that a wife can have no relief so long as she continues to live with her husband, however grossly he neglects to furnish her with needed support, would be to nullify the first clause of the section referred to. The agreed facts under which the order was made show that the parties do not occupy the same room or bed; that they do not eat together, or have any conversation except such as is absolutely necessary, although she cooks the food furnished by him for both. They also show that she is in great need of clothing, medicine, and other things, which he refuses to furnish. The language of the statute indicates an intention that the courts shall have jurisdiction to order relief in such cases. In the last sentence of the opinion in *Bigelow v. Bigelow*, 120 Mass. 320, which holds that this statute is constitutional notwithstanding that it authorizes an order for the support of a wife and children without securing to the husband a right of trial by jury, there is a plain intimation that this is the meaning of the statute. There is also an expression of a doubt whether it "could be upheld as a regulation by the legislature of the duty of a husband to support his wife and children while living with him." The constitutionality of the law is affirmed in that case on the ground that an order for

the support of a wife and children while she is living apart from her husband is within the exception stated in the 15th article of the Declaration of Rights, to the provision securing a right of trial by jury, which exception includes all "cases in which it has heretofore been otherwise used and practised." Under the provisions of law prior to the adoption of the Constitution, all cases of marriage, divorce, and alimony were heard by the governor and council, and, of course, without a trial by jury. Stat. 4 Wm. & M. (Ancient Charter, p. 243). Although at that time there was no statute like that now before us, this statute is only a new method of enforcing a right growing out of marriage, which was enforced by an order for alimony after a divorce from the bonds of matrimony, or a divorce from bed and board, or after the commencement of proceedings to obtain a divorce. The term "alimony," in its broad sense, means support to which the wife or children are entitled on account of the misconduct and neglect of the husband and father. We think that this statute, in its application to a wife in need of support from a husband who fails to perform his marital duties in the family while she is living with him, is merely an enlargement and extension of the remedies existing in cases of marriage, divorce, and alimony before the adoption of the Constitution. It therefore falls within a class of subjects which previously to the adoption of the Constitution were judicially dealt with without a trial by jury. In reference to cases of desertion by the husband which had just occurred, and cases of a wife justifiably living apart from her husband for a slight cause, although the husband's wrong would not entitle the wife immediately to a divorce or to alimony under former laws, this construction was put upon the statute in *Bigelow v. Bigelow*, 120 Mass. 320, and for this reason the statute was held constitutional. We think that the principle of that decision should apply as well to the present case.

Order affirmed.

OHIO SUPREME COURT.

UNION CENTRAL LIFE INSURANCE
COMPANY, *Plff. in Err.*,
v.

Mrs. B. F. BUXER.

(62 Ohio St. 385.)

- *1. Where a husband procures insurance on his life, payable to himself after a term of years, if he shall live so long, and, if not, then to his wife at his death, and, after paying premiums for some years, gives a premium note which has a forfeiture clause therein more onerous, as against the interests of the wife, than the forfeiture clause in the policy, such forfeiture clause in the note will not avail the insurance company as against the wife, unless she assents thereto.
2. Where a condition in a life insurance policy is to the effect that, "in case of default for nonpayment of premium after three years, and no legal surrender having been made, the insured having paid at maturity all notes given for premium, then this policy shall, without surrender, but upon payment of all outstanding premium notes, become a paid-up term policy, without change

of terms or conditions," the payment of all outstanding premium notes, though given after three annual premiums had been paid, is a condition precedent to such policy becoming a paid-up term policy.

3. Where a policy of life insurance is issued and accepted upon the conditions and agreements contained therein, such conditions and agreements form the contract between the parties, and will not be varied or controlled by the subsequent course of dealing between them, in the absence of fraud or bad faith.
4. Where it is provided in a life insurance policy that the company will loan to the insured on such policy, as collateral security, certain sums of money, graded as to amount by the number of annual cash premiums paid, the insured is not entitled to such loan after he is in default in the payment of a premium or premium note, when such default works a forfeiture of the policy by its terms and conditions, unless such default is waived by the company.

(*Minshall and Williams, JJ., dissent from propositions 2-4.*)

*Headnotes by the COURT.

(April 10, 1900.)

NOTE.—Power of insured to destroy rights of beneficiary.

I. In cases of regular life policies.

- a. Generally.
- b. Assignments.
- c. Allowing lapse.
- d. Procuring new policy.
- e. Procuring surrender value.
- f. Giving policy by will.
- g. Wisconsin cases.

II. In cases of benefit societies.

- a. Generally.
- b. Assignments.
- c. Allowing lapse or forfeiture.
- d. Change by surrender.
- e. Giving certificate by will.
- f. Alteration of certificate, etc.
- g. Power under constitution, by-laws, contract, or statute.

I. In cases of regular life policies.

a. Generally.

The weight of authority is that the beneficiary's rights in an ordinary life policy are vested, and cannot be destroyed or affected by the insured in any other way than by allowing a lapse of the policy. But when this is done, in pursuance of a scheme on the part of the insured and the company, to avoid the rights of the beneficiary, and the company, disregarding the lapse, immediately issues a new policy based upon the surrender value of the lapsed policy, it seems that the rights of the beneficiary will not be affected. On this there is some conflict of authority. Many cases endeavor to make a distinction between ordinary life policies and certificates issued by benefit societies, saying that the rights of the beneficiary in an ordinary life policy are vested, but holding that a different rule applies to benefit certificates. Some cases, however, apply the same rules to benefit certificates as to ordinary life policies. See subhead II., *In cases of benefit societies.*

In Wisconsin the cases hold that the rights of the beneficiary in ordinary life policies are

not vested, although the later cases recognize that the weight of authority is to a different effect.

In the following cases it was held that the beneficiary in an ordinary life policy had a vested interest which was not impaired by the acts of the insured: *Waldrom v. Waldrom*, 76 Ala. 285; *Brockhaus v. Kemna*, 10 Biss. 338, 7 Fed. Rep. 609; *Timayenis v. Union Mut. L. Ins. Co.* 22 Blatchf. 405, 21 Fed. Rep. 223; *Chapin v. Fellowes*, 36 Conn. 132, 4 Am. Rep. 49; *Lemon v. Phoenix Mut. L. Ins. Co.* 38 Conn. 294; *Hubbard v. Stapp*, 32 Ill. App. 541; *Pence v. Makepeace*, 65 Ind. 345; *Harley v. Heist*, 86 Ind. 196, 45 Am. Rep. 285; *Wilmaser v. Continental L. Ins. Co.* 66 Iowa, 417, 55 Am. Rep. 277, 23 N. W. 903; *Pilcher v. New York L. Ins. Co.* 33 La. Ann. 322; *Putnam v. New York L. Ins. Co.* 42 La. Ann. 739, 7 So. 602; *National L. Ins. Co. v. Haley*, 78 Me. 268, 57 Am. Rep. 807, 4 Atl. 415; *Gould v. Emerson*, 99 Mass. 154, 96 Am. Dec. 720; *Unity Mut. Life Assur. Asso. v. Dugan*, 118 Mass. 219; *National L. Ins. Co. v. Pingrey*, 141 Mass. 411, 6 N. E. 93; *Ricker v. Charter Oak L. Ins. Co.* 27 Minn. 193, 38 Am. Rep. 289, 6 N. W. 771; *Allis v. Ware*, 28 Minn. 166, 9 N. W. 666; *Packard v. Connecticut Mut. L. Ins. Co.* 9 Mo. App. 469; *Stokell v. Kimball*, 59 N. H. 13; *City Sav. Bank v. Whittle*, 63 N. H. 587, 3 Atl. 645; *Stillwell v. Mutual L. Ins. Co.* 72 N. Y. 838; *Whitehead v. New York L. Ins. Co.* 102 N. Y. 143, 55 Am. Rep. 787, 6 N. E. 267; *Ferdon v. Canfield*, 104 N. Y. 143, 10 N. E. 146; *Garner v. Germania L. Ins. Co.* 110 N. Y. 268, 1 L. R. A. 256, 18 N. E. 130, *Reversing* 17 Abb. N. C. 7; *Foley v. Mutual L. Ins. Co.* 138 N. Y. 333, 20 L. R. A. 620, 34 N. E. 211; *Butler v. State Mut. L. Assur. Co.* 55 Hun. 296, 8 N. Y. Supp. 411; *Re Booth*, 11 Abb. N. C. 145; *People v. Globe Mut. L. Ins. Co.* 15 Abb. N. C. 75, *Reversing* 65 How. Pr. 239; *Carpenter v. Negus*, 17 Misc. 172, 40 N. Y. Supp. 895; *Ruppert v. Union Mut. Ins. Co.* 7 Robt. 155; *Fraternal Mut. L. Ins. Co. v. Applegate*, 7 Ohio St. 292; *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156, 58 Am. Rep. 806, 5 N. E. 417; *Ex parte Dever*, L. R. 18 Q. B. Div. 600; *Jones v.*

ERROR to the Circuit Court for Stark County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover the amount alleged to be due on a life-insurance policy. *Reversed.*

Statement by **Burket, J.:**

Benjamin F. Buxer received from the plaintiff in error a life insurance policy on his own life for \$1,000, payable to himself at a period in the future, to be determined by the premiums paid and accrued profits, after deducting losses, if he should then be alive, and, in case of his death before that time, the amount to be paid to his wife, the defendant in error. The premium was \$38.-33, to be paid on or before the 15th day of August in every year during the term of twenty years, and the policy provided that

the insurance was made upon the consideration of the payment of said premium, "and of the payment, when due, of any and all notes given for premiums, or parts of same." The policy contained the following conditions: "After three years' premiums have been paid, except in case of failure to pay at maturity a premium note, the company will, upon legal surrender of this contract while in force, and the payment of all outstanding premium notes, issue a paid-up, nonparticipating life policy for the amount named in table A, on the following page. In case of default for nonpayment of premium after three years, and no legal surrender having been made, the insured having paid at maturity all notes given for premium, then this policy shall, without surrender, but upon payment of all outstanding premium notes, become a paid-up term policy, without

Jones, 28 Pa. Co. Ct. 254; *Watts v. Mutual Aid Soc.* 5 Pa. Co. Ct. 208; *Connecticut Mut. L. Ins. Co. v. Baldwin*, 15 R. I. 106, 23 Atl. 105; *Gosling v. Caldwell*, 1 Lea, 454, 27 Am. Rep. 774; *Southern L. Ins. Co. v. Booker*, 9 Helsk. 606, 24 Am. Rep. 344; *Irwin v. Travelers' Ins. Co.* 16 Tex. Civ. App. 683, 39 S. W. 1097; *Valley Mut. L. Ins. Co. v. Burke (Va.)* 12 Ins. L. J. 337; *Fortescue v. Barnett*, 3 Myl. & K. 36, 2 L. J. Ch. N. S. 98; *Bunnell v. Shilling*, 28 Ont. Rep. 336.

And the same was said to be the rule in the following cases: *Central Nat. Bank v. Hume*, 128 U. S. 206, 32 L. ed. 375, 9 Sup. Ct. Rep. 41; *Watts v. Phoenix Mut. L. Ins. Co.* 16 Blatchf. 228, Fed. Cas. No. 17,294; *Supreme Conclave, Royal Adelpia v. Cappella*, 41 Fed. Rep. 1; *Masonic Mut. Ben. Soc. v. Burkhart*, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449; *Holland v. Taylor*, 111 Ind. 125, 12 N. E. 116; *Carpenter v. Knapp*, 101 Iowa, 712, 38 L. R. A. 128, 70 N. W. 764; *Marsh v. Supreme Council, A. L. of H.* 149 Mass. 512, 4 L. R. A. 382, 21 N. E. 1070; *Armstrong v. Warren*, 83 Hun, 217, 31 N. Y. Supp. 665; *Yore v. Booth*, 110 Cal. 238, 42 Pac. 808; *Harrison v. McConkey*, 1 Md. Ch. 34.

But in the following cases it was held that the acts of the insured did affect the rights of the beneficiary. In some of these cases this was done by a default suffered by the insured: *Whitehead v. New York L. Ins. Co.* 102 N. Y. 143, 55 Am. Rep. 787, 6 N. E. 267; *Mutual L. Ins. Co. v. Hill*, 178 U. S. 347, 44 L. ed. 1097, 20 Sup. Ct. Rep. 914; *Union Mut. L. Ins. Co. v. Stevens*, 19 Fed. Rep. 671; *Gambis v. Covenant Mut. L. Ins. Co.* 50 Mo. 44; *Olmsted v. Keyes*, 85 N. Y. 593; *Bickerton v. Jaques*, 28 Hun, 119; *Britton v. Mutual L. Ins. Co.* 12 Daly, 164; *Kerman v. Howard*, 23 Wis. 108; *Clark v. Durand*, 12 Wis. 223; *Foster v. Gile*, 50 Wis. 603, 7 N. W. 555, 8 N. W. 217; *Bretlung's Estate*, 78 Wis. 33, 46 N. W. 891, 47 N. W. 17; *Godsal v. Webb*, 2 Keen, 99, 7 L. J. Ch. N. S. 103; *Knapp v. Homeopathic Mut. L. Ins. Co.* 117 U. S. 411, 29 L. ed. 960, 6 Sup. Ct. Rep. 807; *Schneider v. United States L. Ins. Co.* 123 N. Y. 109, 25 N. E. 321, *Reversing* 52 Hun, 130, 4 N. Y. Supp. 797.

And in *State, Metropolitan L. Ins. Co., Prosecutor, v. Schaffer*, 50 N. J. L. 72, 11 Atl. 154, the same was said to be the rule.

In Wisconsin the rule is established, by the cases above cited, that the insured has the power to destroy the interest of the beneficiary.

The alteration of a policy was held not to affect the rights of the original beneficiary, where a policy was issued on A's life, payable 49 L. R. A.

to B, his legal representative, in trust for C, a minor, and, at the request of A, there was added to the application, "or, in the event of the death of said trustee during the lifetime of the insured, he shall appoint a trustee to fill the place of the deceased;" and thereafter, on the death of the trustee, the insured appointed his wife as trustee in place of B, and the company substituted such trustee in the policy, and she collected the money. *Butler v. State Mut. L. Assur. Co.* 55 Hun, 296, 8 N. Y. Supp. 411. In this case the court said that upon the delivery of the policy the beneficiary's interest was vested and the appointment was irrevocable, and that, "as there was no reservation in the policy of the right to make a fresh appointment upon the death of the trustee named therein, Adams's power in this respect ended with the delivery of the policy to Butler."

And where a single man takes out an accident insurance policy on his life payable to his sister, he cannot, after his marriage, without the consent of his sister, substitute his wife as beneficiary. *Irwin v. Travelers' Ins. Co.* 16 Tex. Civ. App. 683, 39 S. W. 1097. This was on the ground that the beneficiary in a policy of insurance has a vested interest. The case does not show to what extent a change was in fact made, but shows that the insured directed the company to have the money paid to the wife, instead of to the sister, and that his father secured the policy from a trustee who had held it for the sister.

In *Carpenter v. Knapp*, 101 Iowa, 712, 38 L. R. A. 128, 70 N. W. 764; *Holland v. Taylor*, 111 Ind. 125, 12 N. E. 116; and *Supreme Conclave, Royal Adelpia v. Cappella*, 41 Fed. Rep. 1, it was said to be the general rule that a beneficiary under an ordinary life policy takes a vested interest therein at the moment the policy is executed and delivered, which cannot be impaired or defeated by any act of the assured or of the assured and the company, to which said beneficiary does not assent.

In *Armstrong v. Warren*, 83 Hun, 217, 31 N. Y. Supp. 665, it was said that in the case of an ordinary insurance policy the insured would have no right to change the beneficiary, but that N. Y. Laws 1892, chap. 699, § 238, has modified this rule as to fraternal organizations.

In *Yore v. Booth*, 110 Cal. 238, 42 Pac. 808, it was said that a person who procures a policy upon his own life payable to his legal heirs, although he pays the premiums himself and keeps the policy in his possession, has no power to change the beneficiary where the policy or charter does not so provide. The question involved in this case was whether statements contained

change of terms or conditions, except as to the payment of premiums and participation in profits, and continue in force for such time as one annual premium on this policy is contained in its reserve value according to the American 4 per cent table of mortality, at the end of which time this contract shall cease. If the insured shall die while the said term policy is in force, the amount of foreborne premiums, with interest at 6 per cent, shall be deducted from the sum insured. (1) This policy shall not be valid or binding until the first premium is paid to the company or its authorized agent, and the receipt hereto attached countersigned by the company's agent, and delivered during the lifetime of the insured; and all premiums, or notes or interest upon notes given the company for premiums, shall be paid on or before the days upon which they become due,

at the company's office, in the city of Cincinnati, or to the authorized agent of the company,—he producing a receipt therefor, signed by the president, vice president, or secretary." "(6) Upon the violation of any of the foregoing conditions, this policy shall be null and void, without action on the part of the company, or notice to the insured or beneficiary; and all payments made hereon, and all accrued surplus or profits, shall be forfeited to the company, excepting as provided in the foregoing fifth paragraph." "(8) After three years from the date of this policy, it shall be incontestable for any cause, excepting the violation of the above conditions regarding the occupation of the insured, his becoming a drunkard or having delirium tremens, nonpayment of premium, or of notes given for same, or interest thereon, and misstatements as to age." The poli-

in applications to other companies, and made previous to the application to this company, were competent to show misrepresentation as to age, by the insured. See also *Thomas v. Grand Lodge, A. O. U. W.* 12 Wash. 500, 41 Pac. 882, subd. II. a.

In *Masonic Mut. Ben. Soc. v. Burkhart*, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449, it was said that the essential difference between a certificate of membership in a beneficiary association and an ordinary life policy is that in the latter the rights of the beneficiary are fixed by the policy, while in the former they depend upon the certificate and the rights of the member under the constitution and by-laws.

In *Marsh v. Supreme Council, A. L. of H.* 149 Mass. 512, 4 L. R. A. 382, 21 N. E. 1070, it was said that in an ordinary life insurance policy made payable to a person named the rights of the beneficiary are fixed by the terms of the policy, and are vested when the policy is issued.

In *Watts v. Phoenix Mut. L. Ins. Co.* 16 Blatchf. 228, Fed. Cas. No. 17,294, it was said: "It is a general rule that, on a life policy in the ordinary form, where the money to become due upon the death of the insured is payable to a certain person named as beneficiary, the policy and money payable upon the death belong, from the time of the delivery of the policy, to the person designated to receive the money, and he alone can maintain an action upon the policy."

A policy taken by a father for the benefit of his daughter vests an interest in her, and he cannot retain possession of the policy after her death, but will be required to deliver it up to her administrator. *Glanz v. Gloeckler*, 10 Ill. App. 484, Affirmed in 104 Ill. 573, 44 Am. Rep. 94. In this case it was said that the fact that the father had never delivered the policy to the daughter did not affect her right.

And where a man effects an insurance on his own life, but in his daughter's name, and pays the premium himself, although he retains the policy in his own possession, it is a complete gift to his daughter, and she may recover the amount provided for by the contract. *Weston v. Richardson*, 47 L. T. N. S. 514. In this case the executor of the insured claimed the money. The court said: "The mere retention of the policy did not show that the beneficial interest, also, was not intended to pass to her. Thus, the gift of the policy to the daughter was a complete one, for both the legal interest and the beneficial were vested in her."

And an alteration of the certificate, reducing the number of beneficiaries, was held inoperative. *Johnson v. Hall*, 55 Ark. 210, 17 S. W. 49 L. R. A.

874. See subdivision II. f, *Alteration of certificate, etc.*

But in *Gambis v. Covenant Mut. L. Ins. Co.* 50 Mo. 44, where a husband took out a policy payable to his wife, and after her death he married again and procured a memorandum upon the policy that it should stand for the benefit of his second wife and others named, it was held that the interest of the first wife ceased at her death, and that the change of beneficiary was valid. In this case the court said: "The only ground upon which the policy could be sustained, when issued, is the fact that the wife had a right to look to the husband for support. It was taken out for the purpose of securing her support after his death. The premiums were paid by him, and the whole thing was instituted and carried on for this laudable purpose. This object being forever lost, was the husband bound to continue the policy for the benefit of her representatives? Could he not surrender it, or, by failing to pay further premiums, let it lapse? Or could he not, with the consent of the company, change the beneficiaries? He must be held to have had that right. It amounts to a surrender of the old policy and the issue of a new one. Every payment made after the change was in the interest of the present wife. Suppose he had refused to pay at all, where would be the plaintiff, and what could he recover? The payments upon renewal were not for his benefit, and he has no claim to that which they secured."

One upon whose life a policy has been taken out, with his consent, payable to a third person, cannot compel its cancellation on the ground that the beneficiary has no insurable interest, and is hostile to him. *Goldsmith v. Union Mut. L. Ins. Co.* 17 Abb. N. C. 15. In this case the court said that if the policy was void as a wager policy there was no occasion for a judgment directing its surrender and cancellation, and if it was valid the apprehension of the plaintiff furnished no ground for the interference of a court of equity.

In some cases the power of the insured to affect the rights of the beneficiary has been determined by the mere construction of the policy; but these cases are not included in this note. Among them are the following: *Carraher v. Metropolitan L. Ins. Co.* 11 N. Y. S. R. 665; *John Hancock Mut. L. Ins. Co. v. White*, 20 R. I. 457, 40 Atl. 5; *Fidelity Mut. Life Assn. v. Winn*, 96 Tenn. 224, 33 S. W. 1045; *State, Metropolitan L. Ins. Co., Prosecutor, v. Schaffer*, 50 N. J. L. 72, 11 Atl. 154; *Metropolitan L. Ins. Co. v. O'Brien*, 92 Mich. 584, 52 N. W. 1012; *Nally v. Nally*, 74 Ga. 669, 58 Am. Rep.

cy states that it is issued and accepted upon the conditions and agreements therein. The premiums were paid, either in cash or by note, to August 15, 1894; and a note was given for the premium which became payable August 15, 1894, at three months, which note was not paid at maturity, and was renewed so as to become due May 1, 1895, and was not paid when due or at all; and on September 30, 1895, the company notified Mr. Buxer that his policy had lapsed for nonpayment of said premium note. He negotiated with the company for a reinstatement of his policy in December, 1895, but did not succeed, and he died May 6, 1896, leaving his widow, the plaintiff in error, surviving him. The premium note which became due May 1, 1895, and for the nonpayment of which the company declared the policy lapsed, contained the following conditions:

458; *Bilbro v. Jones*, 102 Ga. 161, 29 S. E. 118; *Knights Templar & Masons' Life Indemnity Co. v. Gravett*, 49 Ill. App. 252; *Tillman v. John Hancock Mut. L. Ins. Co.* 27 App. Div. 392, 50 N. Y. Supp. 470; *Baker v. Young*, 47 Mo. 453; *Robinson v. United States Mut. Accl. Asso.* 68 Fed. Rep. 825.

Cases where it is held that the power of the insured to affect the rights of the beneficiary is controlled by a statute are also excluded from this note, such as *Videan v. Westover*, 29 Ont. Rep. 1.

b. Assignments.

In the absence of a power contained in a policy it is generally held that the rights of the beneficiaries are vested, and a subsequent assignment by the insured cannot be made so as to affect their interest or to defeat their right to the proceeds.

So, where a policy is taken by a husband for the benefit of his wife, and payable to the assured, his executors, administrators, and assigns, and is thereafter assigned by the assured and his wife, the wife's interest is not affected by the assignment, under *N. H. Laws 1850, chap. 96, § 1*, prohibiting a married woman from making a binding contract, but the assignment constitutes the assignee a trustee for the use and benefit of the wife. *Stokell v. Kimball*, 59 N. H. 13.

And where the policy is made payable to the assured at the end of fifteen years, or, in case of his death before that date, then to his executors and administrators for the use and benefit of his wife and of his son if they should survive him, in case of his death within fifteen years the interest of the wife and son is a vested one, and an agreement made by the assured to assign the policy will not affect their interest. But where the premiums are paid by the assured out of the funds that he has embezzled from the bank as assignee, such bank has a lien on the policy to that extent. *Hubbard v. Stapp*, 32 Ill. App. 541. This was a suit by a bank to compel an assignment of policies which the bank claimed the insured agreed to assign to it.

And where the policy is payable to the assured and his assigns for the benefit of his wife, and she dies leaving a husband and two children, and the husband assigns the policy as security, and the assignee pays the annual premiums until the assured dies, on the death of the wife one third of the policy passes to the husband and two thirds to the children, and the transfer of the policy only carries the husband's rights as heir of his wife. *Harley v. Helst*, 86 Ind. 196, 44 Am. Rep. 285. In this case it was said that the husband might have allowed the policy to lapse by nonpayment of premiums, and that, if he wished to retain to himself the control and ownership of the policy after the death of his wife, he should have so provided in the policy. This suit was a bill of interpleader by the insurance company.

An assignment as a collateral security, by a husband and wife, of a policy on his life payable to his wife and his children, only transfers the policy to the extent of the interest of the husband and wife, and does not affect the rights of the children. *Connecticut Mut. L. Ins. Co. v. Baldwin*, 15 R. I. 106, 23 Atl. 105.

So, where a policy is issued on the life of a husband payable after his death to "his legal heirs," the husband cannot make a valid assignment of the policy, as the interest of the beneficiaries is vested. *Gosling v. Caldwell*, 1 Lea. 454, 27 Am. Rep. 774.

And where a policy for the sole use of the wife prohibits an assignment, but the assured assigns the policy, while his wife and children are living, to his sister, with the assent of the president of the company, to secure past debts and future support, and after the assignment the sister pays several premiums, the assignment is void under *Mass. Gen. Stat. chap. 58, § 62*, and the sister is only entitled to be repaid the premiums paid by her. *Unity Mut. Life Assur. Asso. v. Dugan*, 118 Mass. 219.

A policy of insurance payable to the wife vests in her alone the absolute ownership of it, and it cannot be assigned or transferred by her husband or any other person without her authority. *Pence v. Makepeace*, 65 Ind. 345.

And an assignment by a husband and wife does not affect the rights of the children, where a policy is issued on the life of the husband payable to the wife for her sole use, but, in case of her death before the decease of the assured, the insurance shall be payable to her children, where she dies leaving the insured and seven children surviving. *Southern L. Ins. Co. v. Booker*, 9 Heisk. 606, 24 Am. Rep. 844.

And a policy belongs, the moment it is issued, to the beneficiaries named therein, and the insured has no interest in the same. If it has been delivered to, and is held by, him, he cannot assign or transfer it for any purpose, and his assignee is not entitled to the possession of the policy as against the original beneficiaries. *Allis v. Ware*, 28 Minn. 166.

And a beneficiary in a policy of insurance has a vested interest upon the delivery of the policy, and a subsequent assignment by the as-

band's rights as heir of his wife. *Harley v. Helst*, 86 Ind. 196, 44 Am. Rep. 285. In this case it was said that the husband might have allowed the policy to lapse by nonpayment of premiums, and that, if he wished to retain to himself the control and ownership of the policy after the death of his wife, he should have so provided in the policy. This suit was a bill of interpleader by the insurance company.

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office, in the city of Cincinnati, or to the authorized agent of the company." She further averred that "said policy of insurance contained a provision to the effect that if any premium or premiums, or premium note or notes, or interest upon notes given to the company for premiums, shall not be paid at maturity, said policy should be null and void." She averred that all premiums and premium notes had been paid, except the note which became due May 1, 1895 (being for the premium which was payable August 15, 1894); and she pleaded in excuse for the nonpayment of that note that it was the custom of the company to collect all premiums and notes through agents, who would notify the insured that his premium or note was about due, and then make demand of payment at the proper time, and give a receipt signed by the officers of the company,

and that in this instance no notice was given and no demand made, and that thereby the company waived the prompt payment of the note in question. She further averred that other payments of premium and notes were received by the company after the same were due, and that thereby, and by the course of dealing, he was induced to believe that prompt payment would not be required in order to retain his policy in force. The condition in said policy as to term insurance is fully pleaded, and the benefit thereof invoked, in the petition. The answer of the company admits the allegations of facts in the petition, but denies the waiver and deductions attempted to be drawn from the course of dealing, and pleads the conditions of the policy and note above shown, and the nonpayment of said premium note, and avers that said policy lapsed for nonpayment of

assured does not affect the interest of such beneficiary. *City Sav. Bank v. Whittle*, 63 N. H. 587, 3 Atl. 645.

And where a policy is taken out by a person for the benefit of another named as beneficiary, the title of the beneficiary is vested immediately upon the issuing of the policy, and this right cannot be affected by an assignment or surrender. *Valley Mut. L. Ins. Co. v. Burke* (Va.) 12 Ins. L. J. 337.

Where a policy recites that it is payable to seven children of C, who are expressly declared to be the assured, and the company promises to pay the amount of said insurance to the seven named children in equal shares after the death of C, an assignment by C as collateral security for money loaned does not affect the interest of the children. *Ferdon v. Canfield*, 104 N. Y. 143, 10 N. E. 146.

And where a policy was taken out for the benefit of the sister of the assured, but she paid no part of the premium, and the assured was told when he took out the policy that he could change it at any time, but the beneficiary refused to consent to any change, it was held that he could not maintain a bill in equity to compel her to assign the policy to him, nor could he compel the insurance company to assent to any assignment thereof. *Potter v. Spilman*, 117 Mass. 322.

In *Central Nat. Bank v. Hume*, 128 U. S. 206, 32 L. ed. 375, 9 Sup. Ct. Rep. 41, it was said that a life insurance policy, and the money to become due thereunder, belong to the beneficiary, and the assured cannot transfer to any other person an interest therein.

In *Harrison v. McConkey*, 1 Md. Ch. 34, it was said that, after a transfer by the insured of a policy to an assignee in trust for his wife, the assignor has no more authority or control over the policy, and the assignee will be liable to the wife for the proceeds, and the administrator of the assured has no interest therein.

In *Sauerbier v. Union Cent. L. Ins. Co.* 39 Ill. App. 620, the court said: "As to ordinary policies we apprehend the rule is that the beneficiary has a vested interest which is beyond the control of the party procuring the insurance." In this case the application for the policy stated that it was in favor of the wife "and my children," and the policy named the wife only as beneficiary, and the wife assigned her interest in the policy to her husband, who assigned the policy to a lodge for debt.

That a certificate cannot be assigned so as to cut off the right of the beneficiary, see subd. II., *In cases of benefit societies*. *Block v. Valley Mut. Ins. Co.* 52 Ark. 201, 12 S. W. 477; 49 L. R. A.

Basye v. Adams, 81 Ky. 368; *Quinn v. Supreme Council*, C. K. of A. 99 Tenn. 80, 41 S. W. 343.

But where a policy was taken out by the husband payable to a trustee for his wife, and she died intestate, and he afterwards remarried, and the trustee for value received, at the request of the insured, assigned the policy to the second wife, it was held that on the death of the husband the second wife was alone entitled to the money; that whatever interest the first wife had in the policy vested in her husband as survivor, and that the assignment vested the title in the second wife. It was further held that the right of survivorship was not affected by N. Y. Laws 1840, chap. 80, amended by Laws 1862, chap. 77, and Laws 1873, chap. 821, permitting a married woman to take insurance on the life of her husband, and permitting a surrender by a married woman. *Olmsted v. Keyes*, 85 N. Y. 598.

An assignment by a wife and trustee after her husband's death was held valid as against his distributees, where a settlement provided that the trustees should effect a policy on the life of the wife, pay the premium during her life, and after her death invest the proceeds and pay the interest to the husband for life if he should survive the wife, and after the death of the husband pay to such person as the wife should by will appoint, and, in default of appointment, to the person entitled by distribution. There were no children, and the wife survived her husband, and with the trustee assigned the policy to her cousin, who paid the premium during his life, and his legatee paid the premium and collected the policy. *Godsal v. Webb*, 2 Keen, 99, 7 L. J. Ch. N. S. 103. In this case it was said: "I think that the intention of the ultimate limitation in the clause in question, considered in connection with the rest of the deed, was only to show that the agreement was to exclude the husband from taking more than a life interest in the investment of the policy money otherwise than by the gift of the wife, and that from the nature of the clause, considered as an agreement, it was open to the husband and wife during their joint lives, and to the wife if she survived, to alter that which was intended only for their mutual benefit."

c. Allowing lapses.

In *UNION CENT L. INS. CO. v. BUXER* it was held that the rights of the wife, who was the beneficiary in a policy on her husband's life, were lost by his failure to pay a premium note on its maturity, under a clause in the policy which provided as follows: "After three years'

said note, and that it was canceled on the books of the company in September, 1895, and the insured duly notified thereof. The answer also contains the following: "Defendant admits that said policy of insurance also contained a provision that, in case of default for nonpayment of premium after three years, no legal surrender having been made, the insured having paid at maturity all notes given for premiums, then said policy should, without surrender, upon payment of outstanding premium notes, become a paid-up term policy, and should continue in force for such time as one annual premium thereon was contained in its reserve value, according to the American 4 per cent table of mortality; that no legal surrender of said policy had been made; that no other premium note was then outstanding; and that the reserve value of said policy at said time

would have been more than sufficient to continue said policy in full force until the death of said Benjamin F. Buxer, in the manner and upon the terms and conditions as in said policy provided, had the same not been forfeited for the nonpayment of said premium note." The reply denied the answer, except as admitted in the petition. A jury was waived, and the cause submitted to the court upon the pleadings and evidence. The policy and notes given for premium were introduced in evidence. There was no conflict of testimony. The facts of the case were admitted. Even the acts of indulgence as to payments of premiums and premium notes were not contested by the company. But the court regarded that testimony unimportant, and the record shows that those facts were not considered in rendering the judgment. The court of common pleas rendered

premiums have been paid, except in case of failure to pay at maturity a premium note, the company will, upon legal surrender of this contract, while in force, and the payment of all outstanding premium notes, issue a paid-up, nonparticipating life policy for the amount named in table A on the following page. In case of default for nonpayment of premium after three years, and no legal surrender having been made, the insured having paid at maturity all notes given for premium, then this policy shall, without surrender, but upon payment of all outstanding premium notes, become a paid-up term policy." The policy also provided that all premium notes should be paid on or before the days they became due, and that upon the violation of any of the foregoing conditions the policy should be null and void. The plaintiff endeavored to show that there was a waiver of payment by failure to make a demand, but it was held that the payment of all outstanding premium notes was a condition precedent to the policy being continued as a paid-up term policy.

There is no question but that the insured in an ordinary life policy may defeat the rights of the beneficiary by abandoning the policy, refusing to pay the premium, and allowing a lapse and forfeiture. Where, however, the lapse is only pretended, and the rights of the insured in the original policy are preserved by the cooperation of the company, issuing a new policy, and treating the old one as valuable consideration for the new, even though the formalities of a lapse have been enacted, the cases differ, and each case stands on the particular facts proved. A pretended lapse which is not true in fact will not usually defeat the rights of the beneficiary.

See, further, subhead I. d, *Procuring new policy*.

An abandonment of a life insurance contract by the insured after default in the payment of premiums, together with a refusal by the beneficiaries to keep the policy in life, will be held conclusive against any claim on the policy. *Mutual L. Ins. Co. v. Hill*, 178 U. S. 347, 44 L. ed. 1097, 20 Sup. Ct. Rep. 914.

And a daughter had no vested rights in a policy taken out by her father for the sole use of his wife and heirs, naming the wife, where his wife died and he subsequently remarried, and then, by an arrangement with the company, forfeited the policy by non-payment of premium, and obtained another policy—same amount and same premium—for the sole and separate use and benefit of himself. *Union Mut. L. Ins. Co. v. Stevens*, 19 Fed. Rep. 671. In this case the court said that the facts showed that he

retained possession of the policy; that he alone should have paid the premium, and that he failed to pay the premium, and by the terms of the policy it lapsed and became void, and that he subsequently obtained the second policy; that, as the daughter could not compel her father to pay the premium, he was under no legal obligations to her to do so; that he could revoke that gift, and direct that the money secured by this policy should go elsewhere.

And where a husband procures a policy for the benefit of his wife, or, in case of her death, for their children, and surrenders the policy after a lapse and forfeiture on nonpayment of premium, the beneficiaries cannot repudiate the surrender and at the same time claim a benefit under it as a revival of the forfeited policy. *Whitehead v. New York L. Ins. Co.* 102 N. Y. 143, 55 Am. Rep. 787, 6 N. E. 287. In this case the policy was forfeited five months before the surrender for nonpayment of premium, and it was held that the payment by the company for a surrender did not revive the policy, as it was not shown that the surrender value was paid.

In *Garner v. Germania L. Ins. Co.* 110 N. Y. 266, 1 L. R. A. 256, 18 N. E. 130, the case of *Whitehead v. New York L. Ins. Co.* 102 N. Y. 143, 55 Am. Rep. 787, 6 N. E. 287, was distinguished, as the issue of the new policy in the former case in continuation of the old one, and in preservation of all its essential rights, distinguishes the case so far as the question of waiver is concerned, for in the *Whitehead* case no new policy was issued at all, and the gratuity paid to obtain possession of the lapsed policy was inconsistent with a constant and continued assertion of its validity.

The failure of a wife, who was the beneficiary in a policy on her husband's life, to elect to take a paid-up policy within ninety days after default of premium, was held to prevent her from recovering against the insurance company which had canceled the policy and paid to the husband its surrender value in consequence of the husband's fraudulent representation that his wife was dead. *Knapp v. Homeopathic Mut. L. Ins. Co.* 117 U. S. 411, 29 L. ed. 960, 6 Sup. Ct. Rep. 807. In this case the court said that the surrender was not relied on by the company, and there was nothing in the case to show that it in any way influenced the wife's conduct, or preventing her from paying the premium or making the election required by the policy.

And where a policy was taken out by a husband upon his life for the benefit of his wife, containing a clause of forfeiture for nonpayment of premium, a surrender by the husband

judgment in favor of the plaintiff below, and the circuit court affirmed the judgment. Thereupon the insurance company filed its petition in error in this court, seeking to reverse the judgments below.

Messrs. Ramsey, Maxwell, & Ramsey and Day, Lynch, & Day for plaintiff in error.

Messrs. R. W. McCaughey and Thayer, Webber, & Turner for defendant in error.

Burket, J., delivered the opinion of the court:

As this policy was made payable to the husband at maturity, if then alive, and to his wife at his death, if he died before its maturity, it was to the interest of both to keep the policy in force by the payment of the annual premiums, either in cash or by pre-

on the forged request of the beneficiary, and a forged indorsement of the check given by the company to the husband, payable to him and his wife for the surrender value, made the surrender void, but the beneficiary could not claim that the surrender was void, and at the same time claim to be relieved from the payment of the premiums; and the failure to pay the same prevented a recovery upon the policy. *Schneider v. United States L. Ins. Co.* 123 N. Y. 109, 25 N. E. 321, *Reversing* 52 Hun, 130, 4 N. Y. Supp. 797. In this case the court said that the fraudulent surrender of the policy by the husband before the April premium became due in no way excused the failure to pay the premium, unless the company was in some way connected with that fraud, or guilty of some negligent act in regard thereto. The court further said that "in those cases where a recovery has been permitted by the beneficiary, notwithstanding a surrender and release such as appears in this case, the party seeking to recover was able in some way to connect the company with the fraud, or to show some fault or negligent act on its part that excused the payment of the premium." (*Whitehead v. New York L. Ins. Co.* 102 N. Y. 143, 55 Am. Rep. 787, 6 N. E. 287; *Frank v. Mutual L. Ins. Co.* 102 N. Y. 266, 55 Am. Rep. 807, 6 N. E. 667; *Knapp v. Homeopathic Mut. L. Ins. Co.* 117 U. S. 411, 29 L. ed. 960, 6 Sup. Ct. Rep. 807.)

Where a widow brought an action against a life insurance company, alleging that her deceased husband had obtained a policy on his life and after marriage assigned it to her, and that he and the company, conspiring to defraud her, allowed it to lapse with the intent of canceling the same and obtaining another for his own use; that the premium was not paid on the day it was payable and the policy was surrendered and canceled, and afterwards the premium was paid and a new policy issued differing from the original policy,—it was held that no cause of action was stated. *Britton v. Mutual L. Ins. Co.* 12 Daly, 164. In this case the court said that the assignment of the policy to his wife did not obligate him to keep it alive by the payment of the annual premium, and if she failed to continue the policy by paying the premium it was her loss; that if it had appeared that the husband prevented the wife from paying the premium it might have been different, but that after an assignment the insured was under no obligation to pay the annual premium to keep it alive. It was also said in this case: "The cases relied upon by the plaintiff are all cases where the policy was upon the husband's life for the benefit of the

mium note. Payment might be made in cash or by note, as the parties should determine. As to his interest in the policy, he could give a premium note with a forfeiture clause broader and more onerous than the forfeiture clause in the policy; but, as she had a vested interest in the policy in case she survived him, he could not affect her rights by giving such a premium note without her consent. While the forfeiture clause in the premium note which became due May 1, 1895, was binding upon him, it was not binding as to her, because she had no knowledge of the same, and did not assent thereto. When he found himself unable to pay the premium in cash, it was his interest and duty, as well to himself as to his wife, to keep the policy in force by giving a premium note; and, as to himself, he could insert such terms of forfeiture in the note as he saw fit,

wife and payable to her, or, under the enabling statutes, in the event of her death pending the contract, to her children, as in *Wilson v. Lawrence*, 8 Hun, 593, 13 Hun, 238; *Barry v. Equitable L. Ins. Co.* 59 N. Y. 587; *Eadie v. Shlmon*, 26 N. Y. 9, 82 Am. Dec. 395, and where the substituted policy was enforced for the benefit of the wife, they were cases, as in *Chapin v. Fellowes*, 36 Conn. 132, 4 Am. Rep. 49, and *Barry v. Brune*, 71 N. Y. 261, where the original policy was in force, and was surrendered up and canceled upon the issuing of the new policy; and not cases like this, where the policy had run out, and the contract was at an end by the failure of the assignee to keep it alive."

But on a bill of interpleader by an insurance company it was held that where a policy was issued on a husband's life for the benefit of his wife, her heirs, executors, administrators, and assigns, and after her death the assured allowed the policy to lapse, and took a new policy payable to himself or his legal representative, the respective administrators of the first beneficiary and the assured were entitled to the money in proportion to the amount of premiums paid by their respective intestates. *National L. Ins. Co. v. Haley*, 78 Me. 268, 57 Am. Rep. 807, 4 Atl. 415. In this case the court said that the assured and the insurance company had no legal power by direct agreement to change the beneficiaries named in the policy, and they could not accomplish indirectly by the means resorted to, without the knowledge or consent of the heirs of the beneficiary, what they had no power to do by direct agreement.

Where a husband as beneficiary in a policy on his wife's life for five years paid the premiums, it was held that he had a vested interest, and that the beneficiary could not be changed without his consent, even where the policy had lapsed and a new policy had been issued in place of it. It was held that the new policy after the cancellation of the old one was not a new contract, but a continuation of the original contract with a change of beneficiary. *Bunnell v. Shilling*, 28 Ont. Rep. 336.

That an attempted withdrawal of a member cannot defeat the beneficiary's rights, see subd. II., *In cases of benefit societies*,—*Conseleya v. Supreme Council A. L. of H.* 3 App. Div. 464, 38 N. Y. Supp. 248. *Contra*, *Davidson v. Supreme Lodge K. of P.* 22 Mo. App. 263.

d. Procuring new policy.

The weight of authority is that the insured cannot affect the rights of the beneficiary by surrendering the policy for another one in favor

but, as to her interest, he could not change the contract of insurance without her consent. He might put an end to the policy, by failing to pay the premium in cash or note, or by failing to pay the note at its maturity; but, so long as he kept the policy alive, the interest therein of the wife remained unchanged, unless she consented to a change. She had the right to stand upon the terms and conditions of the policy, unchanged and unaffected by any forfeiture clause in a premium note. But, while he could not thus affect her interest without her consent, she was equally bound with him by the terms and conditions of the policy; and she had no right to insist, after payment of three annual premiums, that he should refuse to give a premium note to keep the policy alive for both, but let it lapse as to himself, so that she might thereby have the benefit of a con-

tinued paid-up term policy. The insurance was primarily for his benefit, as an endowment, and only contingently for her benefit in case he should die before its maturity. In such cases he may do whatever the terms of the policy authorize, without coming in conflict with the authorities as to the inability of the insured or the company to change the vested rights of the beneficiary. He paid the second and third annual premiums by giving a note therefor in the first instance, and he had an equal right to pay the fourth premium in the same manner; but, if it contained a broader forfeiture clause than the terms of the policy, such clause would not be binding on the wife, without her consent. The forfeiture clause in the premium note in this case, however, is not broader, as to the question here involved, than the same clause in the policy. Both provide, in effect,

of another beneficiary. Some cases try to make a distinction where the possession of the policy is retained by the assured, or where it is clear that the insured did not intend that the beneficiary should have a vested interest, holding that the insured may change his beneficiary in such a case. But this distinction is not recognized as a general rule.

In the cases below, the old policy was taken into consideration in issuing a new policy.

So, where a policy is taken out for the benefit of the wife, it cannot be converted into the separate property of the husband, or into a community asset, by a surrender and issuance of a new policy without the consent of the first beneficiary, and the company will be liable to the beneficiary. *Putnam v. New York L. Ins. Co.* 42 La. Ann. 739, 7 So. 602.

And where a policy is made payable on the death of the insured to his then wife if living, otherwise to his children, or if minors to their guardian, and the wife dies first, all the premiums having then been paid, and the insured marries again, and after his second marriage he surrenders the policy without any lapse and without the consent of his children, and takes a paid-up policy payable to his second wife for her benefit, such surrender is invalid, and his children by both marriages are his beneficiaries, and can recover from the company on the first policy. *Ricker v. Charter Oak L. Ins. Co.* 27 Minn. 193, 38 Am. Rep. 289, 6 N. W. 771.

In this case the court said that, as the insured had no legal or equitable interest in the policy at the time of its surrender and cancellation, the act was a nullity, and could not affect the rights of his children, to whom it then belonged, and who alone could release the company from the obligations it contained.

Where a policy is taken by a husband payable to his wife, and afterwards the husband surrenders it to the company in consideration of a supposed misrepresentation, and obtains a paid-up policy for the benefit of his representatives, such surrender does not affect her interest, and a recovery may be had on the original policy. *Fraternal Mut. L. Ins. Co. v. Applegate*, 7 Ohio St. 293. In this case the court said that there was no showing that the husband acted as agent of his wife, or that she had any knowledge of his action, or ratified it, and her consent would not be presumed.

And where a policy was taken payable to the insured in trust for his children, naming them, and was kept alive for fifteen years, and a surrender was then made by the insured four days after default in a premium, and a new policy was issued payable to his wife, and it was the

same number as the canceled one, and the first premium was paid in part by a dividend earned by the prior policy, a payment by the insurance company to the widow did not affect the rights of the beneficiaries in the first-named policy, as they had a vested interest in the policy at the time of its surrender, and the company was liable to them. *Garner v. Germania L. Ins. Co.* 110 N. Y. 266, 1 L. R. A. 256, 18 N. E. 130. In this case the court said that the trustee could not deal with the policy in contravention of their rights, especially one fully apprised of those rights and of his possession and duty as trustee; and the fact that he kept the policy in his own possession was immaterial.

And where a policy is taken on the life of the husband in favor of the wife, and the company, at the request of the husband and without the knowledge of the wife, substitutes for such policy one in favor of the husband, the wife has a vested interest which cannot be destroyed without her consent. *Plicher v. New York L. Ins. Co.* 33 La. Ann. 322. In this case the court said that the pretended lapse of the policy never actually took place; that on the expiration of the time within which she could pay the annual premium the company, with indecent haste, issued what was claimed to be a new policy, but what was not, as to the wife, a new policy, but merely as to her a continuation of the original one. The court further held that the company was also liable to a bona fide assignee of the second policy by reason of estoppel.

In *National L. Ins. Co. v. Pingrey*, 141 Mass. 411, 6 N. E. 93, where an insurance company allowed a surrender of the policy payable to B, and issued a new one payable to C, it was held that on the death of the assured the company could not maintain a bill of interpleader to determine its liability. The court said that by issuing the two policies the plaintiff had exposed itself to both of these claims, and must meet them as best it could. In this case the court also said, under these circumstances the assured could not legally surrender the policy without his mother's consent, and her rights are not affected by such surrender.

And where a policy is taken out by a volunteer upon a husband's life for the benefit of his wife, and the policy provides that after two or more of the annual premiums are paid the policy is to be a paid-up, nonforfeitable one in the sum of \$500 for each premium paid, and the volunteer retains the original policy, and after the payment of four annual premiums surrenders the policy, and subsequently obtains a paid-up policy for his own benefit on the life of the assured and payable to himself, the rights of

that upon failure to pay the note given for premium, at its maturity, the policy shall be null and void. The forfeiture clause in the policy is, in effect, that, upon failure to pay the premium, all outstanding premium notes having been paid at maturity, the policy shall become a paid-up term policy, but, without the payment of such notes, the policy shall not become a paid-up term policy, but shall be null and void, without action on part of the company, or notice to the insured or beneficiary. The forfeiture clause in the premium note in question is that "said policy, including all conditions therein for surrender or continuance as a paid-up term policy, shall, without notice to any party or parties interested therein, be null and void on the failure to pay this note at maturity, with interest at 8 per cent per annum, payable annually." The failure to pay a pre-

mium note at maturity would prevent the policy from becoming a paid-up term policy, under the forfeiture clause in the policy, and the failure to pay the premium note in question at maturity made the condition as to continuance as a paid-up term policy null and void; so that the failure to pay the premium note in question prevented the policy from becoming a paid-up term policy, both under the forfeiture clause in the policy, and under the same clause in the note. The forfeiture clause in the note is, therefore, as to the question of the policy continuing as a paid-up term policy, not broader or more onerous than the same clause in the policy; failure to pay an outstanding premium note under either clause preventing its continuance as a paid-up term policy.

The plaintiff below pleaded the conditions of the policy as to forfeiture, the continu-

the original beneficiary are not affected by the surrender, and the payment of the second policy does not discharge the obligation of the company to pay the widow. *Timayenis v. Union Mut. L. Ins. Co.* 22 Blatchf. 405, 21 Fed. Rep. 223. In this case it was said that he might have allowed the policy to lapse, and thus have defeated the rights of the beneficiary.

And where a policy on a husband's life is payable to his wife, and after her death to her children, and the wife dies, and the husband surrenders the policy and takes a paid-up policy instead, which provides for payment to the wife if living, and if not living to the children of the person whose life is hereby assured, and the husband then remarries, and at his death leaves children of both marriages, the children named in the first policy have a vested interest which is not affected by the acts of their father. *Carpenter v. Negus*, 17 Misc. 172, 40 N. Y. Supp. 995. In this case the court said: "The law is well settled that where a policy such as was first issued by the company is made, the persons for whose benefit the insurance is taken out are the parties with whom the contract is made, and that they have a vested interest therein, of which they cannot be deprived without their consent. The insured is considered to be the agent of such parties in taking out the policy, and in the performance of such acts as are consistent with its terms, and which should be performed in support and promotion of their interests. Such agency, however, it has been expressly held, does not extend to any act in hostility to, or derogation of, the beneficial interest. *Stillwell v. Mutual L. Ins. Co.* 72 N. Y. 385; *Garner v. Germania L. Ins. Co.* 110 N. Y. 266, 1 L. R. A. 256, 18 N. E. 130; *Whitehead v. New York L. Ins. Co.* 102 N. Y. 143, 55 Am. Rep. 787, 6 N. E. 267; *United States Trust Co. v. Mutual Ben. L. Ins. Co.* 115 N. Y. 152, 21 N. E. 1025; *Walsh v. Mutual L. Ins. Co.* 133 N. Y. 408, 31 N. E. 228."

And where an insurance policy is obtained in favor of the *fiancée* of the insured, and placed in the hands of her brother for her, the subsequent surrender by the insured, and the taking of a new policy in favor of a creditor, do not affect her right where she has not consented to the same. *Lemon v. Phoenix Mut. L. Ins. Co.* 38 Conn. 294.

A surrender of a policy by a husband on his life in favor of his wife and children, in the belief that the policy has lapsed, and taking a paid-up policy, do not divest the wife and surviving child of their interest, where the surrender is made by the husband for the wife, but without her authority, and the company has

notice of that fact, and a recovery on the original policy may be had against the company. *Re Booth*, 11 Abb. N. C. 145. In this case it was held that the policy had not lapsed. The insured informed the officers that he was not authorized to sign the surrender for his wife, and they answered that it was a matter of no consequence but a mere form, and afterwards the company obtained the surrender by the assured and his wife, but her signature was improperly acknowledged.

Where a wife takes out a policy of insurance on her husband's life, payable to the wife for her sole use, and in case of her death before her husband's to be paid to her children, and she dies before her husband, leaving children, and after her death the husband surrenders the policy and takes out another in his own name and for his own benefit, the substituted policy and its proceeds belong to the children, and not to the creditors of the husband. *Chapin v. Fellowes*, 36 Conn. 132, 4 Am. Rep. 49. In this case it was not claimed that the husband had any power to destroy the vested interest of the children by surrendering the policy to the company after the death of his wife, but that, as he was under no obligations to pay the premiums to prevent a forfeiture, he became liable to the children, on surrendering that policy and taking a new one for his own benefit, only for the cash value of the policy at that time, and that that was all that was equitably due.

Where the application is made in the name of the wife, and the contract is made directly with her, though the risk is on the life of the husband, the wife's right in it is vested, and no new contract or arrangement of any kind which affects the vested rights of the beneficiary can be made with the company alone by the insured, and the husband has no right to surrender the policy, and a recovery may be had on the original policy. *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156, 58 Am. Rep. 806, 5 N. E. 417. In this case the husband had applied for a surrender-value policy, but the substitution was not completed at his death. The company had failed to give the wife any notice of default, and she was kept in ignorance of the amount of premium due and time for payment.

And where a policy is taken out by a man for the benefit of his son, and the insured, with the consent of the company, surrenders the policy for a new one in his own favor, without the consent of the beneficiary, the right of the beneficiary in the first policy is vested, and he is entitled to the fund in the substituted instrument. *Waltz v. Mutual Aid Soc.* 5 Pa. Co. Ct. 208.

ance as a paid-up term policy, and that the premium note which became due May 1, 1895, had never been paid, and sought to excuse the nonpayment thereof by the course of lenient dealing, the failure to give notice and make demand of payment, and the refusal of the company to make a loan to the insured on his policy as collateral. The insurance company in its answer pleaded and relied upon both conditions of forfeiture in the policy and in the note, and admitted that it had failed to give notice of the maturity of the note, and failed to demand payment thereof, and refused to make a loan on the policy. There was some testimony introduced upon the trial, but it did not change the legal effect of the foregoing conceded facts in the pleadings. Those facts are controlling, and an application of the law to those facts will dispose of the case.

When it is once settled that a life policy is valid and enforceable on behalf of the beneficiary named therein, there seems to be no difficulty in determining that the interest of such beneficiary cannot be disturbed, without his consent, by the mere act of the person insured co-operating with the insurer. *Packard v. Connecticut Mut. L. Ins. Co.* 9 Mo. App. 469. This was an action by the insured against the company for premiums on failure to issue to him a paid-up policy.

But where a policy was taken out by a man payable to his sister, who died, and he surrendered the policy and took another one for the same amount payable, at his death, to his nephew, it was held that the sister had no vested interest. *Bickerton v. Jaques*, 28 Hun, 119. In this case the intention of the insured was held to control. The court said that the cases affecting the right of the person obtaining the policy to surrender it and receive another generally arose under a statute made for the benefit of the widow and children, but that these cases do not apply; and, further: "That he did not intend to place the insurance irrevocably beyond his own control is manifested with reasonable clearness by the fact that he always retained the possession of the policy himself, and he, and not his sister, paid all the premiums which were paid upon it. And after such payments were made, the insurance was kept up by the dividends which had been declared and credited to it under the rules and regulations of the company. In addition to these circumstances, the person to whom the first policy was made payable was the sister of Henry H. Jaques, by whom it had been obtained. She had lived with him, taking care of his household and family for many years prior to her own decease, and she was entirely dependent upon him for her support and maintenance. It is reasonably plain from these facts that his intention in procuring the policy was to provide for her after the time of his own decease, and when, by reason of that event, he would be incapable of affording her any further assistance. This was probably the sole and only intention by which he was actuated in procuring the insurance, and from that it must necessarily follow that her right to it was designed to be contingent upon her surviving him."

In *Whitehead v. New York L. Ins. Co.* 102 N. Y. 143, 55 Am. Rep. 787, 6 N. E. 267, the case of *Bickerton v. Jaques*, 28 Hun, 119, was distinguished, in regard to delivery being necessary to vest title, as the policy in that case was taken out by Jaques, was made payable to his sister, and was not issued under the act of 1840.

Leaving the forfeiture clause in the note out of the question, it is conceded that the premium note was never paid, and is yet outstanding, and therefore, by the terms of the policy, there was never a continuance as a paid-up term policy, unless there is to be found something in the transaction which is the equivalent of payment of the note. Two things are pleaded and relied upon in that connection:

First. The policy provided that after the payment of three annual premiums the insured might borrow certain named sums from the company, graded, as to the amount, by the number of premiums paid; pledging his policy as collateral security. The petition averred that he relied upon this means of obtaining money with which to pay his premium, and that he applied for a loan about the 30th day of May, 1895, and was re-

In *State, Metropolitan L. Ins. Co., Prosecutor, v. Schaffer*, 50 N. J. L. 72, 11 Atl. 154. It was said: "The authorities are conflicting, but there are a number of well-considered cases which hold that where a person who has obtained an insurance upon his life for the benefit of children or others keeps the instrument himself, and alone pays the premiums, the beneficiary has no vested rights in the policy, and the insured has the right to surrender it and take out a new policy payable to other beneficiaries. In some cases the distinction is taken that where, after the policy is taken out, it is delivered to the beneficiary or to someone in trust for him, the right to it thereby becomes vested in the beneficiary. This was the condition in *Fortescue v. Barnett*, 3 Myl. & K. 36, 2 L. J. Ch. N. S. 98. See *Garner v. Germania L. Ins. Co.* 17 Abb. N. C. 7; *Union Mut. L. Ins. Co. v. Stevens*, 19 Fed. Rep. 671; *Barton v. Provident Mut. Relief Assn.* 63 N. H. 535, 3 Atl. 627." See also subd. I. c.—*Union Mut. L. Ins. Co. v. Stevens*, 19 Fed. Rep. 671; *Britton v. Mutual L. Ins. Co.* 12 Daly, 164; *National L. Ins. Co. v. Haley*, 78 Me. 268, 57 Am. Rep. 807, 4 Atl. 415; *Bunnell v. Shilling*, 28 Ont. Rep. 336.

That claiming that certificate is lost, and obtaining a new one, will not affect interest of first beneficiary, see subd. II., *In cases of benefit societies*,—*Maynard v. Vanderwerker*, 30 Abb. N. C. 134, 24 N. Y. Supp. 932; *Supreme Council, Royal Arcanum v. Tracy*, 139 Ill. 123, 48 N. E. 410, *Affirming* 67 Ill. App. 202.

That attempted surrender and change of beneficiary divests the rights of the beneficiary in the original benefit certificate, see same subd.—*Delaney v. Delaney*, 175 Ill. 187, 51 N. E. 961; *Johnson v. Van Epps*, 110 Ill. 551; *Schmidt v. Iowa K. of P. Ins. Assn.* 82 Iowa, 304, 11 L. R. A. 205, 47 N. W. 1032.

e. Procuring surrender value.

It is generally held that a surrender by the insured, for the surrender value, of a regular policy, will not affect the rights of the beneficiary unless there is a lapse by nonpayment of premiums. See subd. I. c. *Allowing lapse*.

A policy of insurance that is made payable to the wife and children vests an interest in them, and a surrender of the policy on payment of its cash value by the assured, and receiving the share of the infant children as their guardian under a regular appointment, will render him liable to them for the amount so received. *Waldrom v. Waldrom*, 76 Ala. 285.

And where a mother takes a policy on her

fused, and that such refusal was the cause of his failure to pay the premium note. The date of the application for a loan and the refusal are both admitted in the answer. The premium note became due May 1, 1895, and was not paid at maturity, and such nonpayment prevented the policy from becoming a paid-up term policy; and an effort thirty days thereafter to obtain a loan was not the equivalent of payment, especially when payment was never made and never tendered. When the application for a loan was made, the policy was lapsed by its own terms, and the company was then under no obligation to make the loan.

Second. The claim is made in the petition that the company did not, in its dealing with the insured, insist upon the prompt payment of premiums and premium notes, and gave no notice and made no demand of

payment of this note, as is more fully shown in the statement of facts above. While such a lenient course of dealing with the insured might, under certain circumstances, entitle him to further reasonable time to make payment, it could not serve as payment itself, or the equivalent thereof. In this case there was never any payment of the premium note, and no tender of payment, and therefore the policy became null and void by its own terms, and the condition upon which it might continue as a paid-up term policy—the payment of all outstanding premium notes—was never complied with. In such a case the payment of all outstanding premium notes is a condition precedent to the policy being continued as a paid-up term policy.

The policy could not be kept alive, as a continued paid-up term policy, under the provision of the policy following: "If the

life payable to her two children by name, and pays the premium, the interest of the beneficiaries is vested in the absence of any by-law or statute or contract reserving the right of the insured to change the beneficiary; and the surrender of the policy for cash by the mother and the guardian of the children entitles the children to the proceeds of the policy. *Jones v. Jones*, 23 Pa. Co. Ct. 254.

And the interest of the beneficiary in the proceeds is vested where a policy is taken by a father for his child, and the father surrenders the policy for a paid-up policy payable to the child, and afterwards as guardian collects the amount under a family arrangement made before the surrender. *Brockhaus v. Kenna*, 10 Biss. 338, 7 Fed. Rep. 609.

And the rights of the beneficiary are not affected where a husband takes a policy payable to his wife, and he is induced to surrender the policy by the representation of the agent that misstatements were made in his application, and he receives back the premiums paid, and dies shortly thereafter. *Stillwell v. Mutual L. Ins. Co.* 72 N. Y. 388. In this case it was held that the beneficiary was entitled to have the policy restored, in order to maintain an action thereon. The court said: "When this policy was taken by the husband, although he paid the premium from his own means, and even regarding it as a provision for the wife, it was irrevocable, so far as he was concerned. I think, however, that the true relation between the parties, in respect to procuring the policy, was that of principal and agent. The husband surrendered a policy of another company belonging to his wife, and applied for and received this policy for her, and in her name as her agent, and when it was delivered to him it was, in legal contemplation, in her possession. As such agent he had no power to give it up, surrender it, or rescind it without her consent."

Where a husband obtains an endowment policy on his life, and assigns the same to his wife and children, and the wife dies, and the husband, assuming to act as executor of his wife and guardian of his children, surrenders the policy for a money consideration, and the same is canceled, the rights of the children are not affected, and they are entitled to recover from the insurance company. *Foley v. Mutual L. Ins. Co.* 138 N. Y. 333, 20 L. R. A. 620, 34 N. E. 211.

And where a husband obtains a policy payable to his wife, and, without her knowledge, exchanges it for a paid-up policy, and then surrenders the latter upon receiving a certificate for its value, the wife may, after his death, 49 L. R. A.

ratify his acts in procuring the first policy and exchanging it for a paid-up policy, and repudiate the surrender of the latter, and collect the same, notwithstanding the certificate has been paid to an assignee. *People v. Globe Mut. L. Ins. Co.* 15 Abb. N. C. 75, Reversing 65 How. Pr. 239. In this case it was said: "It appears that a surrender of the first policy was made within the time and as required by the terms of the policy issued, and a paid-up policy issued, to which action the claimant assents, and we think the company cannot claim that the paid-up policy was void for the want of authority on the part of the husband to make the surrender. . . . When the policy was issued it became the property of the wife; it was, as stated by the court in *Eadie v. Slimmon*, 26 N. Y. 9, 82 Am. Dec. 395, a provision for a state of widowhood, and could not be assigned by the wife prior to the act of 1873 (*Laws 1873*, chap. 821). If Mrs. Brown could not assign the policy herself, no authority could be conferred on her husband to assign or surrender it, and since his death she has not ratified or consented to his action in that respect."

Where the husband procures a policy for the benefit of his wife, or, in case of her death, for their children, the beneficiary acquires a vested right, and the husband has no right to surrender the policy in consideration of money, where the policy has not lapsed. The failure to make a demand of premium, and action by the company tending to prevent payment, preclude a forfeiture, and the company will be held liable for the full amount less the premiums due. *Whitehead v. New York L. Ins. Co.* 102 N. Y. 143, 55 Am. Rep. 787, 6 N. E. 267. In this case it was said that the wife had a vested interest in the policies at the moment of their delivery to her husband, by force of N. Y. Laws 1840, chap. 80, which permitted them to be made in their existing form; that prior to that enactment it was open to question whether the wife and children had an insurable interest in the life of the husband and father.

In *Walsh v. Mutual L. Ins. Co.* 61 Hun, 91, 15 N. Y. Supp. 697, it was said that "the case of *Whitehead v. New York L. Ins. Co.* 102 N. Y. 143, 55 Am. Rep. 787, 6 N. E. 267, was on a question as to the power of the husband to surrender policies of this kind. The matter of the respective rights of the wife and children was not before the court. But the court, in speaking of the policies, says: 'They created a vested interest in the wife, and also one in the children by force of the clause providing for payment to them if the wife should die before the maturity of the policy.' Now, few things

insured shall die while said term policy is in force, the amount of foreborne premiums, with interest at 6 per cent shall be deducted from the sum insured." The insured did not die while the policy was in force, but long after it had lapsed. It is therefore clear, from the conceded and admitted facts, that the policy was not in force at the death of the insured, and that the plaintiff below has no cause of action against the insurance company.

Judgment reversed, and judgment for plaintiff in error.

Minshall, J., dissenting:

The policy sued on in this case was one with many features favorable to the insured and the beneficiary: (1) It insured the life of the husband, for the benefit of his wife, for the period of his natural life, in the

are more unsafe in legal discussions than to take up a sentence in an opinion, and consider it as a decision without reference to other parts of the opinion. And we only quote that sentence because a previous sentence in the same opinion has been cited to show that the wife 'had a vested interest in the policies,' and, therefore, the children could have no interest. Again, that opinion says: 'These policies, therefore, at the moment of their execution, vested in the wife and children as the assured.' So that the opinion speaks as freely of the rights of the children as vested as it does of those of the wife. There is nothing, therefore, in the opinion and in the decision in that case which determines the respective rights of the wife and of the children. Both are called vested; and as to neither was it necessary to decide what they precisely were."

And where the insured transfers a policy by deed to trustees for his wife and children in case they should outlive him, and he afterwards surrenders the policy for a valuable consideration to the company, and one of the trustees dies, the other trustee may maintain a bill to require the insured to give security to the amount of the value of the policy to secure the *cestui que trust*. *Fortescue v. Barnett*, 3 Myl. & K. 36, 2 L. J. Ch. N. S. 98.

See also subd. I. c.—*Knapp v. Homeopathic Mut. L. Ins. Co.* 117 U. S. 411, 29 L. ed. 960, 6 Sup. Ct. Rep. 807; *Schneider v. United States L. Ins. Co.* 123 N. Y. 109, 25 N. E. 321.

1. Giving policy by will.

The rule seems to be that the rights of a beneficiary in an ordinary life policy cannot be affected by a change in the beneficiary by a will of the insured. As to benefit certificates there is some conflict of authority.

The assured in a life insurance policy cannot divert the fund from the beneficiary named in the policy, and make it payable to his executor. *Wilmaer v. Continental L. Ins. Co.* 86 Iowa, 417, 55 Am. Rep. 277, 23 N. W. 903. In this case the court said that the policy constituted a contract between the insured and the company by the terms of which the company was bound, on the payment by him of the premiums, to pay a stipulated sum to the beneficiary at his death, and the will of the insured cannot alter the contract.

And where the charter of a company provided for issuing policies upon the life of any person, expressed to be for the benefit of any woman, minor, or minors, which should inure to the benefit of such person independently of the as- 49 L. R. A.

sum of \$1,000; (2) it was, from its execution, a maturing "endowment policy" in favor of the insured, in a like sum, payable at twenty years from its date, on the continued performance of its conditions; (3) after three years' premiums had been paid, and all notes for the same, it could be converted into "a paid-up, nonparticipating life policy" for an amount indicated in certain tables, upon the surrender of the policy first given. Again, at its maturity as an endowment policy, the insured, instead of receiving payment of \$1,000, could apply it to the purchase of "an annual income for life of \$95.58," or to the purchase of "a paid-up life policy" of \$1,491, with participation in profits, on furnishing a satisfactory medical examination, or, on surrendering the policy, the company agreed that it would on August 14, 1911, pay in cash its entire reserve value and its pro-

sured or his creditors, and a policy was issued for the sole and separate use and benefit of three children, naming them, the said sum "to the said assured, their executors, administrators, or assigns," and the assured by will devised the policy in trust for different purposes. It was held that the children named in the policy were vested upon its delivery with the entire interest. *Ruppert v. Union Mut. Ins. Co.* 7 Robt. 155. And where a policy was payable to the executors, administrators, or assigns of the assured for the benefit of his widow and surviving children, it was held that a will made by the insured bequeathing the policy to his wife did not affect the rights of the children, under Mass. Gen. Stat. chap. 58, § 62, providing that a policy of insurance on the life of any person for the benefit of any married woman shall inure to her separate use and benefit and that of her children. *Gould v. Emerson*, 99 Mass. 154, 96 Am. Dec. 720.

See, further, subd. II., *In cases of benefit societies*, for the following cases:

That a will cannot divert the fund from the beneficiary originally named in the certificate. *Olmstead v. Masonic Mut. Ben. Soc.* 37 Kan. 93, 14 Pac. 449; *Welsert v. Muehl*, 81 Ky. 336.

That a beneficiary in a certificate may be changed by will. *Supreme Conclave, Royal Adelpia v. Cappella*, 41 Fed. Rep. 1; *Woodruff v. Tiltman*, 112 Mich. 188, 70 N. W. 420; *Masonic Benev. Assn. v. Bunch*, 109 Mo. 560, 19 S. W. 25.

g. Wisconsin cases.

In this state the rule was early established that the insured has the absolute right to change the beneficiary. The weight of authority has since been recognized as contrary thereto, but the courts of this state still adhere to their original views.

The insured may dispose of the insurance money by will to the exclusion of the beneficiary named in the policy, during the lifetime of such beneficiary, where a policy is taken for the benefit of the wife and children. *Bretlung's Estate*, 78 Wis. 33, 46 N. W. 891, 47 N. W. 17. In this case the court said: "We have already stated that, according to the established rule of this court, where one person procures a policy on his own life for the benefit of another, and pays the premiums thereon, he may dispose of the insurance money by will or otherwise to the exclusion of the beneficiary named in the policy. Now, it is said that this doctrine is op-

portion of the company's profits, combined, provided the policy should not have been previously determined by lapse or death. It also contained a provision for a "paid-up term policy" in favor of the wife, in these words: "In case of default for nonpayment of premium after three years, and no legal surrender having been made, the insured having paid at maturity all notes given for premium, then this policy shall, without surrender, but upon payment of all outstanding premium notes, become a paid-up term policy, without change of terms or conditions, except as to the payment of premiums and participation in profits, and continue in force for such time as one annual premium on this policy is contained in its reserve value, according to the American 4 per cent table of mortality, at the end of which time this contract shall cease. If the insured

posed to the great weight of authority, and we are urged to change our decision on the subject so as to bring it in harmony with the decisions elsewhere. In answer to this suggestion we observe that we feel bound to adhere to the rule which has been so long established in this state."

So, where one procures a policy of insurance on his own life for the benefit of another, and pays the premiums thereon, he may dispose of the policy by will or otherwise, and exclude the beneficiary named in the policy. *Foster v. Gile*, 50 Wis. 603, 7 N. W. 555, 8 N. W. 217. In this case it was said that this is the rule in Wisconsin, while the weight of authority in other states seems to be contrary. The prior decision of *Clark v. Durand*, 12 Wis. 233, and the Minnesota case of *Ricker v. Charter Oak L. Ins. Co.* 27 Minn. 193, 38 Am. Rep. 289, 6 N. W. 771, were distinguished, and the court said: "But if there is any middle ground upon which the judgments in these cases may rest, and which commends itself as more reasonable and just, it ought to be adopted. We believe there is such ground, and we feel at liberty to adopt it. Notwithstanding what was said in *Clark v. Durand*, we think the taking of the policy by the insured, payable to another, is so far in the nature of an executed voluntary settlement that it vests in the person to whom the insurance money is made payable an actual subsisting interest in the policy, but not the absolute, unconditional ownership of it and of the moneys therein agreed to be paid. The interest of the beneficiary is subject to the right of the insured, who has paid the premiums, to revoke the same and retain it himself or vest it elsewhere. At least, he may do this with the consent of the company which issued the policy."

And a husband who survives his wife may dispose of a policy issued for her benefit, where he has paid the premium. *Kerman v. Howard*, 23 Wis. 108. In this case it was held that Wis. Rev. Stat. chap. 95, § 5, providing that a policy on the life of any person for the benefit of a married woman shall inure to her sole use and that of her children, if any, independently of her husband and of his creditors and representatives, enabled the husband to effect a policy of insurance on his life for the benefit of his wife. The court said: "But when the husband effects a policy on his own life for the benefit of his wife, pays the premiums, and survives her, we do not think the statute intended to deprive him of all power over the policy. Suppose he wished to change the policy in favor of some other person, could he not do it with the consent of the company? He might wish

shall die while the said term policy is in force, the amount of foreborne premiums, with interest at 6 per cent, shall be deducted from the sum insured." It is on this provision in the policy that the plaintiff, the wife of the insured, asked a recovery, and on which a judgment was rendered in her favor, which was affirmed by the circuit court. It is admitted that all the conditions requisite to a paid-up term policy had on August 15, 1894, been performed,—all premiums to that time had been paid, and there were no outstanding notes; and, if nothing more had been done, she would, at the date of her husband's death, have been entitled to \$1,000, less the amount of foreborne premiums, with interest at 6 per cent, as the insured died within the term of such paid-up policy. This is not disputed by counsel for the company, who has argued the case with much fairness,

to use or assign the policy as a means of credit or security. He might not wish to continue the payments by which the policy was kept alive, and thus abandon the policy altogether. Would he not have the right to discontinue payment of the premiums, and let the policy lapse? It seems to us that he would, or that he might bequeath or assign the beneficial interest in the policy as he might think proper. This right to dispose of the policy he would have in the absence of the statute, and we do not think the legislature intended to deprive him of it by that provision." The court distinguished the case of *Eadie v. Shimmom*, 26 N. Y. 9, 82 Am. Dec. 395, as there the policy recited that the wife paid the premium for the first year, and for the like premium to be paid the company insured the life of the husband, and the assignment by the husband and wife was void on account of duress; but that case was on the ground that the insurance was effected by the wife at her expense.

The infant has not a vested interest where a father takes out a policy for the benefit of his infant child, and the father, desiring to cease paying premiums, transfers the same by delivery, with the consent of the insurance company, to a third person, who agrees to pay premiums. *Clark v. Durand*, 12 Wis. 233. In this case the court said that the infant was no party to the policy or agreement, and furnished no part of the consideration. "So far as he was concerned, it was a mere proposed gratuity or gift,—a voluntary thing,—which they were in no way bound to do, and which they might do or cease to do, as best suited their convenience or pleasure. He was a mere volunteer, not having any present beneficial interest, but who, it was intended at one time, should, on the happening of many contingencies, be so interested on some future occasion. He had no vested right in the policy or in the money secured by it."

II. In cases of benefit societies.

a. Generally.

There is a conflict of authority as to whether or not the insured can destroy the rights of the beneficiary under a benefit certificate, in the absence of authority under a statute, constitution, by-laws, or contract. Some cases and text-books are quite decided in expressing the opinion that the weight of authority is in favor of the right of the assured to destroy the rights of the beneficiary.

Some cases hold that the insured has the

but, I think, on a mistaken construction of the terms of the policy. The claim is that this stipulation was modified by a note given for the premium due August 15, 1894 (premiums being due and payable in advance), and which note contained this provision: "Said policy, including all conditions therein for surrender or continuance as a paid-up term policy, shall, without notice to any party or parties interested therein, be null and void upon failure to pay this note at maturity, with interest at 8 per cent per annum, payable annually. In case this note is not paid at maturity, the full amount of premium shall be considered earned as premium during its currency, and the note payable without reviving the policy or any of its provisions."

It is admitted in the pleadings that the wife was no party to the note containing

this provision, and that it was given without her knowledge or consent. That it materially varied the terms of the policy as to this particular feature is apparent. It in fact blotted out the provision as to a paid-up term policy. It is claimed, however, that the husband had the right to give such a note, without the assent of his wife, in the interest of himself, and for the benefit of his wife, as the policy would have been void as to everything secured by it, except the paid-up term, unless he were permitted to give a note for the premium. The argument is maintained with much plausibility, but it is not sound. Whether it would have been to the interest of the wife, or not, to surrender the advantage of a paid-up term policy for other possible advantages that might result from giving a note, is immaterial. She could not, as we shall presently see, be af-

power to destroy the rights of the beneficiary in a benefit certificate, on the ground that a beneficiary in such insurance has no vested rights. *Supreme Conclave, Royal Adelpia v. Cappella*, 41 Fed. Rep. 1; *Johnson v. Van Epps*, 110 Ill. 551; *Delaney v. Delaney*, 175 Ill. 187, 51 N. E. 961, *Affirming* 70 Ill. App. 130; *Milner v. Bowman*, 119 Ind. 448, 21 N. E. 1094; *Schmidt v. Iowa K. of P. Ins. Asso.* 82 Iowa, 304, 11 L. R. A. 205, 47 N. W. 1032; *Carpenter v. Knapp*, 101 Iowa, 712, 38 L. R. A. 128, 70 N. W. 764; *Woodruff v. Tiltman*, 112 Mich. 188, 70 N. W. 420; *Masonic Benev. Asso. v. Bunch*, 109 Mo. 560, 19 S. W. 25; *Davidson v. Supreme Lodge, K. of P.* 22 Mo. App. 263; *Fleeman v. Fleeman*, 39 N. Y. S. R. 307, 15 N. Y. Supp. 838; *Thomas v. Grand Lodge, A. O. U. W.* 12 Wash. 500, 41 Pac. 882.

And the same was said to be the rule in the following cases: *Jory v. Supreme Council, I. of H.* 105 Cal. 20, 26 L. R. A. 733, 38 Pac. 524; *Brown v. Grand Lodge, A. O. U. W.* 80 Iowa, 287, 45 N. W. 884.

In *De Silva v. Supreme Council of Portuguese Union*, 109 Cal. 373, 42 Pac. 32, the question was not decided.

But other cases hold that the beneficiary in a benefit certificate has a vested interest, and that the assured has no power to change the beneficiary or affect his interest by any action, on the ground that benefit certificates and policies are controlled by the same rules as policies. *Johnson v. Hall*, 55 Ark. 210, 17 S. W. 874; *Block v. Valley Mut. Ins. Asso.* 52 Ark. 201, 12 S. W. 477; *Kline v. National Ben. Asso.* 111 Ind. 462, 11 N. E. 620; *Bayse v. Adams*, 81 Ky. 368; *Weisert v. Muehl*, 81 Ky. 336.

And the same was said to be the rule in *Love v. Clune*, 24 Colo. 237, 50 Pac. 34.

Some cases so hold where the beneficiary has paid the dues and assessments. *Tudor v. Tudor*, 26 Ohio L. J. 368; *Supreme Council, Royal Arcanum v. Tracy*, 169 Ill. 123, 48 N. E. 401, *Affirming* 67 Ill. App. 202; *Conselyea v. Supreme Council, A. L. of H.* 3 App. Div. 464, 38 N. Y. Supp. 248; *Maynard v. Vanderwerker*, 30 Abb. N. C. 134, 24 N. Y. Supp. 932.

And the same was said to be the rule in *Nix v. Donovan*, 46 N. Y. S. R. 21, 18 N. Y. Supp. 435.

So, where no consent of the society is shown. *Olmstead v. Masonic Mut. Ben. Soc.* 37 Kan. 93, 14 Pac. 449.

And where the contract is held to be one between the society and beneficiary. *Smith v. National Ben. Soc.* 123 N. Y. 85, 9 L. R. A. 616, 25 N. E. 197, *Affirming* 51 Hun, 575, 4 N. Y. Supp. 521.

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And some transfers by the assured were held ineffectual in *Quinn v. Supreme Council, C. K. of A.* 99 Tenn. 80, 41 S. W. 343; *Owby v. Supreme Lodge, K. of H.* 101 Tenn. 16, 46 S. W. 758.

Where a benefit certificate was issued in favor of the wife, and after death it was attempted to show that the insurance was void for misrepresentation, and the evidence was excluded upon the apparent ground that the beneficiary had acquired a vested interest which could not be defeated by the acts of the member upon whose life the benefit depended. It was held that such is the nature of the interest of a beneficiary in an ordinary policy, but as to beneficiary certificates the weight of authority has established the doctrine that the interest of the beneficiary before the death of the member is a mere expectancy which may be changed at any time by the action of the assured. *Thomas v. Grand Lodge, A. O. U. W.* 12 Wash. 500, 41 Pac. 882.

See also *Yore v. Booth*, 110 Cal. 238, 42 Pac. 808, subd. I. a.

b. Assignments.

Where a benefit certificate payable to the assured was issued after his suspension for non-payment of assessments, in place of a certificate payable to his wife, an assignment by the assured, in pursuance of an agreement that the assignee should pay him a certain amount and the necessary dues for reinstatement, was held void as against public policy, and the beneficiary was entitled to the fund less the amount paid by the assignee. *Quinn v. Supreme Council, C. K. of A.* 99 Tenn. 80, 41 S. W. 343.

And where a certificate of a benefit society was made payable to the "estate" of the insured, it was held that the insured could not sell or assign the certificate so as to divert the fund from both his legal heirs and beneficiaries. *Bayse v. Adams*, 81 Ky. 368. In this case it was said that there was no provision in the charter, or authority given, for the sale or assignment of the policy, nor for investing the purchaser and assignee with any of the privileges as a member, or interest in the fund payable at the death of the insured.

In *Block v. Valley Mut. Ins. Asso.* 52 Ark. 201, 12 S. W. 477, it is held that in Arkansas there is no difference between insurance companies and benefit companies, and that, in the absence of any provision of the charter or by-laws authorizing the substitution of a beneficiary, the rights of the beneficiary cannot be cut off by an assignment.

fectured by agreements to which she was not a party, on the ground that it might be to her interest. She had the right to be consulted in the matter, and determine for herself whether she would abandon an interest that had vested in her, for some other advantage that might accrue from giving such a note. The provision contained in the note is inconsistent with the terms of the stipulation as to a paid-up term policy, and, if such stipulations may be avoided in this way, they might as well be stricken from their policies. They would be more deceptive than real. First, it will be observed that the right to such a policy only arises upon the nonpayment of premium after three years, and no surrender of the policy has been made. As it rests upon a nonpayment of premium after a certain number of premiums have been paid, a subsequent failure in this regard

during the term cannot affect it,—the consideration for it being the premiums that had, without default, been paid; and any agreement which requires the subsequent payment of a premium, or a note given for it, as a condition of its existence, is derogatory to it. To say that payments are required, to preserve a paid-up policy, is a solecism in language. It cannot be a paid-up policy, so long as payments are required to keep it alive as such policy. Again, it will be observed that foreborne premiums are to be deducted from the amount of the policy. This could not be if their nonpayment works a forfeiture. In a case of forfeiture there is nothing to deduct from. It will be further observed that, on the happening of the conditions mentioned, it is to become a paid-up term policy "without change of terms or conditions, except as to payment of premiums and partici-

c. Allowing lapse or forfeiture.

An attempted withdrawal by a member to defeat the wife's rights was held ineffectual on account of her having control of the certificate, where a benefit certificate was taken for the benefit of the wife, and she paid assessments up to a certain time, after which a tender by her was refused. *Conselyea v. Supreme Council, A. L. of H. 3 App. Div. 464, 38 N. Y. Supp. 248.* In this case the court said that she had secured the certificate under an agreement by which she was to pay the assessments, and these she paid, with the knowledge of the society, and thereby acquired a vested interest in the certificate of which the member could not deprive her. It was further held that the husband could not deliberately make himself a member not in good standing so long as she paid or tendered.

And where a certificate in a benefit association for the mother of the insured provided that it should be incontestable, and recited that the admission fee and the advance assessments had been paid, it was held that the beneficiary obtained a vested interest which was not defeated by failure to pay an order given for the assessment and admission fee, although the order provided for the forfeiture of the rights of the member in the association if the same was not paid. *Kline v. National Ben. Assn. 111 Ind. 462, 11 N. E. 620.* This was on the ground that the association was estopped by the recital in the certificate. It was held that the clause of forfeiture in the order was inconsistent with the recital in the certificate. It was said in this case that the beneficiary takes an immediate interest in the policy, and her rights cannot be impaired by any act of the assured performed subsequent to the execution of the policy, for the contract is that of any ordinary insurance company, and not one of a benevolent organization.

But where a member of the endowment rank, *Knights of Pythias*, had a certificate payable to his daughter, and afterwards was suspended for nonpayment of assessments and applied for reinstatement and paid up all sums required, and requested a new certificate payable to his wife, it was held that the interest of the first beneficiary was not such a vested interest but that the beneficiary could be changed. *Davidson v. Supreme Lodge, K. of P. 22 Mo. App. 263.* In this case the court said that the application for readmission was in form the application for admission of a person who was not then a member of the endowment rank. He designated the terms on which he desired to

be let in. One of these terms was that the benefit should be paid to his wife, and not to his daughter, as in the former certificate, and when the defendant accepted this application, and readmitted the applicant, it assented to these terms, and the failure to issue to him a new certificate did not affect his right.

d. Change by surrender.

A certificate in a benefit society payable to the wife of the assured may, after the death of the beneficiary, be surrendered, and another taken out payable to another person. *Johnson v. Van Epps, 110 Ill. 551.* In this case the court said: "Whatever may have been the rights of Johnson with respect to the policy before the death of his wife,—about which we express no opinion,—we have no hesitancy in holding that after that event he had the same power over it as if it had originally been made payable to himself, 'his executors and administrators,' in which case, of course, he would at any time during his life, with the consent of the company, have had the right to surrender it, and take out another making a different disposition of the proceeds, as was done in this case."

The beneficiary in a benefit certificate has no vested interest in the contract of insurance, and during the life of the member he may change the beneficiary subject to the restrictions, statutes, charter, by-laws, or certificate. The fact that the wife withheld the certificate from her husband when he demanded it does not authorize her to take advantage of her own wrong, where the society waives the surrender. *Delaney v. Delaney, 175 Ill. 187, 51 N. E. 961, Affirming 70 Ill. App. 130.* In this case the surrender was made by filing an affidavit that the certificate was lost, and another was then issued payable to another beneficiary. The court said: "Such right of the assured to change the beneficiary does not exist, as a general thing, in the case of an ordinary life insurance policy. The decisions in the text-books are not altogether in accord as to the reasons which exist for the distinction in this regard between certificates issued by a mutual benefit society and ordinary life insurance policies. But whether there are any good reasons for the distinction or not, it is too well established by authority to be here controverted."

In *Schmidt v. Iowa K. of P. Ins. Assn. 82 Iowa, 304, 11 L. R. A. 205, 47 N. W. 1032,* it is held that a beneficiary of a benefit society has no vested right in it before the death of

pation in profits;" that is, it will no longer participate in profits, nor be affected by non-payment of premiums.

The policy does, however, recognize the right of the insured to give, and of the company to receive, premium notes, and provides that a failure to pay them at maturity shall render the policy void; and from this it is argued that the note, with the forfeiture clause in it as to the paid-up term policy, was authorized by the policy as issued. This policy, however, must, as any other agreement, be construed together, and such meaning given to it as will preserve all of its terms, without impairing any of them, if that can be reasonably done; and, like every instrument imposing a forfeiture, it should be construed against the forfeiture, for forfeitures are not favored in law. There is, however, no difficulty in construing the language conferring the right to give notes for premiums with the provision that, if not

paid at maturity, the policy should be void, so as not to affect a paid-up term policy that had previously accrued. As already pointed out, the policy has in it many features securing interests to the insured that are separate from those of the beneficiary. Hence, in accordance with settled rules of construction, the effect of giving premium notes that are not paid at maturity must be confined to the interest of the insured in the policy, and cannot be extended to an interest in the beneficiary that has already vested, unless by the consent of the latter. Unless that be the proper construction, a paid-up term policy would be defeated, any time after it accrues, by the insured giving an ordinary note for unpaid premiums; and we should have the absurdity that, while an accrued paid-up term policy would not be affected by a non-payment of premium, the nonpayment of a simple note given for the premium would render it void. The company did not think

the member on whose account it is issued, and that the member may change the beneficiary without the consent of the beneficiary, and without the assent of the association. This case does not show whether the change of the beneficiary was authorized by constitution, by-laws, or contract. The insured on his deathbed had directed a surrender of the certificate, and a request to be made for one to another beneficiary. The surrender was indorsed on the certificate, but the new one was not issued at the time of his death.

But in *Supreme Council, Royal Arcanum v. Tracy*, 169 Ill. 123, 48 N. E. 401, affirming 67 Ill. App. 202, it is held that a member of a benefit society, who, in consideration of a cash loan from his wife, makes her the beneficiary, and delivers to her the certificate, where she pays all the assessments, cannot divest her right by making a false affidavit that the certificate has been lost and procuring a duplicate certificate for a new beneficiary. In this case it was said that "the new certificate was obtained through perjury and fraud, and, as the daughters can have no standing as innocent purchasers, they are not entitled to be protected as against appellee, who advanced her money on the faith of a contract with her husband."

And where a benefit certificate was taken out by a member for the benefit of her aunt, who was to pay the assessments thereon, and subsequently the member represented to the association that the certificate was lost, and obtained a new certificate in favor of her husband, it was held that the first-named beneficiary had a vested interest, and that her niece was powerless to deprive her of such interest by procuring a new certificate. *Maynard v. Vanderwerker*, 30 Abb. N. C. 134, 24 N. Y. Supp. 932. In this case it was said that N. Y. act 1883, permitting a change in the payee or beneficiary, does not prevent a contract between the member and the beneficiary by virtue of which a vested interest passes to the latter.

Where a benefit certificate was issued to a husband payable to his wife, and after her death he surrendered the certificate and had another issued payable to his niece, and thereafter surrendered this certificate and had a third issued payable to another party, and the insured was incapable of transacting any business by reason of infirmity of mind, it was held that the surrender of the second certificate did not impair the rights of the beneficiary therein. *Ownby v. Supreme Lodge, K. of H.* 101 Tenn. 16, 46 S. W. 758.
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e. Giving certificate by will.

A beneficiary in a mutual benefit society has no vested interest in a benefit certificate until the death of the insured member. Up to this time he may change his designation of beneficiary at will, against the consent of such beneficiary, even though the latter may have advanced the money to pay the assessments upon the certificate. *Supreme Conclave, Royal Adelpheia v. Cappella*, 41 Fed. Rep. 1. In this case it was further said that, in making a change of beneficiary, the assured is bound to do what is required by the policy and by-laws, but there are three exceptions: First, if the society has waived a strict compliance with its own rules and has issued a new certificate; second, if it be beyond the power of the insured to comply literally with the regulations; third, if the insured has pursued the by-laws, and done all in his power to change the beneficiary, but dies before a new certificate is issued.

The holder of a certificate in a benefit society may change the beneficiary, or by will charge his beneficiary with the payment of a debt out of the insurance money, or in other words, change his beneficiary, as to a portion of the insurance, to his creditors, unless prohibited by the rules of the association. *Woodruff v. Tilman*, 112 Mich. 188, 70 N. W. 420. In this case it was said that the Ancient Order of United Workmen is a mutual benefit association, and certificates in these associations partake of the nature of testamentary dispositions of property, and must be construed in the same manner as bequests by will.

And the right of members of benefit societies in the sum agreed to be paid at death is simply the power to appoint the beneficiary, and the beneficiary acquires no vested interest, nor has he any property in the certificate. He has simply an expectancy which may be divested by the member by changing the beneficiary by will. *Masonic Benev. Assn. v. Bunch*, 109 Mo. 560, 19 S. W. 25. In this case the court said: "There is a marked distinction between an ordinary policy of life insurance and a certificate of membership in a benevolent society. In the former the beneficiary's interest is a vested right immediately upon the issuing of the policy, whereas in a benevolent society like plaintiff the beneficiary has no vested right in the certificate before the death of the member on whose account it was issued, and the member may change the beneficiary without the consent of the beneficiary."

so; else, why was a clause forfeiting the paid-up term policy inserted in the note? It was only by the unauthorized clause inserted in the note that the policy in question was to become void by nonpayment, not by any provision in the policy, or any note authorized by it to be given. A promissory note in the usual form is one thing, and a note with a forfeiture clause in it is another and different thing. It is said in the opinion of the majority that, as the premium note was not paid, therefore, by the terms of the policy, there was not a continuance of the paid-up term policy. The fallacy consists in this: The policy was a paid-up term policy at and before the note was given. It was such policy, in favor of the wife, whether another cent was paid or note given for premium for a period that included the death of her husband. The failure to pay the note, had there been no forfeiture clause in it, would not have prevented it

from becoming a paid-up term policy. It had become such before the note was given. It is the very essence of a paid-up term policy that it cannot be affected by any default whatever. If the insured dies within the term, the amount is to be paid the beneficiary, after deducting foreborne premiums, and not in case premiums, or notes given therefor, are paid. As, then, the note given, and on which the company founds its defense to the action, was not within the purview of the terms of the policy, and was unauthorized by the plaintiff, she is entitled to recover.

Where a policy of insurance is taken by one for the benefit of another, it is in the nature of an executed gift, or, as said by some, is a settlement in trust for the benefit of the beneficiary; and it is settled law that, after it becomes vested, it cannot be changed or affected without the assent of the beneficiary. *Bliss, Ins. § 339; Lemon v. Phoenix*

But in *Olmstead v. Masonic Mut. Ben. Soc.* 37 Kan. 93, 14 Pac. 449, it was held that where a benefit certificate was made payable to the assured's wife or her legal representative, and she died during his lifetime, a will made by the assured could not divert the fund from the heirs of his deceased wife. In this case the court said that the general rule of ordinary life policies is that the rights of the beneficiaries are vested when the policy is taken out, and the assured cannot change the beneficiary without his consent. It was insisted that certificates of co-operative insurance companies are not governed by the rule mentioned, but depend upon the rights of the assured under the constitution and by-laws, and the member may change the beneficiary; but it is held that, however well founded this distinction may be, a change cannot be made except with the consent of the society and in conformity with its rules and regulations. In this case no provision was made in the certificate, and the record did not show any rule of the society respecting such change.

And a certificate of insurance issued by a benefit society vests rights in the beneficiaries which cannot be divested without their consent. *Welsert v. Muehl*, 81 Ky. 338. In this case the insured devised the fund "to his widow," and the certificate was payable "to his heirs." The court said that there is no such difference between an ordinary life insurance company and mutual benefit associations, like the one under consideration, as would restrict the operation of the rule as to vested rights to an insurance company, and not extend and apply it to mutual benefit associations.

1. Alteration of certificate, etc.

A benefit certificate was held to constitute an ordinary life insurance policy, and it was said that the party obtaining it had no power to change the beneficiary named therein, where the articles or by-laws did not so provide, and the beneficiaries acquired a vested right of which they could not be deprived by a change of the beneficiaries. *Johnson v. Hall*, 55 Ark. 210, 17 S. W. 874. In this case the certificate was altered from "to her children" to "her children C., H., and E.," omitting to name one.

Where a member of a mutual benefit society, whose children were named as beneficiaries, stopped paying his assessments, separated from his family, and was divorced, and the wife paid the assessments for the children's sake, it was 49 L. R. A.

held that the member could not change the beneficiaries to his mother, and that the children were entitled to the fund. *Tudor v. Tudor*, 28 Ohio L. J. 368. In this case the court said that the fund was wholly the wife's creation; that had she not kept up the dues the policy would have been nonexistent years before, and that her fidelity to those unable to protect themselves had saved it, and that it could not be diverted from them or appropriated.

g. Power under constitution, by-laws, contract, or statute.

Many cases cited by the authorities turn on the question of the controlling effect of, and compliance with, the constitution, by-laws, contract, or statute, in the effort of the assured to impair the rights of the beneficiary. This distinction is not noticed in many cases that cite these cases. Cases in which the power of the assured to affect the rights of the beneficiary is controlled by the constitution, by-laws, contract, or statute, are not considered in this note, but are condensed and grouped as follows:

In some cases it is held that the power of the insured to cut off the rights of the beneficiary is controlled by the terms of the constitution of the order. *Hotel-Men's Mut. Ben. Assn. v. Brown*, 33 Fed. Rep. 11; *Martin v. Stubbings*, 126 Ill. 387, 18 N. E. 657; *Benton v. Brotherhood of Railroad Brakemen*, 146 Ill. 570, 34 N. E. 939; *High Court. C. O. of F. v. Malloy*, 169 Ill. 58, 48 N. E. 392, *Affirming* 67 Ill. App. 685; *Wendt v. Iowa L. of H.* 72 Iowa, 682, 34 N. W. 470; *Hainer v. Iowa L. of H.* 78 Iowa, 245, 43 N. W. 185; *Slmcoke v. Grand Lodge, A. O. U. W.* 84 Iowa, 383, 15 L. R. A. 114, 51 N. W. 8; *Titsworth v. Titsworth*, 40 Kan. 571, 20 Pac. 213; *Eckler v. Terry*, 95 Mich. 123, 54 N. W. 704; *Wells v. Covenant Mut. Ben. Assn.* 126 Mo. 630, 29 S. W. 807; *Knights of Honor v. Watson*, 64 N. H. 517, 15 Atl. 125; *Kepler v. Supreme Lodge, K. of H.* 45 Hun. 274; *Cullin v. Supreme Tent, K. of M.* 77 Hun. 6, 28 N. Y. Supp. 276; *Moan v. Normile*, 37 App. Div. 614, 56 N. Y. Supp. 339; *Durlan v. Central Verein of Hermann's Soehne*, 7 Daly, 168; *Renk v. Herrman Lodge*, 2 Dem. 409; *Fischer v. Fischer*, 99 Tenn. 629, 42 S. W. 448.

And in other cases the same question is controlled by the constitution and by-laws. *Leaf v. Leaf*, 13 Ky. L. Rep. 490, 17 S. W. 354; *Richmond v. Johnson*, 28 Minn. 447, 10 N. W. 596; *Leadlay v. McGregor*, 11 Manitoba, 9; *Sanger v. Rothschild*, 50 Hun. 157, 2 N. Y. Supp. 794;

Mut. L. Ins. Co. 38 Conn. 294; *Ricker v. Charter Oak L. Ins. Co.* 27 Minn. 193, 38 Am. Rep. 289, 6 N. W. 771; *Pilcher v. New York L. Ins. Co.* 33 La. Ann. 322; *Chapin v. Fellowcs*, 36 Conn. 132, 4 Am. Rep. 49; *Timayenis v. Union Mut. L. Ins. Co.* 21 Fed. Rep. 223; 2 May, Ins. § 399p; 2 Joyce, Ins. §§ 730, 1651; *Pingrey v. National L. Ins. Co.* 144 Mass. 382, 11 N. E. 562; *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 163, 167, 58 Am. Rep. 806, 5 N. E. 417. The interest of the beneficiary is so distinct from that of the person procuring the insurance, that even the acts or declarations of the latter are not evidence against the beneficiary. *Fraternal Mut. L. Ins. Co. v. Applegate*, 7 Ohio St. 292; *Union Cent. L. Ins. Co. v. Cheever*, 36 Ohio St. 201, 38 Am. Rep. 573. Hence, though the husband had the right to give a note for the premium that became due August 15, 1894, he had not the right to stipulate therein that if it was not paid at maturity the paid-up term policy should become void. This term in the note exceeded his authority, and did not, therefore, affect his wife. If it

had been omitted, the effect of the nonpayment of the note would simply have affected his own interest; and, there being no authority for its insertion, the effect of the nonpayment of the note on the interest of the wife is the same as if it had been omitted. If, by the taking of a note for the premium (that is, a straight note, which he might have taken without the assent of his wife), a paid-up policy did not then accrue, it did on the nonpayment of the note; for then, in the language of the policy, "a default for nonpayment of premium" occurred. The default occurred May 1, 1895, as the note then matured, and was not paid. And whether the time of the term should be reckoned from the date of the note, or from its maturity and nonpayment, is not material, as in either case the husband died within the period of the term. I therefore concur in the first and dissent from the other propositions of the syllabus, and from the reversal of the judgment.

Williams, J., concurs in this opinion.

Sabin v. Grand Lodge, A. O. U. W. 28 N. Y. S. R. 45, 8 N. Y. Supp. 185; *Jinks v. Banner Lodge*, No. 484, 189 Pa. 414, 21 Atl. 4; *Beatty v. Supreme Commandery U. O. of G. C.* 154 Pa. 484, 25 Atl. 644; *Southern Tier Masonic Relief Asso. v. Laudenbach*, 5 N. Y. Supp. 901.

In some cases the charter was held to control as to the right to change the beneficiary. *Raub v. Masonic Mut. Relief Asso.* 3 Mackey, 68; *Duval v. Goodson*, 79 Ky. 224; *Basye v. Adams*, 81 Ky. 368; *Van Bibber v. Van Bibber*, 82 Ky. 347; *Schillinger v. Boes*, 85 Ky. 357, 3 S. W. 427; *Manning v. Ancient Order of U. W.* 86 Ky. 136, 5 S. W. 385; *Tennessee Lodge*, No. 20, K. of H. v. Ladd, 5 Lea, 716; *Gaines v. Kentucky Grangers' Mut. Ben. Soc.* 11 Ky. L. Rep. 580; *Kentucky Mut. Ben. Asso. v. Howe*, 9 Ky. L. Rep. 198; *Richardson v. Kentucky Grangers' Ben. Soc.* 4 Ky. L. Rep. 735; *Gentry v. Supreme Lodge, K. of H.* 23 Fed. Rep. 718; *Dietrich v. Madison Relief Asso.* 45 Wis. 84; *Presbyterian Mut. Assur. Fund v. Allen*, 106 Ind. 595, 7 N. E. 317.

And the charter and certificate were held to control in *Head v. Supreme Council*, C. K. of A. 64 Mo. App. 212.

And the charter, by-laws, and contract were held to control the rights of the beneficiary, in *Rollins v. McHatton*, 16 Colo. 203, 27 Pac. 254.

Under the charter, constitution, and by-laws, the power to change the beneficiary may be authorized without disturbing any vested rights. *Lamont v. Grand Lodge*, I. L. of H. 31 Fed. Rep. 177; *Lamont v. Hotel Men's Mut. Ben. Asso.* 30 Fed. Rep. 817; *Gentry v. Supreme Lodge, K. of H.* 23 Fed. Rep. 718.

The rights of the beneficiary are subject to the by-laws, rules, and regulations of the society. *Holland v. Taylor*, 111 Ind. 121, 12 N. E. 116; *Isgrigg v. Schooley*, 125 Ind. 94, 25 N. E. 151; *Stephenson v. Stephenson*, 64 Iowa, 534, 21 N. W. 19; *Heydorst v. Conrack*, 7 Kan. App. 202, 52 Pac. 700; *Supreme Council*, A. L. of H. v. *Perry*, 140 Mass. 580, 5 N. E. 634; *Marsh v. Supreme Council*, A. L. of H. 149 Mass. 512, 4 L. R. A. 382, 21 N. E. 1070; *Union Mut. Asso. v. Montgomery*, 70 Mich. 587, 38 N. W. 588; *Grand Lodge, A. O. U. W. v. Noll*, 90 Mich. 37, 15 L. R. A. 350, 51 N. W. 268; *Scholl v. Sadowry*, 42 Pittsb. L. J. 43; *Mitchell v. Overman*, 103 U. S. 62, 26 L. ed. 369; *Hanson v.* 49 L. R. A.

Minnesota Scandinavian Relief Asso. 59 Minn. 123, 60 N. W. 1091; *Guttererson v. Guttererson*, 50 Minn. 278, 52 N. W. 530; *Finch v. Grand Grove*, U. A. O. of D. 60 Minn. 308, 62 N. W. 384; *National Asso. of National American Asso. v. Kirglin*, 28 Mo. App. 80; *Hofman v. Grand Lodge of Brotherhood of Locomotive Firemen*, 73 Mo. App. 47; *Barton v. Provident Mut. Relief Asso.* 63 N. H. 535, 3 Atl. 627; *Hellenberg v. District No. 1 I. O. of B. B.* 94 N. Y. 580; *Thomas v. Thomas*, 131 N. Y. 205, 30 N. E. 61; *Ireland v. Ireland*, 42 Hun, 212; *Hannigan v. Ingraham*, 55 Hun, 257, 8 N. Y. Supp. 232; *Sabin v. Grand Lodge, A. O. U. W.* 26 N. Y. Week. Dig. 309, 6 N. Y. S. R. 151; *Mayer v. Equitable Reserve Fund Life Asso.* 17 N. Y. S. R. 525, 2 N. Y. Supp. 79; *Southern Tier Masonic Relief Asso. v. Laudenbach*, 5 N. Y. Supp. 901; *Deady v. Bank Clerk's Mut. Ben. Asso.* 17 Jones & S. 246; *Kult v. Nelson*, 24 Misc. 20, 53 N. Y. Supp. 95; *Smith v. Harman*, 28 Misc. 681, 59 N. Y. Supp. 1044; *Charch v. Charch*, 57 Ohio St. 561, 49 N. E. 408; *Beatty's Appeal*, 122 Pa. 428, 15 Atl. 861; *Heasley v. Heasley*, 191 Pa. 539, 43 Atl. 364; *Catholic Knights v. Kuhn*, 91 Tenn. 214, 18 S. W. 385; *Handwerker v. Diermeyer*, 98 Tenn. 619, 36 S. W. 869; *Lane v. Lane*, 99 Tenn. 639, 42 S. W. 1058; *Schardt v. Schardt*, 100 Tenn. 276, 45 S. W. 340; *Spawn v. Chew*, 60 Tex. 532; *Byrne v. Casey*, 70 Tex. 247, 8 S. W. 38; *Vollman's Appeal*, 92 Pa. 50; *Arthur v. Odd Fellows' Beneficial Asso.* 29 Ohio St. 557; *Supreme Council Catholic Mut. Ben. Asso. v. Priest*, 46 Mich. 429, 9 N. W. 481; *Grand Lodge, A. O. of U. W. v. Child*, 70 Mich. 163, 38 N. W. 1; *Grand Lodge, A. O. of U. W. v. Reneau*, 75 Mo. App. 402; *Grand Lodge A. O. of U. W. v. Kohler*, 106 Mich. 121, 63 N. W. 897; *Hamilton v. Royal Arcanum*, 189 Pa. 273, 42 Atl. 186; *Greeno v. Greeno*, 23 Hun, 478.

In some cases the rights of the beneficiary are controlled by the by-laws and certificate. *Holland v. Taylor*, 111 Ind. 125, 12 N. E. 116; *Sorge v. Supreme Lodge, K. of H.* 98 Tenn. 446, 39 S. W. 853; *Sabin v. Phinney*, 134 N. Y. 423, 31 N. E. 894.

The certificate or contract is held in some cases to control the rights of the beneficiary. *Bowman v. Moore*, 87 Cal. 306, 25 Pac. 409; *Supreme Council, C. K. of A. v. Franke*, 137 Ill. 118, 27 N. E. 86, *Affirming* 34 Ill. App. 651; *Highland v. Highland*, 109 Ill. 866; *Anthony*

v. Massachusetts Ben. Asso. 158 Mass. 322, 33 N. E. 577; Hall v. Northwestern Endowment & Legacy Asso. 47 Minn. 85, 49 N. W. 524; Supreme Council A. L. of H. v. Smith, 45 N. J. Eq. 486, 17 Atl. 770; Luhrs v. Luhrs, 123 N. Y. 367, 9 L. R. A. 534, 25 N. E. 388; National Mut. Aid Soc. v. Lupold, 101 Pa. 111; Flisk v. Equitable Aid Union, 20 W. N. C. 290, 11 Atl. 84; Supreme Council C. K. of A. v. Morrison, 18 R. I. 468, 17 Atl. 57; Hopkins v. Hopkins, 92 Ky. 324, 17 S. W. 864; Voigt v. Kersten, 184 Ill. 314, 45 N. E. 543, 61 Ill. App. 42; Brown v. Grand Lodge, A. O. of U. W. 80 Iowa, 287, 45 N. W. 884; Hirschl v. Clark, 81 Iowa, 200, 9 L. R. A. 841, 47 N. W. 78; Smith v. National Ben. Soc. 123 N. Y. 85, 9 L. R. A. 616, 25 N. E. 197.

And in some cases the rights of the beneficiary are determined under a statute in relation to benefit societies, taken in connection with the by-laws, rules, and regulations. *Armstrong v. Warren*, 83 Hun. 217, 31 N. Y. Supp. 665; *Fleeman v. Fleeman*, 39 N. Y. S. R. 307, 15 N. Y. Supp. 838; *Milner v. Bowman*, 119 Ind. 448, 5 L. R. A. 95, 21 N. E. 1094; *Gladding v. Gladding*, 29 N. Y. S. R. 485, 8 N. Y. Supp. 880; *Daniels v. Pratt*, 143 Mass. 216, 10 N. E. 166; *Coyne v. Bowe*, 23 App. Div. 261; *Moore v. Chicago Guaranty Fund Life Soc.* 178 Ill. 202, 52 N. E. 882, *Affirming* 76 Ill. App. 438; *Masonic Mut. Ben. Soc. v. Burkhart*, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449; *Elsey v. Odd Fellows' Mut. Relief Asso.* 142 Mass. 224, 7 N. E. 844; *Supreme Lodge, K. of H. v. Nairn*, 60 Mich. 44, 26 N. W. 826.

Conclusion.

In conclusion, it may be said that the weight of authority seems to be that in ordinary life policies the insured has not the power to destroy

the rights of the beneficiary, but that he has such power in regard to benefit certificates. Some cases try to make a distinction in this regard between ordinary life policies and certificates issued by benefit societies in cases where the terms of the constitution, charter, by-laws, or contract are not considered as controlling. The statement so frequently met with, that there is a difference between ordinary life policies and benefit certificates, must be considered in connection with the fact that in most of the benefit certificate cases cited by the courts there is some controlling feature in the certificate, constitution, or by-laws which affects that particular case. In the absence of these distinctive features there seems to be a conflict of authority as to the power of the insured to destroy the rights of the beneficiary. It may, however, be said that the insured in either case may allow a policy or certificate to lapse, and thus defeat the right of the beneficiary, and that the weight of authority is in favor of the right of the insured in a benefit certificate to change the beneficiary by will. In some cases the rights of the insured and the beneficiary are determined by the fact that the insured retained exclusive possession of the policy, and, in other cases, that the beneficiary alone paid the premiums or assessments. But these rules are not followed in all cases. The Wisconsin cases cannot be considered of much weight outside of that state, as they refuse to recognize the authorities of other states unless in accord with the view adopted in that state, which is that the insured has the right to destroy the rights of the beneficiary.

Cases involving the transfer by the beneficiary of a policy to defeat his own rights, and cases where the insured has made an assignment in bankruptcy, are not included in this note.

I. T.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

A. B. FARQUHAR COMPANY, Limited,
Appt.,
v.
NATIONAL HARROW COMPANY.

(102 Fed. Rep. 714.)

Letters or notices sent out by the owner of a patent for the purpose of destroying the business of another by threatening the latter's agents and customers with suits for infringement, when this is not done in good faith to warn against infringement, but in bad faith and solely for the purpose of destroying the business of another, is a fraudulent attack upon property rights against which a court of chancery should not refuse protection.

(June 1, 1900.)

A PPEAL by complainant from a decree of the Circuit Court of the United States for the District of New Jersey in favor of defendant in a suit brought to enjoin defend-

NOTE.—For injunction to prevent publication of claims of infringement, on which there has been doubt and difference of opinion, see *Flint v. Hutchinson Smoke Burner Co. (Mo.)* 16 L. R. A. 243, and *note*; also *Shoemaker v. South Bend Spark Arrester Co. (Ind.)* 22 L. R. A. 332, 49 L. R. A.

ant from interfering with complainant's business. *Reversed.*

Before *Acheson* and *Dallas*, Circuit Judges, and *Bradford*, District Judge.

The facts are stated in the opinion.

Messrs. William C. Strawbridge and John G. Johnson, for appellant:

Where notices are given in bad faith, with no intention to sue, but simply for the purpose of injuring and destroying the business of a competitor, it is within the jurisdiction, and it is the duty, of a chancellor to interfere, if the business of the competitor is in danger of being irreparably ruined by such notices.

If property rights are invaded, an injunction will be granted, even though it enjoins against the perpetration of a crime.

Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; *Lewin v. Welsbach Light Co.* 81 Fed. Rep. 904; *Kidd v. Horry*, 28 Fed. Rep. 773.

There is a distinction between an attempt to enjoin the sending out of warning letters and advertisements in the matter of an alleged infringement, and an injunction against warnings made in bad faith, with the intention to destroy a business.

Computing Scale Co. v. National Comput-

ing Scale Co. 79 Fed. Rep. 962; *Kelley v. Ypsilanti Dress-Stay Mfg. Co.* 10 L. R. A. 686, 44 Fed. Rep. 23; *Emack v. Kane*, 34 Fed. Rep. 46; *Casey v. Cincinnati Typographical Union, No. 3*, 12 L. R. A. 193, 45 Fed. Rep. 135; *Arthur v. Oakes*, 24 U. S. App. 239, 25 L. R. A. 414, 4 Inters. Com. Rep. 744, 63 Fed. Rep. 327, 11 C. C. A. 209.

The court will restrain any publication tending to destruction of property, whether money or professional reputation.

Dixon v. Holden, L. R. 7 Eq. 488; *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551; *Loog v. Bean*, L. R. 26 Ch. Div. 306; *Lyons v. Wilkins* [1896] 1 Ch. 811; *Murdock v. Walker*, 152 Pa. 595, 25 Atl. 492; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Davis v. Zimmerman*, 91 Hun, 489, 36 N. Y. Supp. 303; *Nashville, C. & St. L. R. Co. v. McConnell*, 82 Fed. Rep. 65; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 387, 5 Inters. Com. Rep. 522, 54 Fed. Rep. 730.

Dallas, Circuit Judge, delivered the opinion of the court:

We entirely concur in the statement of the court below that "the patent owner is justified in using all lawful means to protect his monopoly," and that "he may give notice of his rights as he understands them, and of his intention to ask the courts to enforce them in suit to be brought for the purpose." But the bill in this case, which was dismissed on demurrer (99 Fed. Rep. 160), charges the defendant with something more than the use of lawful means to protect its monopoly. It alleges, not merely that the defendant is giving notice of its rights and of its intention to enforce them, but that it "is now endeavoring to break up and destroy the harrow business of your orator, and to drive it out of the field of the manufacture of spring-tooth harrows, . . . by the circulation among the customers and agents of your orator of letters, addressed and mailed to said customers and agents, in and by which said customers and agents are falsely and maliciously informed that the harrows of your orator's manufacture, handled by said customers and agents, are infringements upon patents owned by the defendant corporation; . . . that the threats of the defendant company against the customers and agents of your orator are rendered the more effective and harmful to the business of your orator by circulars in which, by innuendo, it is conveyed to customers and agents of your orator, and contrary to the fact, as the defendant, the National Harrow Company, and its officers, well know, that your orator is not able to fulfil, by reason of lack of means, and will otherwise evade guaranties given by your orator to its customers and agents to protect them against suits for infringement 49 L. R. A.

brought by the National Harrow Company against them; that said threats of the defendant against the customers and agents of your orator are rendered still more effective by the circulation by the defendant company of notices in and by which it is falsely stated and pretended that certain patents owned by the defendant company have been adjudicated and sustained in contested cases, and injunctions issued against the defendants therein; that the defendant has continued for many years, and particularly for the past three years, the sending of the letters and circulars hereinbefore referred to, to the customers and agents of your orator, for the purpose of breaking up and destroying your orator's business in spring-tooth harrows; that the threats of suit against the customers and agents of your orator are not made in good faith, or with any intention of instituting suit against such customers or agents or against your orator."

Assuming, as on demurrer must be assumed, the truth of these allegations, we are of opinion that the court below erred in holding them insufficient to entitle the complainant to relief in equity. Where notices are given or circulars distributed in good faith to warn against infringement, no wrong whatever is committed; but where, as is here averred, they are not made or issued with such intent, but in bad faith, and solely for the purpose of destroying the business of another, a very different case is presented. In such a case property rights are fraudulently assailed, and a court of chancery, whose interposition is invoked for their protection, should not refuse to accord it. *Emack v. Kane*, 34 Fed. Rep. 46; *Kelley v. Ypsilanti Dress-Stay Mfg. Co.* 10 L. R. A. 686, 44 Fed. Rep. 23; *Casey v. Cincinnati Typographical Union, No. 3*, 12 L. R. A. 193, 45 Fed. Rep. 135; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 387, 5 Inters. Com. Rep. 522, 54 Fed. Rep. 730; *Computing Scale Co. v. National Computing Co.* 79 Fed. Rep. 962; *Lewin v. Welsbach Light Co.* 81 Fed. Rep. 904; *Nashville, C. & St. L. R. Co. v. McConnell*, 82 Fed. Rep. 65; *Adrianse, P. & Co. v. National Harrow Co.* 98 Fed. Rep. 118; *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900.

The objection that the "bill is lacking in allegations necessary to establish jurisdiction of the circuit court" is not well taken. *Herbert v. Rainey*, 54 Fed. Rep. 248-251; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 387, 5 Inters. Com. Rep. 522, 54 Fed. Rep. 730.

The decree is reversed, and the cause will be remanded to the circuit court, with direction to enter a decree disallowing the demurrer to the bill of complaint, and with leave to the defendant to answer within such time as that court may prescribe.

MINNESOTA SUPREME COURT.

Albert H. SPERRY, *Resp't.*,
v.

A. FLYGARE *et al.*, *Appts.*

(.....Minn.....)

- *1. A rural highway authorized to be laid out and established by chapter 302, Laws 1895, is not a "local improvement" within the meaning of § 1, art. 9, of the Constitution.
2. Said chapter 302, Laws 1895, is unconstitutional and void as in violation of § 1, art. 9, of the Constitution, which requires all taxes to be as nearly equal as may be.

(June 26, 1900.)

A PPEAL by defendants from an order of the District Court for Kandiyohi County overruling a demurrer to a complaint filed to enjoin the issuing of bonds to pay for the establishment of a highway. *Affirmed.*

The facts are stated in the opinion.

Messrs. Daniel Fish and Eli Torrance, with *Mr. Samuel Porter*, for appellants:

It is for the legislature to say what public improvements are local.

As the state Constitution stood prior to 1869, all taxes were to be "as nearly equal as may be," and were to be based upon the equalized cash valuation of "all property on which taxes are to be levied."

While the Constitution was in that form this court held that assessments for public purposes, upon the basis of benefits conferred, were prohibited.

Stinson v. Smith, 8 Minn. 366, Gil. 326; *Bidwell v. Coleman*, 11 Minn. 78, Gil. 45; *Comer v. Folsom*, 13 Minn. 219, Gil. 205; *Dowd v. Sibley County*, 36 Minn. 430, 31 N. W. 517.

These holdings led to the adoption, in 1869, of the first proviso, whereby the cash-valuation rule was abrogated in so far as it applied to local improvements undertaken by municipal corporations. This proviso simply reinvests the legislature with its original, unlimited authority over the subject of taxation for local improvements. Counties are municipal corporations within the meaning of the proviso.

Doulan v. Sibley County, 36 Minn. 430, 31 N. W. 517.

County commissioners and town supervisors, in establishing rural highways, are expressly empowered to offset benefits against damages in determining the amount of compensation to be awarded for lands taken or injured.

Gen. Stat. 1894, § 1812; *State v. Leslie*, 30 Minn. 533, 16 N. W. 408.

*Headnotes by BROWN, J.

NOTE.—On the question, What constitutes a local improvement for which assessments may be made?—see also (as to street sprinkling) *Chicago v. Blair* (Ill.) 24 L. R. A. 412, and note; *Sears v. Boston* (Mass.) 43 L. R. A. 834; (as to boulevards) see *Crane v. West Chicago Park Comrs.* (Ill.) 26 L. R. A. 311. 49 L. R. A.

The term "local improvement" is defined by this court as "signifying improvements made in a particular locality, by which the real property adjoining or near such locality is specially benefited."

Rogers v. St. Paul, 22 Minn. 494.

The cash-valuation rule, as respects taxation for local improvements, was abrogated by the amendment of 1869, and the principle of taxation with reference to special benefit substituted in its place.

Washburn Memorial Orphan Asylum v. State, 73 Minn. 343, 76 N. W. 204.

The wisdom of leaving this power unlimited is not in issue here, but only the fact that it is so.

Hennepin County v. Bartleson, 37 Minn. 343, 34 N. W. 222.

When a notice and hearing are provided for, and an official board is required to decide upon such hearing, and is itself given authority to "call witnesses" to assist it in deciding, the right of interested persons to "appear or be heard" is secured.

State ex rel. Merrick v. Hennepin County Dist. Ct. 33 Minn. 235, 22 N. W. 625, 632.

The assessment of the cost of local improvements "is an exercise of the taxing power of the government, and not the right of eminent domain."

Stinson v. Smith, 8 Minn. 366, Gil. 326; *McComb v. Bell*, 2 Minn. 295, Gil. 256; *Noonan v. Stillwater*, 33 Minn. 198, 53 Am. Rep. 23, 22 N. W. 444; *State ex rel. Merrick v. Hennepin County Dist. Ct.* 33 Minn. 235, 22 N. W. 625, 632.

The determination by the board of public works as to what property is benefited, and the extent of such benefits, is, under the statute, conclusive, in the absence of fraud or demonstrable mistake of fact.

State ex rel. Cunningham v. Ramsey County Dist. Ct. 29 Minn. 65, 11 N. W. 133; *Rogers v. St. Paul*, 22 Minn. 494; *Carpenter v. St. Paul*, 23 Minn. 232; *State ex rel. Cunningham v. St. Paul Bd. of Public Works*, 27 Minn. 442, 8 N. W. 161; *State ex rel. Merrick v. Hennepin County Dist. Ct.* 33 Minn. 249, 22 N. W. 625, 632.

The usual constitutional provision prohibiting the taking of private property for public use without compensation is a limitation on the exercise by the state of the right of eminent domain, and not a limitation on the taxing power.

2 Dill. Mun. Corp. § 738.

The Constitution designed to leave the legislature altogether free in this particular,—to trust their immediate agents, rather than the courts, with the duty of determining the best ways and means of distributing such burdens.

People ex rel. Griffin v. Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; *Hennepin County v. Bartleson*, 37 Minn. 343, 34 N. W. 222; *Washburn Memorial Orphan Asylum v. State*, 73 Minn. 346, 76 N. W. 204.

Mr. A. B. Choate, with Messrs. Brown, Reed, Merrill, & Buffington and Olson & Johnson, for respondent:

No absolute right to be heard is secured to the owner whose property, that is money, is to be taken for the building of a road. Such a provision does not constitute due process of law.

State ex rel. Blaisdell v. Billings, 55 Minn. 467, 57 N. W. 206, 794.

The legislature of this state is restricted in its power to levy taxes to the method of general assessments in proportion to cash valuation.

Stinson v. Smith, 8 Minn. 366, Gil. 326; *Bidwell v. Coleman*, 11 Minn. 78, Gil. 45.

The power of the legislature to defray the cost of public improvements by imposing taxes upon certain districts, under the method of general levy on the basis of cash valuation, had been found adequate for all purposes.

Guilder v. Otsego, 20 Minn. 74, Gil. 59; *Guilder v. Dayton*, 22 Minn. 366.

It is not competent for the legislature to authorize the levying of special assessments in proportion to benefits, except by committing the whole matter to the local authorities, whose business it shall be, not only to levy the assessment, but to apportion it in proportion to benefits, and therefore to determine what district or territory is benefited, and the benefits to each particular tract in the district.

Malby v. Tautges, 50 Minn. 253, 52 N. W. 858; *Davidson v. Ramsey County Comrs.* 18 Minn. 482, Gil. 432.

The legislature has failed to maintain the distinction between what it may do itself and what it may authorize others to do, and it has assumed to exercise functions which the people have only empowered it to authorize local authorities to exercise, and for this reason the act is void.

Welty, Assessments, § 275.

If more is taken as an assessment than the special benefit conferred, it is, as to such excess, private property unjustly taken for public use without compensation to the owner.

Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Chamberlain v. Cleveland*, 34 Ohio St. 551; *State ex rel. Scotten v. Brill*, 58 Minn. 152, 59 N. W. 989; *Johnson v. Milwaukee*, 40 Wis. 315; *Oregon & C. R. Co. v. Portland*, 25 Or. 229, 22 L. R. A. 713, 35 Pac. 452; *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535.

The power to make assessments is a delegated power, and is subject to restrictions imposed by the terms in which it is delegated; hence the constitutional authority to lay assessments according to benefits does not authorize assessments arbitrarily levied.

Welty, Assessments, § 275.

A rural highway is in no sense a local improvement.

Re Washington Avenue, 69 Pa. 352, 8 Am. Rep. 255; *Graham v. Conger*, 85 Ky. 582, 4 S. W. 327.
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Brown, J., delivered the opinion of the court:

This is an action to restrain and enjoin the defendants, board of county commissioners and auditor of Kandiyohi county, from issuing and negotiating the bonds of the county under and pursuant to chapter 302, Laws 1895, to pay the cost and expense of locating and establishing a public highway under the terms of such law. Defendants demurred to the complaint, and appealed from an order overruling the same.

The act under which defendants are threatening to proceed, and which fully warrants the threatened action if valid and constitutional, is an evident attempt on the part of the legislature to extend the law of assessments for local improvements, heretofore, with respect to streets and the improvement thereof, confined exclusively to municipal corporations proper, to rural roads and highways to be laid out by county commissioners. Just why the legislature should deem it wise and prudent to do so is not clear. It is quite well known that assessments for the improvement of streets and sidewalks in our larger cities have proved exceedingly burdensome to property owners, and in some instances reached a point well-nigh to confiscation. Property owners of moderate means have been compelled to abandon their property, or sacrifice it by sale for much less than its actual value to avoid total loss. Owners of agricultural lands have hardships quite heavy enough to bear, and if any reasons exist for thrusting upon them the additional burdens incident to the "local-improvement" system of taxation, as practised and enforced in cities, they are not apparent to the casual observer. Taxation according to benefits as applied to improvements in the streets of a city is very different when applied to a country highway. In the city the improvement will benefit and improve the property adjacent to, and abutting upon, the improved street, but will not benefit property remote therefrom, while in the country districts the highway is an advantage to the public at large, and the benefit thereof is not confined to farms through which it may pass. It is therefore reasonable to require the benefited city property to pay the expense of the improvement, while it would not be reasonable or just or fair to require the farms along the line of a country road to pay the entire cost and expense of opening and laying the same out. In a case in Pennsylvania, where there was a similar attempt to extend this system into the country districts, the supreme court said: "To apply it [that is, taxation according to benefits] to the country and to farm lands would lead to such inequality and injustice as to deprive it of all sacredness as a rule or as a substitute for a fair and impartial valuation of benefits in pursuance of law, so that at the very first blush everyone would pronounce it to be palpably unreasonable and unjust. . . . Whether we view this avenue as a macadamized highway, 7 miles long or 300, the result is the same to those along its route. To

charge its cost upon the farms lying within 1 mile on each side, at a fixed sum per acre, is so obviously onerous and unreasonable, and leads to such a destruction of private right, and such unfairness of imposition for the advantage of the public at large and of individuals who pay nothing, it cannot, on any fair principle of reasoning, be said to be a valuation according to benefits." *Washington Ave. Case*, 69 Pa. 352, 8 Am. Rep. 255. Such a law was declared invalid in Kentucky. *Graham v. Conger*, 85 Ky. 582, 4 S. W. 327.

The act under consideration authorizes the county commissioners of each county in the state to lay out and establish county roads and highways, and to charge and assess the cost and expense thereof to all lands lying within 1 mile of the highway, with certain exceptions, according to benefits received. Such assessments are not limited to the amount of benefits received, but the lands are made to pay the entire cost of the road, whether such cost exceed the benefits or not. But one question was argued in this court, and that with reference to the constitutionality of the act. It is assailed in several particulars, but as we deem and hold it unconstitutional on the ground that the highways thereby authorized to be laid out are not "local improvements," within the meaning of § 1 of article 9 of the Constitution of the state, our consideration of the act will be confined to that question.

As originally adopted, the Constitution required all taxes to be as "nearly equal as may be," and while in this form it was held to prohibit special or local assessments for public purposes based on benefits. *Stinson v. Smith*, 8 Minn. 366, Gil. 326; *Bidwell v. Coleman*, 11 Minn. 78, Gil. 45; *Comer v. Folsom*, 13 Minn. 219, Gil. 205. To obviate the effect of these decisions, and in the interests of local improvements of a public nature, but so specially beneficial to private interests as to make it unjust to resort to the public treasury to pay therefor, the Constitution was amended in 1869 by exempting from this equality provision assessments for local improvements by municipal corporations. So that unless the laying out of a rural highway is a "local improvement," within the meaning of the amended Constitution, the act in question is invalid, as a violation of the requirement that all taxes be equal, within the above decisions. The term "local improvements" was defined by this court in *Rogers v. St. Paul*, 22 Minn. 494, as follows: "By common usage, especially as evidenced by the practice of courts and text writers, the term 'local improvements' is employed as signifying improvements made in a particular locality by which the real property adjoining or near such locality is specially benefited. . . . An examination of these authorities will also show that the term 'local improvements,' or terms synonymous, are more commonly applied to the grading, curbing, and paving of streets than to any other class of improvements. Our Constitution is to be presumed to have employed the term 'local improvements' in 49 L. R. A.

the sense which is thus attributed to it by common usage." Prior to and ever since the adoption of the constitutional amendment roads and highways in the country districts were and have been laid out, established, and improved at the expense of the public at large. Damages for laying out such roads have been paid from the public treasury, and at no time have farm lands been assessed therefor, any further than in assessing damages, benefits to the land through which the highway passes have been deducted from the amount awarded to the landowner. But benefits accruing to the public generally have never been considered or allowed in reduction of individual damages. Until the passage of this act a rural highway was not understood to come within the meaning or to constitute a local improvement, and if sustained it will completely change the method heretofore in existence and employed for laying out and establishing such road. The term "local improvements" has been most generally used and employed in reference to improvements by municipal corporations proper, rather than to counties and towns, which are only quasi municipal corporations. 1 Dill. Mun. Corp. 22. And such has been the direction of legislation. With respect to the construction of ditches for draining wet and swampy lands in the interests of the public welfare, and assessing the expense thereof to the lands benefited, a county has been held to be a municipal corporation, and such ditches local improvements, within the meaning of the Constitution. *Dowlan v. Sibley County*, 36 Minn. 430, 31 N. W. 517. But that decision can have no controlling force or effect with reference to the question here in hand. The construction of ditches for the purposes just stated operates peculiarly to the benefit of the lands adjacent to the ditch. Such lands are thereby reclaimed, and made suitable and fit for agricultural purposes, and it is proper and just that the lands so specially benefited and improved should pay the cost and expense incident to the improvement. This is true also with respect to the improvement of public streets of a municipal corporation proper, such as paving, construction of sewers, and laying sidewalks, all resulting in and constituting a special benefit to the property adjacent to, and abutting upon, the improved street. But not so with reference to farm lands adjoining a public road. Such road is not a special benefit to the farm, or the owner thereof, independent of, and unconnected with, the public benefit. It might be such a benefit if in its construction and improvement it drained wet and swampy portions of the land, or improved the same in some other special way. But such highways are not ordinarily beneficial in those respects. In speaking on the subject of local improvements in the case of *State ex rel. Stetler v. Reis*, 38 Minn. 371, 38 N. W. 97, Mitchell, J., said: "It is not the agency used, or its comparative durability, but the result accomplished, which must determine whether a work is an improvement in the sense in which that word is here used. The only essential elements of a 'lo-

cal improvement' are those which the term itself implies, *viz.*, that it shall benefit the property on which the cost is assessed in a manner local in its nature, and not enjoyed by property generally. . . . This construction is fully warranted by the definitions of the word 'improvement' given by lexicographers. It has been defined as 'that by which the value of anything is increased, its excellence enhanced, or the like;' or 'an amelioration of the condition of property affected by the expenditure of labor or money, for the purpose of rendering it useful for other purposes than those for which it was originally used, or more useful for the same purposes.' A rural highway does not come within this definition. Such a "road is devoted to the public use. It is a country road in which the entire public is interested, and where the owners of adjacent land, although not touching the road, are equally benefited with those living directly upon it." *Graham v. Conger*, 85 Ky. 582, 4 S. W. 327. A highway extending through a county is not ordinarily of any greater benefit to lands through which it passes than to lands farther removed therefrom. And, if this act be upheld, the burden of laying out and establishing country roads will hereafter be borne by the few for the benefit of the public generally. A construction of our law that would work such an injustice should not be adopted.

The legislature may, no doubt, create and establish taxing districts, and provide for the taxation of lands therein for public improvements necessary to, and in the interests of, the district, but such was not the

object or purpose of this act. The plain object of it was, as expressed by the learned judge below in his order overruling the demurrer, an attempt on the part of the legislature to "stamp all rural highways as local improvements." It provides that owners of land within 1 mile of the highway laid out thereunder shall pay the cost and expense thereof. It creates no district for taxing or other purposes, but simply selects a few landowners to discharge a burden that should be assumed by all, or at least by those who are equally benefited by the improvement. The question as to the power and authority of the legislature in establishing taxing districts for the purposes of public improvements is not, therefore, before us. The act cannot be sustained on the district theory. In view of all these considerations, we are constrained to hold that a rural highway is not a "local improvement," within the meaning of the Constitution, and that the act in question is invalid.

We have examined and considered the suggestions of counsel for appellant that the act may be sustained with the assessment feature eliminated, but we cannot see our way clear to so hold. We are not prepared to say that with such feature stricken therefrom the legislature would have passed the act. Indeed, without it the act is shorn of its principal feature, and its whole purpose is gone.

Our conclusion is in accord with that reached by the learned judge of the court below, and his order in the premises is affirmed.

OHIO SUPREME COURT.

TRAVELERS' INSURANCE COMPANY of Hartford, Connecticut, *Plff. in Err.*,

v.
J. W. MYERS *et al.*
(62 Ohio St. 529.)

- *1. Policies of insurance should be construed, like other contracts, so as to give effect to the intention and express language of the parties. *West v. Citizens' Ins. Co.* 27 Ohio St. 1, 22 Am. Rep. 294, approved and followed.
2. In a policy which insures against loss from liability to employees of the insured who may accidentally sustain bodily injury while in the employ of the insured "under circumstances which shall impose upon the insured a common-law or statutory liability to such employees by reason thereof," a stipulation as follows: "Immediate written notice shall be given this company of any accident and of all alleged injuries, together with copies of all statements made by

*Headnotes by the Court.

NOTE.—For stipulation as to immediate notice of injury, see also *Foster v. Fidelity & C. Co. (Wis.)* 40 L. R. A. 833.

As to immediate notice of loss, see *Solomon v. Continental F. Ins. Co. (N. Y.)* 46 L. R. A. 682.

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employees, and all other information in possession or knowledge of the insured in any way relating to such accident or liability therefor,"—is of the essence of the contract, and cannot be waived by an agent of the company without authority therefor.

3. When such policy contains a stipulation that "no agent has authority to waive or alter anything in this policy contained," and the same is accepted by the insured, it is both notice to and an agreement by the insured that an agent has no authority to waive or alter anything contained in the policy. *Union Cent. L. Ins. Co. v. Hook*, 62 Ohio St. 258, 56 N. E. 906, approved and followed.
4. "Immediate written notice" in such stipulation means written notice within a reasonable time under the circumstances of the case; and, where the facts are not disputed, what is a reasonable time is a question of law.

(May 8, 1900.)

ERROR to the Circuit Court for Ashland County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiffs in an action brought to recover the amount alleged to be due under an employer's liability insurance policy. *Reversed.*

Statement by Davis, J.:

The action was brought in the court of common pleas of Ashland county to recover under a policy of insurance issued to the defendant in error "against loss from liability to employees of the insured who may accidentally sustain bodily injuries while on the pay roll of the insured, and while actually occupied by the performance of duty in the trade or occupation for which they have been employed by the insured, and under circumstances which shall impose upon the insured the common-law or statutory liability to such employees by reason thereof." This policy contained the following stipulation: "Immediate written notice shall be given this company of any accident, and of all alleged injuries, together with copies of all statements made by employees and all other information in possession or knowledge of the insured in any way relating to such accident or liability thereof." And also the following stipulation: "No agent has authority to waive or alter anything in this policy contained." During the term of this policy,—that is, on October 27, 1894,—Simon Custer, an employee of the defendants in error, sustained certain personal injuries. This fact was communicated verbally by the insured to one Mason, who was at that time the local soliciting agent of the plaintiff in error at Ashland, in Ashland county, Ohio. Mason told the plaintiffs (defendants in error here) not to do anything further at the present time, for likely the man would never say anything, and that such an investigation into the circumstances of the accident as would be necessary in procuring statements of witnesses and employees might arouse the suspicion of Custer, and cause him to make a claim for damages, and that, if any claim was made by Custer, the plaintiffs should inform Mason of the same and he would attend to it. Acting on this suggestion of Mason's, the insured gave no notice to the insurance company until July 22, 1895,—nearly nine months after the accident to Simon Custer had occurred. Custer made no claim upon his employers for the injury until July 18, 1895, and then claimed that the injury which he had received had developed into a serious difficulty. Promptly on receipt of the notice given July 22, 1895,—that is, on July 23, 1895,—the insurance company declined to recognize the claim of the insured on the ground that the insured had not complied with the stipulations of the policy that immediate written notice be furnished to them of all accidents, and with the necessary statements of the circumstances relating to the liability. The case was tried in the common pleas court upon an agreed statement of facts, a jury being waived. The court gave judgment for the plaintiffs, and upon petition in error to the circuit court the judgment was affirmed. The case comes into this court upon petition in error to reverse the judgments of the common pleas and circuit courts.

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Messrs. Day, Lynch, & Day, for plaintiff in error:

After the issuing and delivery of the policy to J. W. Myers & Co. the express stipulation therein controlled as to form of notice, time of giving notice, and the limitation upon the power of agents.

When J. W. Myers & Co. received this policy they were presumed to know and accept all its terms and conditions.

West v. Citizens' Ins. Co. 27 Ohio St. 1, 22 Am. Rep. 294; *Quinlan v. Providence Washington Ins. Co.* 133 N. Y. 356, 31 N. E. 31.

When the policy of insurance, as in this case, contains an express limitation upon the power of the agent, such agent has no legal right to contract as agent of the company, with the insured, so as to change the conditions of the policy or dispense with the provisions of any essential requisite contained therein.

Maier v. Fidelity Mut. Life Asso. 47 U. S. App. 322, 78 Fed. Rep. 566, 24 C. C. A. 239; *Quinlan v. Providence Washington Ins. Co.* 133 N. Y. 356, 31 N. E. 31; *Walsh v. Hartford F. Ins. Co.* 73 N. Y. 10.

In determining the question of liability in this case it is immaterial whether the plaintiff read the policy or not, or that he had no actual knowledge of the conditions or of the limitations of the power of Kelsy. The conditions and limitations were a part of the contract, and he was bound to take notice of them.

Carey v. German American Ins. Co. 84 Wis. 80, 20 L. R. A. 267, 54 N. W. 18; *Kirkman v. Farmers' Ins. Co.* 90 Iowa, 457, 57 N. W. 952; *Martin v. Farmers' Ins. Co.* 84 Iowa, 516, 51 N. W. 29; *Gould v. Dwelling-House Ins. Co.* 90 Mich. 302, 51 N. W. 455; *Cleaver v. Traders' Ins. Co.* 85 Mich. 527, 32 N. W. 660; *Goldin v. Northern Assur. Co.* 46 Minn. 471, 49 N. W. 246; *German Ins. Co. v. Heiduk*, 30 Neb. 288, 46 N. W. 481; *Smith v. Niagara F. Ins. Co.* 60 Vt. 682, 15 Atl. 353.

The failure to perform a condition of the contract cannot be waived by an agent, when the contract itself declares that he shall not have power to waive it.

Porter v. United States L. Ins. Co. 160 Mass. 183, 35 N. E. 678; *Kyte v. Commercial Union Assur. Co.* 144 Mass. 43, 10 N. E. 518; *Hend v. Providence Ins. Co.* 2 Cranch, 127, 2 L. ed. 229; *Ermentrout v. Girard F. & M. Ins. Co.* 63 Minn. 305, 30 L. R. A. 346, 65 N. W. 635; *Hankins v. Rockford Ins. Co.* 70 Wis. 1, 35 N. W. 34; *Herbat v. Lowe*, 65 Wis. 321, 26 N. W. 751; *Brown v. Massachusetts Mut. L. Ins. Co.* 59 N. H. 298, 47 Am. Rep. 205; *Shuggart v. Lycoming F. Ins. Co.* 55 Cal. 408; *Enos v. Sun Ins. Co.* 67 Cal. 621, 8 Pac. 379; *Lycoming F. Ins. Co. v. Langley*, 62 Md. 196; *Oshkosh Match Works v. Manchester F. Assur. Co.* 92 Wis. 510, 66 N. W. 525; *Westchester F. Ins. Co. v. Wagner*, 10 Tex. Civ. App. 398, 30 S. W. 959; *Phanix Ins. Co. v. Stevenson*, 78 Ky. 150; *Havens v. Home Ins. Co.* 111 Ind. 90, 12 N. E. 137; *Smith v. Provident Sav. Life Assur. Soc.* 31 U. S. App. 163, 65 Fed. Rep. 765, 13 C. C. A. 284; *Winnesheik Ins. Co. v. Holzgrafe*, 53 Ill. 516, 5 Am. Rep. 64; *Pottsville Mut. F. Ins.*

Co. v. Minnequa Springs Improv. Co. 100 Pa. 137; *Burlington Ins. Co. v. Kennerly*, 60 Ark. 532, 31 S. W. 155; *Dwelling-House Ins. Co. v. Snyder*, 59 N. J. L. 18, 34 Atl. 931; *Underwood Veneer Co. v. London Guarantee & Acci. Co.* 100 Wis. 378, 75 N. W. 996; *Foster v. Fidelity & C. Co.* 99 Wis. 447, 40 L. R. A. 833, 75 N. W. 69; *State v. Osgood*, 85 Me. 288, 27 Atl. 154; *McFarland v. United States Mut. Acci. Asso.* 124 Mo. 204, 27 S. W. 436; *Mandell v. Fidelity & C. Co.* 170 Mass. 173, 49 N. E. 110; *Grand Rapids Electric Light & P. Co. v. Fidelity & C. Co.* 111 Mich. 148, 69 N. W. 249; *Kimball v. Mason's Fraternal Acci. Asso.* 90 Me. 183, 38 Atl. 102; *Smith & D. Mfg. Co. v. Travelers' Ins. Co.* 171 Mass. 357, 50 N. E. 516.

Mr. H. A. Mykrants, for defendants in error:

Insurance companies must not be surprised if they are held to strict accountability for the conduct of their agents while acting in what appears to be the scope of their employment.

Massachusetts L. Ins. Co. v. Eshelman, 30 Ohio St. 647.

Whatever fault there was in this transaction, if it may be called a fault, was wholly that of the agent, who was then acting for the company, and not the fault of the insured. If, then, either party must suffer from such omission or neglect of the agent, it should be the party whose agent was derelict.

Union Ins. Co. v. McGookey, 33 Ohio St. 565.

There was a full and complete compliance with all the provisions of the contract of insurance by the defendant in error.

Provision 4 of the policy, calling for immediate written notice of all injuries to employees and claims made by them, was fully complied with by defendants in error by the written advices given to plaintiff in error in July, 1895.

Defendants in error gave plaintiff in error immediate written notice of the claims of the employee Custer as soon as they had any knowledge of any claim made by said Custer.

Mandell v. Fidelity & C. Co. 170 Mass. 173, 49 N. E. 110; *Harnden v. Milwaukee Mechanics' Ins. Co.* 164 Mass. 382, 41 N. E. 658; *Baker v. Commercial Union Assur. Co.* 162 Mass. 358, 38 N. E. 1124.

Where, by the conditions of a policy, notice of loss is required to be given forthwith, it is only necessary that such notice be given with due diligence under the circumstances of the case.

St. Louis Ins. Co. v. Kyle, 11 Mo. 278, 49 Am. Dec. 74; *Central City Ins. Co. v. Oates*, 86 Ala. 558, 6 So. 83, 11 Am. St. Rep. 67, and note; *West v. Citizens' Ins. Co.* 27 Ohio St. 9, 22 Am. Rep. 294; *Webster v. Dwelling-House Ins. Co.* 53 Ohio St. 563, 30 L. R. A. 719, 42 N. E. 546.

If it be left in doubt, in view of the general tenor of the instrument and the relation of the contracting parties, whether given words were used in an enlarged or a restricted sense, or other things being equal, 49 L. R. A.

that construction should be adopted which is most beneficial to the promisee.

Crane v. Standard Life & Acci. Ins. Co. 3 Ohio N. P. 318; *Carpenter v. German American Ins. Co.* 135 N. Y. 298, 31 N. E. 1015; *Kentzler v. American Mut. Acci. Asso.* 88 Wis. 589, 60 N. W. 1002.

If Mason, agent of the plaintiff in error, was by giving such directions acting beyond his authority, it was without the knowledge of the defendants in error, and the latter had a right to believe from said agent's statements and conduct that he was acting within the scope of his employment, as would naturally be apparent to any reasonable man.

Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. ed. 617; *Massachusetts L. Ins. Co. v. Eshelman*, 30 Ohio St. 647.

The knowledge of the agent is the knowledge of the principal.

Union Ins. Co. v. McGookey, 33 Ohio St. 555; *Farmers' Ins. Co. v. Williams*, 39 Ohio St. 584; *Ohio Farmer's Ins. Co. v. Danison*, 38 Ohio L. J. 163; *Bebee v. Hartford County Mut. F. Ins. Co.* 25 Conn. 51, 65 Am. Dec. 553; *People's Ins. Co. v. Spencer*, 53 Pa. 353, 91 Am. Dec. 217; *Liddle v. Market F. Ins. Co.* 4 Bosw. 179; *Beal v. Park F. Ins. Co.* 16 Wis. 241; *Hough v. City F. Ins. Co.* 29 Conn. 10, 76 Am. Dec. 581; *Keenan v. Missouri State Mut. Ins. Co.* 12 Iowa, 129; *Combs v. Hannibal Nav. & Ins. Co.* 43 Mo. 148, 97 Am. Dec. 383.

Conditions in respect to notice and proofs of loss may be waived by an agent by parol, in spite of a provision that no agent can change the terms or conditions, and that the same shall not be changed or waived except in writing signed by the president or secretary.

Carson v. Jersey City Ins. Co. 43 N. J. L. 300, 39 Am. Rep. 584; *Horton v. Home Ins. Co.* 122 N. C. 498, 29 S. E. 499; *Snyder v. Dwelling-House Ins. Co.* 59 N. J. L. 544, 37 Atl. 1022.

A stipulation in a policy that no agent shall have power to waive "any provision or condition" thereof applies only to those conditions and provisions in the policy which relate to the formation and continuance of the contract of insurance and are essential to its binding force while it is running, and does not apply to those conditions which are to be performed after the loss, in order to enable the assured to sue upon contract.

2 Am. & Eng. Enc. Law, p. 338; *Hartford F. Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. 29; *Providence Life Ins. & Invest. Co. v. Martin*, 32 Md. 310; 1 May, Ins. § 143, p. 254; *Etna Ins. Co. v. Maguire*, 61 Ill. 342; *Wood, Ins. §§ 391, 395, 421*; *Barber, Ins. pp. 128, 129*; *Richards, Ins. p. 87, § 86*.

If the company holds out its agent to the public as authorized to do a particular act, or to transact a particular kind of business, this carries with it an authority to adopt the ordinary means, and to do and say the appropriate things to accomplish the object for which the agent is employed.

Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. ed. 617; *Abraham v. North German Ins. Co.* 40 Fed. Rep. 717.

Proof of loss may be waived by parol, though the policy requires it to be in writing. *German Ins. Co. v. Gibson*, 53 Ark. 494, 14 S. W. 672; *Burlington Ins. Co. v. Kennerly*, 60 Ark. 532, 31 S. W. 155; *McFarland v. Kittanning Ins. Co.* 134 Pa. 590, 19 Atl. 796, 19 Am. St. Rep. 723, and note.

Davis, J., delivered the opinion of the court:

Policies of insurance, like other contracts, should be reasonably construed, so as not to defeat the intention and express language of the parties. *West v. Citizens' Ins. Co.* 27 Ohio St. 1, 22 Am. Rep. 294. It was agreed by the parties to this contract of insurance that immediate written notice should be given to the company of any accident and of all alleged injuries, together with copies of all statements made by employees, and all other information in possession or knowledge of the insured in any way relating to such accident or liability therefor. It is obvious that this stipulation is of the essence of the contract in insurance of this kind. It is not merely a stipulation as to the form of bringing to the notice of the insurer the fact of a loss, as in policies of fire and life insurance. It is clearly a matter of substance in the contract, because the obligation of the insurer is not against the mere happening of an accident or an injury, but against "loss from liability" to employees who may be accidentally injured while in the employ of the insured "under circumstances which shall impose upon the insured a common-law or statutory liability to such employees by reason thereof." The occurrence of an accident and injury, however slight, if it may result in a legal liability to an employee of the insured, would necessarily involve an inquiry into the facts and circumstances which may make the insured liable; and these must be communicated to the insurer, else there would be no notice to the insurer that there had been anything more than an accident without liability. In insurance of this character it is a matter of the first importance to the insurer, who may be forced to become the real defendant in a lawsuit against the insured employer, to be speedily informed of all the facts and witnesses concerning a possible litigation. In a very little time the facts may, in a great measure, fade out of memory, or become distorted; witnesses may go beyond reach; physical conditions may change; and, more dangerous than all, fraud and cupidity may have had opportunity to perfect their work. Therefore this stipulation is vital to the contract; and it need not be surprising that the policy contains an agreement that it shall not be waived by any agent, for it is declared by the insurer and accepted by the insured that "no agent has authority to waive or alter anything in this policy contained." It is not claimed that written notice was given to the company at the time of the alleged accident and injury, nor for almost nine months thereafter; and it does not appear from the record that the company was at any time furnished with copies of all or any statements made by

employees, and all other information in possession or knowledge of the insured in any way relating to such accident or liability therefor. Immediate notice means notice within a reasonable time, and, when the facts are not disputed, what is a reasonable time is a question of law. *American F. Ins. Co. v. Hazen*, 110 Pa. 530, 1 Atl. 605; *Kimball v. Howard F. Ins. Co.* 8 Gray, 33; *Bennett v. Lycoming County Mut. Ins. Co.* 67 N. Y. 274. There was nothing in the circumstances of this case to require or justify the delay of such notice for a period of nine months, and much to indicate that such delay was positively prejudicial to the insurer. But it is answered that the insured gave to the insurer immediate written notice of the claims of the employee who was injured, as soon as the insured had any knowledge of any claim being made by the employee. Notice of the claims of the injured employee, however, is not the thing stipulated for. The contract is that immediate written notice—that is, within a reasonable time—shall be given of any accident and of all alleged injuries, together with information relating to liability therefor. This was not done. From the record of this case we are able to say that the proper notice could have been given within a few days after the accident, as well as, or better than, nine months afterwards. The insured undertook at their own peril to decide whether there was or would be a liability or not, and whether the injury received was severe enough to require the stipulated notice to be given. Having assumed that hazard, and realized their mistake, they have no one to blame but themselves that they are left without a remedy.

Equally unavailing for the defendants in error is the claim that the stipulation for notice was waived by Mason, the insurance company's local soliciting agent, or that the company is estopped to plead the contract in defense, by misleading statements made by Mason. The apparent scope of Mason's authority did not justify the insured in accepting and relying upon his words when this accident was verbally reported to him. He was a mere soliciting agent, and was invested with none of the powers of a general agent or of a special adjusting agent. It does not appear to us that he was intrusted with any duties in regard to receiving and transmitting notice or of adjustment between the parties to the policy. So far as we are informed, his duties ended when he received and transmitted to the company the application of the insured for the insurance. Therefore the defendants in error had no right to rely on his advice or suggestions in regard to a matter which was not within the apparent scope of his authority, and still less could they so rely on his advice when it was distinctly contrary to the contract stipulations. It was further expressly stipulated in the policy that "no agent has authority to waive or alter anything in this policy contained." The policy is not unilateral. Since the insured have received, accepted, and retained the policy, they are parties to it, although

not signing it, and are presumed to know and accept all of its terms and conditions. *Union Cent. L. Ins. Co. v. Hook*, 62 Ohio St. 256, 56 N. E. 906. The insured, having agreed that the stipulation as to notice could not be waived or altered by an agent, cannot excuse themselves for nonperformance of the contract as to notice to the company by showing that they acted on the suggestion of the soliciting agent that they should not perform the contract as they had made it. In this conclusion we are sustained by numerous decisions in other states. We cite only a few of them. *Carey v. German American Ins. Co.* 84 Wis. 80, 20 L. R. A. 267, 54 N. W. 18; *Smith v. Niagara F. Ins. Co.* 60 Vt. 682, 1 L. R. A. 216, 15 Atl. 353; *Porter v. United States L. Ins. Co.* 160 Mass. 183, 35 N. E. 678; *Walsh v. Hartford F. Ins. Co.* 73 N. Y. 10; *Kirkman v. Farmers' Ins. Co.* 90 Iowa, 457, 57 N. W. 952; *Gould v. Dwelling-House Ins. Co.* 90 Mich. 302, 51 N. W. 455; *German Ins. Co. v. Heiduk*, 30 Neb. 288, 46 N. W. 481; *Ermentrout v. Girard F. & M. Ins. Co.* 63 Minn. 305, 310, 30 L. R. A. 346, 65 N. W. 635.

We are aware that there are decisions to

the effect that conditions in respect to notice and proofs of loss may be waived by an agent, notwithstanding a provision that no agent can change the same. Those decisions are put upon the ground that such limitations on the authority of agents apply only to provisions relating solely to the formation and continuance of the policy, and which are essential to the binding force of the contract while it is running, and do not apply to conditions which are to be performed after the loss has occurred, such as giving notice and proof of loss. While we prefer to put the decision of this case on the grounds of, and in line with, the decisions already stated, we think that we have made it sufficiently clear that the stipulation as to notice in this policy is of the very substance of the contract in insurance of the kind here contracted for, and therefore could not be waived by any agent. The court of common pleas erred in rendering judgment for the defendants in error upon the conceded facts, and the circuit court erred in affirming the judgment of the court of common pleas.

The judgments of both courts are reversed, and the judgment is for plaintiff in error.

PENNSYLVANIA SUPREME COURT.

George FOOTE *et al.*, *Appts.*,
v.
AMERICAN PRODUCT COMPANY.

(195 Pa. 190.)

1. **The rider of a bicycle is not required to give way to a heavily laden wagon when turning a corner and keeping on the right side of the street, as required by the law of the road and the express terms of an ordinance, unless some apparent necessity is shown for an exception to the rule.**
2. **One riding a bicycle, as he approaches a corner, keeping on the right side of the street, has a right to assume that the driver of a wagon approaching the corner from another direction will keep to the right if they meet, so that the bicycle can pass between the wagon and the curb.**
3. **A boy on a bicycle, who is placed in a dangerous position by the negligence or carelessness of the driver of a wagon, will not be held to the same strict measure of care as under ordinary circumstances, in attempting to release himself from the perilous situation.**
4. **An ordinance requiring vehicles, when meeting and passing, to keep to the right, is admissible in evidence on the question of negligence in a collision.**

(March 28, 1900.)

NOTE.—On the subject of bicycle law, see full review of the authorities in note to *Taylor v. Union Traction Co.* (Pa.) 47 L. R. A. 289.

For constitutionality of statute as to bicycle paths, see *State v. Bradford* (Minn.) 47 L. R. A. 144.

49 L. R. A.

A PPEAL by plaintiffs from a judgment of the Court of Common Pleas, No. 4, for Philadelphia County in favor of defendant in an action brought to recover damages for negligent injuries to the minor plaintiff while he was riding a bicycle along the public street. *Reversed.*

The facts are stated in the opinion.

Mr. Richard C. Dale, for appellants:

That the driver of a garbage cart is entitled to violate the fundamental law of the road, and, by grinding his wagon against the curb to the left, crush down the rider on a wheel, who, in obedience to the law of the road, has kept to the right, is a proposition which it is most important should be thoroughly understood, if it is hereafter to be regarded as the law.

Taylor v. Union Traction Co. 6 Pa. Dist. R. 365; *Com. v. Dooley*, 6 Pa. Dist. R. 381.

Mr. Maurice W. Sloan, for appellee:

The fact that the defendant was turning the southeast corner of Seventeenth and Spruce streets is no evidence of negligence. The law does not require a traveler to drive over any particular portion of the road. The obligation is to turn to the right when met by others.

Brooks v. Thomas, 42 Phila. Leg. Int. 120.

Where no duty exists at common law an ordinance of council cannot create one.

Philadelphia & R. R. Co. v. Ervin, 89 Pa. 71, 33 Am. Rep. 726; *Philadelphia & R. R. Co. v. Boyer*, 97 Pa. 91; *Buente v. Pittsburg, A. & M. Traction Co.* 2 Pa. Super. Ct. 185; *Taylor v. Union Traction Co.* 184 Pa. 465, 40 Atl. 159.

Mestrezat, J., delivered the opinion of the court:

The evidence on the part of the plaintiffs tended to establish the following facts: On the afternoon of September 1, 1897, Benjamin Foote, one of the plaintiffs, a boy of twelve years, was riding a bicycle on the east side of Seventeenth street, in the city of Philadelphia. He had been on an errand for his mother, and came from Pine street, and was going north towards Spruce street. Edward H. Cloud, Esq., came out of De Lancey street, which is a short distance south of Spruce street, on a bicycle, and followed him on the east side of the street at a distance of 50 or 75 feet. As the boy neared the foot crossing at the corner of Seventeenth and Spruce streets, he met the garbage wagon of the defendant, and was struck by it, or was thrown by trying to save himself in dismounting, and fell with his left foot under the rear wheel of the wagon. The wheel passed over his foot, inflicting severe injuries. The boy was riding at an ordinary rate of speed, and rang his bell as he approached Spruce street. The garbage wagon was a four-wheeled vehicle, drawn by one horse. It came west on Spruce street, and turned south at the southeast corner of Spruce and Seventeenth streets, "hugging the curb," and so close thereto that the boy could not pass between it and the curb. The wagon made an angle of about 45 degrees with the east curb line of Seventeenth street, and the horse was more nearly parallel with the street; the apparent intention of the driver being to proceed south along the east side of Seventeenth street. At or near the street crossing the boy first saw the wagon, which was then directly in front of him, and he immediately began to check his speed by back-pedaling. In thus attempting to prevent a collision with the wagon and to dismount, the right pedal of his bicycle struck the curb, and he was thrown to the left, under the left rear wheel of the wagon. When the wagon turned into Seventeenth street, the horse was going at a moderate rate, and was stopped a few feet from the place of the accident. When the boy first saw the wagon, the rear wheel was not clear of the Seventeenth street curb, but when it ran over his foot it was about 2 feet from the curb. An ordinance of the city of Philadelphia, approved February 2, 1897, provides that "all persons driving or riding upon the streets or highways of the city, whether on horseback, in carriages, wagons, or other vehicles, or upon bicycles, tricycles, or other mechanical contrivances, shall at all times drive on the road upon the right side of the street or highway, and shall pass all vehicles traveling in the opposite direction by driving or riding to the right of such vehicle or pass all vehicles traveling in the same direction by driving or riding to the left of such vehicles."

At the conclusion of the plaintiffs' testimony, the court directed the jury to render a verdict for the defendant. No reasons were assigned for the action of the court, and the record is equally silent as to the reason for the refusal of a new trial. Where binding

instructions are given to the jury, or where the court refuses to take off a compulsory nonsuit, the reasons for this action of the court should be at least briefly stated. This very frequently would prevent an appeal, by enabling the counsel to see the correctness of the court's position; and, if an appeal should be taken, it would aid very materially the appellate court, as well as counsel, in an intelligent review of the case. The action of the court in giving binding instructions to the jury to find for the defendant can only be sustained upon the ground that the evidence failed to disclose negligence on the part of the driver of the wagon, or that it established negligence on the part of the boy. The rights and duties of the boy and the driver of the garbage wagon on the highways of the city were reciprocal. Each was required to obey the law of the road, and to conform to its requirements. "By the law and the custom of the land, it is the duty of persons traveling in wagons or other vehicles, meeting each other on the public road, to pass on the right-hand side of the road. . . . The law or custom . . . applies to, and is intended to regulate the duty and conduct of, those traveling on the road, as between themselves." *Grier v. Sampson*, 27 Pa. 188. The evidence in the case at bar did not justify the court in declaring, as a matter of law, that the boy was within the well-recognized exception to the rule stated,—that a light vehicle or bicycle must give way to a heavily laden wagon. There was no apparent necessity here for the application of this exception to the rule. Under the act of April 23, 1889, the boy had the same right, and was subjected to the same restrictions, in the use of his bicycle, as a person using a carriage drawn by a horse. That he was riding the bicycle, therefore, did not deprive him of the protection of the law of the road, but required the driver of the garbage wagon to accord to him the same privileges and rights in the street as though he were using a carriage. In passing north along the east side of Seventeenth street, the boy was where he had a right to be, and where, if traveling on the street in that direction, the law of the road, as well as the city ordinance, required him to be. When the collision occurred, the driver was turning his wagon around the southeast corner of Spruce and Seventeenth streets, and the plaintiffs claim that it was with the intention of going south on the east side of the street. When no one was approaching with a desire to pass him with a vehicle, the driver had the right to use any part of the street not occupied by another; yet when he turned abruptly on Seventeenth street, in the manner shown by the testimony, he was taking the chance of a collision with other travelers going north on that street, whose rights at that place were superior to his. Whether the boy could have seen the wagon on the street in time to prevent the collision, as claimed by the defendant, was not for the court to determine, under the circumstances shown by the testimony. Nor was it for the court to say that his effort to free himself from his danger

was a negligent act contributing to his injury. Even if he saw the wagon on Spruce street as he approached the corner, unless he could also see that it was too close to the curb to permit him to pass, he had a right to assume that the driver, if he did turn on Seventeenth street, would keep to the right, so that he could pass between the wagon and the curb. This was the rule of the road, and he had a right to act on the expectation that the driver would observe it. *Baker v. Fehr*, 97 Pa. 70. If, acting on this assumption, without any fault on his part the boy was placed in a dangerous position by the negligence or carelessness of the driver, he will not be held to the same strict measure of care as under ordinary circumstances, in attempting to relieve himself from a perilous situation.

We are of opinion that the case should have been submitted to the jury, with prop-

er instructions as to the rights and duties of the parties at the time of the accident. The facts developed by the plaintiffs' evidence did not warrant the court in saying, as a matter of law, that there was no negligence on the part of the defendant, or that the boy's negligence contributed to his injuries. The facts of the case, and the inferences to be drawn therefrom, were clearly for the jury.

The objection by the defendant to the city ordinance offered in evidence by the plaintiffs was not well taken. While the ordinance in itself was not evidence of negligence, it may be considered, with other evidence, in ascertaining whether the defendant was guilty of negligence. *Lederman v. Pennsylvania R. Co.* 165 Pa. 118, 30 Atl. 725.

The judgment is reversed, and a venire facias de novo is awarded.

TENNESSEE SUPREME COURT.

A. W. WYSONG, Admr., etc., of F. K. Rambo, Deceased,
v.

E. K. RAMBO *et al.*

W. A. LONDON *et al.*, Appts.

(.....Tenn.....)

1. Interest on advancements of land to some of the heirs of a person, which were made for the purpose of equalizing the share of another heir, should be allowed only from the death of the ancestor until the lapse of a reasonable time for the settlement of the estate, where the heir whose share was to be equalized failed to take any steps to procure the settlement for many years after the ancestor's death, and in the meantime permitted the other heirs to enjoy the possession of their lands.

2. The difference between the value of land at the time of the assignment of dower and homestead and at the time when those estates fell in is not an increment to the estate, within the meaning of a rule for allowance of interest on advancements up to the amount of an increment to the estate, since the additional value accrues merely by the removal of an encumbrance.

(November 4, 1899.)

A PPEAL by W. A. London *et al.* from a decree of the Court of Chancery Appeals modifying a decree of the Chancery Court for Marshall County equalizing advancements for the settlement of the estate of F. K. Rambo, deceased. *Affirmed.*

The facts are stated in the opinion of the Court of Chancery Appeals delivered by NEIL, J., as follows:

This is an appeal from the county court,

NOTE.—For interest on advancements, see *Clark v. Helm* (Ind.) 14 L. R. A. 716.
49 L. R. A.

and presents a controversy between the heirs of F. K. Rambo upon the subject of advancements. The case is this: On the 8th of October, 1877, F. K. Rambo died intestate in Marshall county, and left surviving him his widow, Mary B. Rambo, and the following children; David Rambo, E. K. Rambo, B. F. Rambo, John F. Rambo, W. W. Rambo, and G. W. Rambo,—being six sons, besides another son, M. V. Rambo, who died a short time before his father, leaving several children. F. K. Rambo owned at his death about 101 acres of land in Marshall county. After his death his widow had homestead and dower assigned to her, which comprised about 76 acres. The residue of the land was sold to pay his debts. The widow kept the homestead and dower until her death, which event occurred on the 17th of March, 1899. On the 8th of April, 1899, the present bill was filed. A few years before his death, F. K. Rambo advanced to each one of his children, except M. V. Rambo, land to the value of \$500. To M. V. Rambo nothing was advanced. The heirs of M. V. Rambo sold their interest in the land and in the estate of their grandfather to W. A. London and Scott D. Davis, and these persons appear in the cause, and claim participation in the account of advancements which was ordered. The heirs of John F. Rambo are each owners, by their ancestor's purchase of the shares of W. W. Rambo and George W. Rambo. One purpose for which the bill in this case was filed was to sell the land for the purpose of division, as well as for a settlement of advancements. During the progress of the cause the land (that is, the land which was formerly the widow's homestead and dower, but had become disencumbered by her death) was sold, and brought the sum of \$1,652. At the time of the death of F. K. Rambo, his widow was sixty-eight years old; and the reversionary interests in the homestead and dower were together worth at that time, taking in-

to consideration her expectancy under the mortality tables, the sum of \$1,300. The land has not increased in value since the death of F. K. Rambo, but has deteriorated to the extent of about 20 per cent. However, the shares of the representative heirs are now worth more than they were worth at the death of the testator, but this enhanced value arises from the falling in of the life estate of the widow. The difference in value is represented by the difference between what the property sold for at the clerk's sale, \$1,652, and the said \$1,300; that is, \$352. During the life of the widow the entire proceeds of the land now in controversy were appropriated to her use and benefit, by reason of the fact that this land had been assigned to her, and was claimed by her as homestead and dower. The chairman of the county court referred the case to the clerk, to report the amount of advancements each one of the seven children had received, and the amount at which the same should be charged. He reported that each one of the seven heirs had received \$500, as already stated, except M. V. Rambo, and that interest should be charged upon each of these sums of \$500 from the death of F. K. Rambo, the ancestor of the said seven sons. To this report David Rambo, B. F. Rambo, E. K. Rambo, and the children of John F. Rambo filed exceptions, and these exceptions were sustained by the chairman. He thereupon decreed that W. A. London and Scott Davis should receive out of the first purchase money paid in the sum of \$500, to make them equal with each of the other six heirs, and that the rest of the fund, after the payment of costs, should be equally divided between the seven shares. From this decree London and Davis have appealed and assigned errors.

The only question presented is whether interest should be charged upon the advancements from the death of F. K. Rambo, October 8, 1877, to the date of the final decree rendered on the 16th of September, 1899. Both sides rely with much confidence upon the reported decisions of the supreme court, and, in order to a true solution of the question, it will be necessary to review the question as it appears in all the Reports.

The first case is *Burton v. Dickinson*, 3 Yerg. 112, decided in March, 1832. That case contained mere *dictum*,—no real decision upon the question. The following language occurs in that opinion: "It is insisted that the negroes ought to have been valued at their worth when Colonel Murfree died, without adding thereto the increase by births, by growth, and the value of their labor for five years, and, putting this together as a common fund, and dividing it amongst all the children, advanced and unadvanced, deducting the advancements from the allotments to the elder children. On the other hand, it is insisted that the negroes advanced in 1799 to Mrs. Dickinson, and to Mrs. Hilliard in 1801, ought to have been estimated at their worth when advanced, which mistake in complainant's favor would produce nearly the same result that the two errors produced,

were the position of complainant correct. That both positions were correct, we have little doubt," etc. This, however, as above stated, was *dictum*, not a decision.

So the matter stood until *Morris v. Morris*, 9 Heisk. 814, 822, decided at the April term, 1872. In this case it is said: "It is a well-settled rule that interest will not be charged on advancements." It is not clear from the opinion whether this refers to interest before the death of the ancestor or afterwards, but the case is cited in a subsequent decision, to which we will refer presently, as having had reference to interest between the date of the advancement and the death of the ancestor.

The next case is *McNairy v. McNairy*, 1 Tenn. Cas. 329, 332 *et seq.*, decided at the December term, 1874. This is the leading case upon the subject in the state, and deserves to be specially noted. It is referred to and relied on in all the subsequent cases, except one. In this case Judge McFarland says: "The next question we dispose of is in regard to interest upon advancements. The advancements set forth in the bill to the several children are in unequal amounts. It is well settled that interest is not chargeable upon advancements previous to the death of the testator or intestate. It is supposed that up to the death of the intestate the other children not advanced receive other benefits equal to that received by the advanced children from the use of the advancement. *M'Dougald v. King*, Bail. Eq. 155. But it is argued that after the death, or the time fixed for division, interest should be charged upon the advancements up to the time the division or distribution actually takes place, in order to preserve equality. There are cases which seem to favor this doctrine. See the case above referred to, and *Daves v. Haywood*, 54 N. C. (1 Jones, Eq.) 253; *Hamer v. Hamer*, 4 Strobb. Eq. 124. In some cases this would reach the proper result. The true theory, we apprehend, is that the partition and distribution should be made as at the death of the intestate, or at the time fixed by the will in cases of intestacy; the property or funds to be valued as at that time, and the advancements be charged as received at that time. See *M'Dougald v. King*, Bail. Eq. 155; *Burton v. Dickinson*, 3 Yerg. 112. If the actual division is postponed beyond this time, and the *corpus* of the fund or property left for division does not increase by way of interest or profits, then it could hardly be proper to charge the advanced child interest upon his advancement; for his share of the *corpus* of the property might be taken to pay interest upon his advancement, and thereby absorb it, without any corresponding benefit by way of interest upon the *corpus*. If, on the other hand, the division of the *corpus* of the estate is delayed beyond the time when the rights of the parties accrued, and during the delay interest or profit accrue upon the entire *corpus*, then it would not be proper to divide the interest or profits equally among all entitled, without regard to advancements, or, what would be the same thing, add the

interest or profits to the *corpus*, to constitute the gross fund for distribution, without also charging interest upon the advancement also during the delay. To illustrate: If A die, leaving B and C as his distributees, and a fund of \$3,000 for distribution, B, however, having been advanced \$1,000, the distribution would be simple. B would be charged with his advancement of \$1,000, and receive \$1,000 of the *corpus*, and C the remaining \$2,000. If the division be delayed, but without the accumulation of interest, the result would be the same. If, on the other hand, the division be delayed until the *corpus* of the fund accumulate \$1,500 of interest, then to add this to the *corpus*, and also the advancement without interest, and divide the aggregate equally, would be to give B one half of the interest accrued upon the *corpus*, and charge him nothing for interest upon his advancement. This would be erroneous. B's share of the *corpus* was only \$1,000. He was entitled to this and the interest that accumulated upon it, which, in the case supposed would be \$500; and C to his share of the *corpus*, and the interest that his share had drawn, which would be \$1,000. Precisely the same result would be reached in the case supposed by adding the *corpus* and interest during the same time into one aggregate, and dividing the same equally. So, in a case of this sort, to charge interest upon the advancement during the delay would reach a correct result. So we see that, in a case where no interest or profits accrue during the delay, there is no difficulty. So, also, where during the delay the *corpus* of the fund has for the whole time drawn the regular rate of interest, it is equally free from difficulty. But if we suppose cases where the *corpus* of the property is partly land, partly money, and partly other property, some of which accumulates interest for the whole time or delay, part produces profits for part of the time, but not at the regular rate of interest, and part produces no profit, then the case is not free from difficulty. The theory may be clear enough, but the practical application may be difficult. In the case last supposed, it would not be right to charge interest upon the advancement at the regular rate against the increase upon the *corpus* of the fund, which was not at the same uniform rate. As we have said, we think the true rule is that the advancements should be equalized out of the principal of the estate, estimated at the time the distribution should have been made, the accumulations upon the principal or *corpus* during any delay that occurs to be apportioned according to the share of each in the *corpus*; that is, each one will receive the profits that his share of the principal has accumulated, estimating the profits as having been accumulated upon the whole *corpus*. The principle is as well stated in *White v. White*, 3 Dana, 374, as any case to which we have been referred. It is said that in the present case there will be no profits or interest for division; that it has all been absorbed in paying the annuity due the executrix, and other claims. If the account shows this

result, then the settlement will be simplified. If otherwise, the rule above indicated should be followed as near as practicable. Absolute equity [equality] in some cases may not be found practicable."

The next case is *Rice v. Steger*, 3 Tenn. Ch. 328, decided by Judge Cooper in April, 1877. What is there said is really by way of argument, using the rule with regard to advancements in disposing of another question. What is there said, however, is as follows: "The proper mode in which this should be done is to treat the charge as an advancement is treated,—that is, by adding it to the *corpus* of the estate to be distributed, and deducting it from the share of Robert M. Porter in the fund thus created. If for any reason the distribution be postponed beyond the time when it ought to be made, and in the meantime the *corpus* of the estate produces interest or profits, the devisees would be entitled to share these accrued profits in the proportion of their respective shares of the original *corpus*. *Burton v. Dickinson*, 3 Yerg. 112; *McNairy v. McNairy*, MSS. Sup. Ct. Dec. Term 1874, cited in the note at the end of the case in 3 Yerg. 2d ed." The note thus referred to figures in subsequent cases, and will now be mentioned. It is as follows: "There is also a suggestion that advancements should be valued at the time they were made, which is undoubtedly correct, and for which this case is cited in *House v. Woodard*, 5 Coldw. 200. There is also a suggestion that the property of the estate, for the purposes of division, should have been valued as at the death of the intestate, without adding thereto the increase by births, by growth, and the value of their labor; putting this together as a common fund, and dividing it among all the children, deducting the advancements of the shares of such as were advanced. The general idea thus thrown out is correct. The property as it existed at the death of the intestate, with the advancements, constituted the fund for division, and the children were entitled to share in the subsequent increase and profits in the proportion in which they were entitled to share the *corpus*. The subject was considered, and so adjudged, in *McNairy v. McNairy*, decided at the December term, 1874, at Nashville." The opinion of *McNairy v. McNairy* had thus been written before Judge Cooper got out what is known as "Cooper's Edition of the Tennessee Reports," and, of course, before he wrote the note just quoted.

In *Grandberry v. Jordan*, decided at the December term, 1879, and reported in 3 Tenn. Cas. 267, it is said: "It is undoubtedly true that the property as it existed at the death of the intestate, subject to the claims of creditors and expenses of administration, constituted the fund for division, and the distributees were entitled to share in any subsequent profits in the proportion in which they were entitled to share in the *corpus*. If, for any reason, the distribution of an estate be postponed beyond the time when it ought to be made, and in the meantime the *corpus* of the

estate produces income or profits, the parties entitled should share those profits in the proportion of their respective shares of the *corpus*, upon the obvious principle that the law's delay will not be allowed to work any injury to any party. *Burton v. Dickinson*, 3 Yerg. 112; *McNairy v. McNairy* (MS.; Dec. term, 1874, at Nashville, since published in 1 Tenn. Cas. 329); *Rice v. Steger*, 3 Tenn. Ch. 328. If there be no profit, or if the profit be used for specific purposes by agreement of the parties, the reason of the rule fails, and its observance would be a useless form." This opinion was delivered by Judge Cooper.

The next case is *Johnson v. Patterson*, decided at the September term, 1884, and reported in 13 Lea, 626 *et seq.* In that case the court used the following language: "The next and last question is as to charging interest on advancements. . . . It is settled by all authority, we believe, that interest is not to be charged before the death of the testator or intestate. See 1 Wait, Act. & Def. 212, and authorities cited. The chancellor charged no interest whatever in his decree. The referees report that interest should be charged on advancements made in the lifetime of the intestate, from time of his death. It was so laid down as a *dictum* in the case of *Burton v. Dickinson*, 3 Yerg. 112, and approved in the editor's note, page 122. It was so decided as the general rule in the case of *McNairy v. McNairy*, (Nashville, Dec. term, 1874) after much consideration, in an able opinion by Judge McFarland. We think this, as a general rule, is correct, as then held, and the referees have correctly reported on this question. It will in most cases produce the desired end, as said in that opinion. There may be cases where it might not reach equality, the leading object of our law in such cases, and then it could be so applied as to produce that result. In this case it will work no injustice as far as we can see; and, if the advancement is not charged with interest from the death of the ancestor, then the party will be getting that much more than an equal share of the estate. She will have to account for it, and have it charged against her at its value when received; and, starting from the death of Andrew Johnson, interest will be calculated on the ascertained value as fixed in this opinion."

In *Williams v. Williams* (decided at the September term, 1885) 15 Lea, 438, the court used the following language upon the same subject: "The third exception is because the report recommends that interest should be allowed on advancements from death of testator. This is correct as to all money advancements, or property advanced in the lifetime of the testator, with the money value charged against the legatee in the will. See *Burton v. Dickinson*, 3 Yerg. 122; *Johnson v. Patterson*, 13 Lea, 657. As to property advancements, the rule is given in Judge Cooper's note to the case in 3 Yerg., approved in *McNairy v. McNairy*, December, 1874, that the property as it existed at the death of the testator, with the advancements, constitutes the fund for division, and the children are

entitled to share in the subsequent increase and profits in the proportion in which they were entitled to the *corpus*. These rules will serve to guide in the final settlement of this case."

In the case of *Roberson v. Nail*, decided at the October term, 1886, and reported in 85 Tenn. 124, 2 S. W. 19, it is said: "The rule is to estimate the advancement, if value is fixed, at the time made; if value is not fixed, at actual value. *Burton v. Dickinson*, 3 Yerg. 112; *House v. Woodward*, 5 Coldw. 200; *Andrews v. Andrews*, 7 Heisk. 251. Interest from date of advancement will not be charged (*Morris v. Morris*, 9 Heisk. 814; *Brown v. Dortch*, 12 Heisk. 740, 754), but will be charged from the death of the intestate (*Johnson v. Patterson*, 13 Lea, 657). This error in the decree is probably of no practical importance, as the amounts charged, without interest, will doubtless largely exceed the interest of each of the three children, and upon that basis no surplus would remain for them. . . . The decree will be modified so as to charge the defendants with the \$1,000 advanced to each heir by Isaac Roberson, with interest thereon since his death."

The next case is *Steele v. Frierson*, decided at the December term, 1886, and reported in 85 Tenn., at page 430, 3 S. W. 649. In this case it is said: "There is no doubt of the correctness of the decree of the chancellor in holding that the item of \$1,000 paid by the intestate for his son Thomas was an advancement. . . . The chancellor should have allowed interest on this advancement from the date of the testator's death. The report of the master is not excepted to upon the ground that interest is not reported on this advancement. But we do not think it was necessary, because, as matter of law, such advancements bear interest. The question is properly raised by exception to the report of the referees, and the decree of the chancellor and report of referees will be corrected upon this point."

The next case is *Moore v. Burrow*, decided at the April term, 1890, and reported in 89 Tenn. 101, 17 S. W. 1035. The court there said (page 106, 80 Tenn., and page 1036, 17 S. W.): "Error is also assigned on that part of the decree charging Mrs. McKelvy with interest on advancements from death of her father. On this point the decree is right. The rule is well settled that interest must be computed on advancements, in money or property, from the time the ancestor dies. *Johnson v. Patterson*, 13 Lea, 632; *Williams v. Williams*, 15 Lea, 439; *Steele v. Frierson*, 85 Tenn. 431, 3 S. W. 649. This case presents no ground for an exception to the general rule." In this case it appeared that John J. Burrow had placed his daughter Mrs. McKelvy in possession of land in 1856, the land at that time being worth \$3,222. In 1873 he gave to his son George H. Burrow 600 acres of land, subject, however, to an equalization between himself and Mrs. McKelvy. John J. Burrow died in 1887, having used and occupied the 600 acres up to his

death. The bill was filed in 1888. As seen, Mrs. McKelvy was charged with interest on the \$3,200 from the death of her father.

Since the case of *McNairy v. McNairy*, the court has not undertaken a general discussion of the subject. That case is the leading one in the state, and, as we have seen, is referred to and relied on in nearly all of the subsequent decisions. From the discussion in that case it is seen that interest is not charged as upon a debt, but merely for the purpose of effecting equality. It is stated in that case, and also in the subsequent case in 13 Lea, which is itself referred to and approved in other cases, in substance, that, if equality can be effected without charging interest at the legal rate, this will be done. The last cases (those in 85 Tenn. 430, 3 S. W. 649, and 89 Tenn. 101, 17 S. W. 1035), however, seem to show that interest will be charged as a matter of law; but in the other last case (*Moore v. Burrow*, 89 Tenn. 101, 17 S. W. 1035) it should be noted that the court uses this language: "This case presents no ground for exception to the general rule." It should be noted that this case refers to *Johnson v. Patterson*, 13 Lea, 632, in which it was said (page 657) that, if the charging of interest did not reach equality, then the rule could be so applied as to produce that result. This was evidently the matter of exception to the rule indicated by the opinion just referred to, in *Moore v. Burrow*.

From the foregoing review, we apprehend that interest should be charged upon advancements, as a matter of law, from the death of the ancestor, as a means of producing equality, unless there is some equitable consideration in the case which will justify an exception. It is insisted by David Rambo, and others in the same interests, that, under the authority of *McNairy v. McNairy*, no interest should be charged upon advancements unless there was an increase in the corpus of the estate. It is urged that there is no increase here, and that therefore no interest should be allowed upon the advancements. It is said that to allow interest upon these advancements for the time claimed (more than twenty years) would amount practically to a confiscation of the share of David Rambo and others in their father's estate; there being left to them on this basis, only about \$60 apiece out of the \$1,652. On the other hand, it is said that David Rambo and others have had the enjoyment of their lands for more than twenty years, while M. V. Rambo had nothing. To this it is replied that M. V. Rambo at any time after his father's death could have had the homestead and dower land sold subject to the homestead and dower right, and could have had the proceeds divided, and advancements then settled. To this it is replied, in turn, that it was no more incumbent upon M. V. Rambo to have the land sold and divided, than it was upon his brothers. In view of the condition of our decisions upon the subject, we are in some doubt as to whether we should apply the rule rigidly, or should find an exception in the facts set forth in the finding of facts. It seems inequitable that M. V. Ram-

bo should lie by for more than twenty years, when he could have had a division at any time, and now he, or those owning his interest, come forward at this late day for a division, and demand the payment of interest upon the part of his brothers. At this rate, counting interest for twenty-two years, there would be \$660 interest on each of the six shares advanced. Adding this to each of the six shares and the \$1,652, the total estate would be \$8,612. One seventh would be \$1,230, which would go to the M. V. Rambo share, leaving (omitting the costs) \$422 for division among the seven, or, say, \$60 to the share. That is, stated roughly, out of the money now on hand M. V. Rambo's interest would receive \$1,230, and each of the others only about \$60. To justify this apparent inequality, our attention is called to the fact that the other heirs have had possession of their lands during all this time, and getting rents and profits thereof. The argument would be a good one, if any reason existed for the postponement of the division until this time; that is, if the situation of the estate had been such, on account of debts or litigation or uncertainty of title, or otherwise, that there could not have been a sale and division. But during the whole twenty-two years there has been no obstacle in the way of M. V. Rambo's enjoyment of his interest, except his own inertia. Such inequality as M. V. Rambo has suffered since his father's death, by the fact that his brothers were in possession of \$500 worth of land, and he was in possession of none, was caused merely by his failure to act. It will not do to say that it was as much incumbent upon his brothers as upon him to file a bill and have the reversionary interest sold. He was the only one who occupied an unequal position, and he was called upon first to move, or to bear the consequences. He had not the legal right to lie by twenty-two years, contented with the existing state of things, and then, after this length of time, to claim interest from his brothers on their shares, because of his own inertia. To allow this would be a perversion of the rule. It would be to convert a shield of protection into a sword of oppression. It is true that the cases in 85 Tenn. 430, 3 S. W. 649, and 89 Tenn. 101, 17 S. W. 1035, seem to state the rule, broadly, that interest must be counted, as a matter of law, from the death of the ancestor; but it must be borne in mind that the court did not have before it in those cases any circumstances calling for an exception to the rule, and it must further be borne in mind, as we have already stated, that the court indicates that the rule is subject to exception, and that the leading case upon the subject (*McNairy v. McNairy*) was not overruled. We are not unaware that *McNairy v. McNairy* was not at that time published, but it was referred to, and is subsequently stated in the 13 Lea case, and this case was before the court and was cited. We do not think, therefore, that the court intended to lay down an ironclad rule, that, under all circumstances, interest must be counted from the death of the ancestor.

We have considered the question whether we should allow interest to the extent of the difference between the value of the land at the time the homestead and dower were assigned, and at the time the life estate fell in; this difference, as shown in the finding of facts, being \$352. This would seem to fall directly within the rule laid down in *McNairy v. McNairy*. It would seem from the latter case that, wherever there has been an increment to the *corpus* of the estate, interest should be counted at least to the amount of the increment. It would further seem from that case that interest could be counted in no case other than one in which there had been an increment to the *corpus*. It is observed, however, under the later cases, that the doctrine has progressed so far as that it is the rule now, in general, to charge interest, without regard to the question of increment. The fundamental thought is that there shall be equality. It is further true, under the doctrine of laches, that, when the inequality has been produced by the negligence of a party who makes his failure the basis of his action, he should not be heard to complain. Now, the cases in 85 Tenn. 430, 3 S.W. 649, and 89 Tenn. 101, 17 S.W. 1035, were instances merely where interest was charged upon the law's delay in effecting a settlement of the estate. It will be observed, from an inspection of those cases, that the suits were tried within a reasonable time. Without doubt, if M. V. Rambo had filed his

bill for a sale of the property within a reasonable time, he would have had the right to charge his brothers' interest upon their advancements pending a settlement, from the death of his father. Under the facts stated, we think that a charge of interest during the probable law's delay (say, at that period, two years) would have produced an equitable result. Recurring now to the item of \$352, the difference between the value of the land at the time the dower and homestead were assigned, and the time when those estates fell in: This is not, strictly speaking, an increment to the estate, but a mere removal of an encumbrance, and hence the rule of *McNairy v. McNairy* would not apply. It results that the decree of the chancellor must be modified to the extent of charging on the advancements made by the ancestor interest for the period of two years from the death of such ancestor. In all other respects the decree of the chancellor must be affirmed, with costs of this court and of the court below. Remanded for further proceedings. All the Judges concur.

Messrs. Thompson & Wallace for appellants.

Messrs. Walker & McLane for appellees.

Affirmed orally by Supreme Court, January 27, 1900.

TEXAS SUPREME COURT.

BRUSH ELECTRIC LIGHT & POWER COMPANY, *Plff. in Err.*,

v.

E. LEFEVRE and Wife.

(93 Tex. 604.)

1. An exception to the allegations of a petition on the ground of indefiniteness should be sustained where it merely sets out the conclusions of the pleader as to the legal effect of an ordinance prescribing regulations for the suspension of electric wires, and fails to state in terms or in substance the provisions of the ordinance.
2. Failure to insulate electric light wires extending across a street, at and above the point where they were fastened to a wooden awning 16 feet above the level of the street, does not render the electric light company liable for the death of a person by contact therewith while upon the awning for the purpose of raising the wires

to permit the passage thereunder of a house which he was engaged in moving, where the awning was not used as a place of resort, and it could not reasonably have been expected that anyone would ever be upon it, and the height at which the wires were strung precluded the possibility of any traveler upon the street coming in contact with them.

(June 11, 1900.)

ERROR to the Court of Civil Appeals for the First Supreme Judicial District to review a judgment affirming a judgment of the District Court for Galveston County in favor of plaintiffs in an action brought to recover for the alleged negligent killing of plaintiffs' son. *Reversed.*

The facts are stated in the opinion.

Messrs. Terry, Ballinger, Smith, & Lee, for plaintiff in error:

The court of civil appeals erred in holding that, by reason of the negligence of said E.

NOTE.—As to liability for injuries by electric wires in highway, see note to *Denver Consol. Electric Co. v. Simpson* (Colo.) 81 L. R. A. 566; also *Atlanta Consol. Street R. Co. v. Owings* (Ga.) 33 L. R. A. 798; *Willey v. Boston Electric Light Co.* (Mass.) 87 L. R. A. 723; *Newark Electric Light & P. Co. v. Garden* (C. C. A. 8d C.) 87 L. R. A. 725; *Trenton Pass. R. Co. v. Cooper* (N. J. L.) 38 L. R. A. 637; *Snyder v. Wheeling Electrical Co.* (W. Va.) 89 L. R. A. 499; *Gannon v. Laclede Gaslight Co.* (Mo.) 48

L. R. A. 505; and *Mooney v. Luzerne* (Pa.) 40 L. R. A. 811.

For negligence as to electric wires on or in buildings, see *Griffin v. United Electric Light Co.* (Mass.) 32 L. R. A. 400, and note; *McLaughlin v. Louisville Electric-Light Co.* (Ky.) 34 L. R. A. 812; *Perham v. Portland General Electric Co.* (Or.) 40 L. R. A. 799; and *Brown v. Edison Electric Illuminating Co.* (Md.) 46 L. R. A. 745.

Lefevre in taking hold of the wires, he was not debarred from recovering for the injuries to his son.

The recovery in behalf of the mother would not belong to her separate estate, because such recovery was not the separate estate of Mrs. Clara Lefevre, but was community property of herself and husband, and she would be equally affected by the negligence of her husband, and not entitled to recover separately.

Rev. Stat. arts. 3021, 3027; *Houston City Street R. Co. v. Sciacca*, 80 Tex. 355, 16 S. W. 31; *San Antonio Street R. Co. v. Mechler* (Tex. Civ. App.) 29 S. W. 203.

It was the son's duty, after he had revived his father, knowing their proximity to the dangerous wires, to remove both himself and his father from the place of danger, and not to permit the father or himself to remain in such a position as that the latter, whether consciously or unconsciously, could throw him upon the wires.

Brandon v. Gulf City Cotton Press & Mfg. Co. 51 Tex. 122; *Seale v. Gulf, C. & S. F. R. Co.* 65 Tex. 278, 57 Am. Rep. 602; *Cuff v. Newark & N. Y. R. Co.* 35 N. J. L. 30, 10 Am. Rep. 205; *Galveston, H. & S. A. R. Co. v. Sweeney*, 6 Tex. Civ. App. 178, 24 S. W. 947; *McGough v. Bates*, 21 R. I. 213, 42 Atl. 873; *Cooley, Torts*, § 76; *Mihwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 474, 24 L. ed. 259; *Reibel v. Cincinnati, I. St. L. & O. R. Co.* 114 Ind. 476, 17 N. E. 107; *International & G. N. R. Co. v. Culpopper*, 19 Tex. Civ. App. 182, 46 S. W. 922; *Missouri, K. & T. R. Co. v. Roberts* (Tex. Civ. App.) 46 S. W. 270; *Shearm. & Redf. Neg.* 5th ed. § 32, 35.

The license or permit given to E. Lefevre by the mayor to move the house was of no effect, since no officer of the city could suspend the law, and such permit was absolutely void as being in direct contravention of the ordinance.

Day v. Green, 4 Cush. 433; *Williams v. Brooklyn Elev. R. Co.* 126 N. Y. 96, 26 N. E. 1048; *Graves v. Shattuck*, 35 N. H. 257, 69 Am. Dec. 536; *Newcomb v. Boston Protective Department*, 146 Mass. 600, 16 N. E. 555; *Broschart v. Tuttle*, 59 Conn. 1, 11 L. R. A. 33, 21 Atl. 925; *McGrath v. City & S. R. Co.* 93 Ga. 312, 20 S. E. 317; *Central R. & Bkg. Co. v. Brunswick & W. R. Co.* 87 Ga. 386, 13 S. E. 520; *Elliott, Roads & Streets*, p. 578, note 2; *Croswell, Electricity*, § 259.

If the defendant, exercising the diligence of a reasonably prudent man, in view of all the facts, could not have anticipated the injuries resulting to Paul Lefevre by his father's negligently grasping hold of the wires, and thereafter, and as a result thereof, falling against him in such a manner as to cause his death, no recovery can be had.

Texas & P. R. Co. v. Bigham, 90 Tex. 223, 38 S. W. 162; *St. Louis Southwestern R. Co. v. Oasseday*, 92 Tex. 526, 50 S. W. 125; *Brandon v. Gulf City Cotton Press & Mfg. Co.* 51 Tex. 121; *Seale v. Gulf, C. & S. F. R. Co.* 65 Tex. 274, 57 Am. Rep. 602; *Wood v. Pennsylvania R. Co.* 177 Pa. 306, 35 L. R. A. 199, 35 Atl. 699; *Stone v. Boston & A. R. Co.* 171 Mass. 536, 41 L. R. A. 794, 51 N. E. 1; *Whar-*

ton, Neg. §§ 134, 148, 153, 155; *Hoffman v. King*, 160 N. Y. 618, 46 L. R. A. 672, 55 N. E. 401.

Messrs. James B. Stubbs, Charles J. Stubbs, and Edwin S. Easley for defendants in error.

Brown, J., delivered the opinion of the court:

E. and Clara Lefevre, being husband and wife, sued the plaintiff in error in the district court of Galveston county for damages on account of the death of Paul, charged to have been occasioned by the negligence of the electric light company. The case was tried before a jury, and resulted in a verdict and judgment for \$1,000 for E. Lefevre, and \$3,000 for Clara Lefevre, which judgment was affirmed by the court of civil appeals. It will not be necessary to give a full statement of the facts in this case. The facts necessary to an understanding of the questions decided by us are as follows: Paul Lefevre was killed by coming in contact with the defendant's wires, maintained and operated by it in the city of Galveston, which wires were suspended diagonally across the intersection of Strand and Twenty-First streets, in that city. The wires were fastened upon awnings at the northeast and at the southwest corners of the intersection of said streets. Between these points two wires extended at the height of about 16 feet from the street; and at the northeast corner they were fastened upon a trestle about 2½ feet above the top of the awning in front of the house situated on that corner, and from the top of the trestle they extended down to the awning, and thence into the building, for lighting purposes. The top of the trestle on the awning was about 19 feet, and the top of the awning was about 16 feet, from the level of the street. The wires between the top of the trestle and the awning had been spliced, and were entirely bare, having no insulation upon them. E. Lefevre, assisted by his son and others, was engaged in moving a house along Strand towards the east, and, arriving at the intersection of Strand with Twenty-First street, they found that the wires were hanging too low for the house to pass under them, the top of the house being about 24 feet above the level of the street. E. Lefevre went upon the awning in question, and, having fastened a rope to the wires to lift them above the house, threw it to his son, who was upon the top of the house that was being moved; and E. Lefevre, in order to assist his son, caught hold of the wires, receiving a shock that produced unconsciousness. Paul, seeing the condition of his father, jumped from the top of the house onto the awning, and, with the help of another, released the father from the wires; and, he being restored to consciousness, Paul fell from some cause, and his father fell likewise upon him, on the top of the awning. Paul caught with both of his hands the two wires extending from the trestle to the awning, and received a shock that produced his death. There is no evidence that this awning was ever used as a place of resort, or for

any purpose whatever, by persons going upon the top of it; and the photographic views of it, which were in evidence, and are in the statement of facts, indicate that it was simply an awning built for shade and protection to the sidewalk and the front of the house to which it was attached.

We shall discuss but two questions presented by the application: First. Were the allegations of the petition, setting up the ordinance which required the wires to be raised 25 feet above the street, sufficiently definite? Second. Was there any evidence of negligence on the part of the plaintiff in error which proximately caused the death of Paul Lefevre?

The plaintiffs' petition contains these allegations: "That, in obedience to the ordinances of the said city of Galveston, it is, and was on the day and date above named, the duty of the defendant company to cause all of its electric wires to be suspended, and keep them suspended, at least 25 feet above the grade of the streets, and to cause same to be properly and completely insulated from surface contact; . . . that said wires were not suspended 25 feet above the grade of the streets at said point, but were suspended only about 15 feet, and by reason of this fact it became necessary to lift said wires higher, in order that the house might pass thereunder." The allegations of the petition, as set out, are the conclusions of the pleader upon the legal effect of the ordinance; but the provisions of that ordinance are not alleged, either in terms or in substance, so that the court could, from the plea, determine what was required by it of the electric light company. The special exception interposed by the defendant below to the foregoing allegations of the petition should have been sustained. *Austin v. Walton*, 68 Tex. 507, 5 S. W. 70.

There can be no liability for the injury in this case unless, from all the circumstances, the electric light company could reasonably expect that some person might be injured by its failure to cover the wires placed by it upon the awning where the deceased received his injury. *Texas & P. R. Co. v. Bigham*, 90 Tex. 225, 38 S. W. 162. In the case cited, Chief Justice Gaines, on behalf of the court, expressed the rule in the following language; quoting from the Supreme Court of the United States in the case of *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256: "But it is generally held that in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." This is probably as accurate a statement of the doctrine as can be given, and is substantially that generally laid down by the authorities." Applying this rule to the facts of this case, the inquiry arises: Would an ordinarily prudent man, looking at the surroundings as they then appeared, have reasonably expected that any person would

be upon the awning, and might be injured by coming in contact with the exposed wires? If such a consequence might have been reasonably foreseen, then the plaintiff in error would be liable for the injury, under the facts of this case, unless there be some other defense. If not, then it cannot be held liable for the death of Paul Lefevre. If the testimony is such that a jury might have found that the electric light company ought to have anticipated the injury, then this court cannot inquire into the correctness of such a conclusion, although it might differ with the jury as to the correctness of the verdict. In the facts of this case there is not a scintilla of proof that the awning had been used by any person as a place of resort, either for pleasure or for business. Looking at the photographic views of the situation, the awning appears to be such as is common in the towns and cities as a protection to the front of the building, with no railing or other protection upon the top or roof showing the intention for persons to resort there for any purpose whatever. If a man of ordinary prudence had been placing the wires at the same points, the facts would not have notified him that probably someone would be injured by them. From the street and the sidewalk to the place where the exposed wires were located is a distance of about 16 feet, which must have been at least 10 feet above the heads of men of ordinary height passing along the street, and there were no means by which passers upon the street or sidewalk could come in contact with the wire. It was therefore not negligence, with regard to persons traveling along the street or sidewalk, to leave the wire exposed, because there was no reasonable, and scarcely a possible, chance for such persons to be injured thereby. We are of opinion that there is no evidence upon which a jury could base a verdict in favor of the defendants in error, and the trial court erred in refusing to give the requested instruction to find for defendant.

For the error of not sustaining the exception to the plaintiffs' petition, and because there is no evidence of negligence on the part of the electric light company, the judgments of the District Court and Court of Civil Appeals are reversed, and this cause is remanded.

T. B. VICKERY *et al.*, Appts.,
v.

J. D. CRAWFORD.

(93 Tex. 373.)

A sheriff is not protected by a writ of sequestration issued in conformity to law, in the seizure of property which is in the possession of, and owned by, a stranger to the writ.

(February 26, 1900.)

NOTE.—As to levy on property of stranger to writ, see *Dixon v. White Sewing Mach. Co.* (Pa.) 5 L. R. A. 659; and *Brownell v. Durkee* (Wis.) 13 L. R. A. 487.

QUESTIONS certified by the Court of Civil Appeals for the Fifth Supreme Judicial District for the opinion of the Supreme Court which arose upon appeal by defendants from a judgment of the District Court for Van Zandt County in favor of plaintiff in an action brought to recover damages for alleged wrongful seizure of property in plaintiff's possession under a writ commanding the seizure of the property as belonging to B. W. Rose. *Answers returned favorable to appellee.*

The facts are stated in the opinion.

Messrs. Wynne & Smith for appellants.

Messrs. Kearby & Kearby and *W. O. Blanks* for appellee.

Williams, J., delivered the opinion of the court:

This case is brought before us upon certificate from the court of civil appeals of the fifth district, presenting the following statement and question:

"Hufnagel Shoe Co. sued B. W. Rose, and caused a writ of sequestration to issue, directed to the sheriff of Van Zandt county, Texas, in full conformity with our statutes governing the writ of sequestration, commanding him to seize certain specific property, being a lot of shoes. The writ was executed by the sheriff by seizing and taking into his possession said property. At the time of said seizure said property was owned by and in the possession of J. D. Crawford, who was not a party to the suit, and a stranger to the writ. The property was destroyed by fire while in the sheriff's custody. J. D. Crawford brought this suit against the sheriff and his bondsmen to recover the value of the property so seized and taken from his possession.

"Question. Where a sheriff, by virtue of a writ of sequestration, issued in conformity with our statutes, seizes certain specified property named in the writ, said property at the time of seizure being owned by and in possession of a stranger to the writ, is such writ a protection to the sheriff in seizing and taking possession of the property in a suit against him where the stranger seeks to recover damages for such seizure? See *Lackey v. Campbell* (Tex. Civ. App.) 54 S. W. 46."

We have been unable to find any decision of this court upon the question certified. But in the case of *Maddox v. Tierney*, 3 Tex. App. Civ. Cas. (Willson) § 396, it was held by the court of appeals that an order of sale issued upon a judgment foreclosing a mortgage upon specific property as against the defendant to the action would not protect the officer in taking such property, if it belonged to and was in possession of another, not a party to the suit in which the judgment was rendered. We think that decision was correct, and that the principle upon which it was based applies equally to the question before us. The writ in general use in other jurisdictions which most closely resembles our writ of sequestration is the writ of replevin. A diversity of opinion has

existed among the courts of other states upon the question whether or not that writ will protect an officer who, under its authority, when issued against one party, takes the property described in it from the possession of another, to whom it actually belongs. Some of the courts argue that, since the writ is fair and regular on its face, and commands the officer to seize the property described in it, and he is bound to obey its mandates, he must necessarily be protected in doing so. *Boyden v. Frank*, 20 Ill. App. 175; *Willard v. Kimball*, 10 Allen, 211, 87 Am. Dec. 632; *Shipman v. Clark*, 4 Denio, 446, 47 Am. Dec. 264; *Foster v. Pettibone*, 20 Barb. 350; *Weiner v. Van Rensselaer*, 43 N. J. L. 547; *Watkins v. Page*, 2 Wis. 96; *Weinberg v. Conover*, 4 Wis. 803. Others hold that, since the writ is issued at the suit of one person against another, for the purpose of recovering the title, or possession, or both, from such other, it does not impart authority to take from the possession of a third person his property. *Stimpson v. Reynolds*, 14 Barb. 508; *State v. Jennings*, 14 Ohio St. 73; *Davis v. Gambert*, 57 Iowa, 239, 10 N. W. 658; *West v. Hayes*, 120 Ala. 92, 23 So. 727. In many of the decisions first cited the rulings were limited to cases in which the property of the third party was found in and taken from the possession of the defendant in the writ, but the reasoning of the courts would seem to extend as well to cases in which the taking was from the possession of the owner himself. In several of them there are dissenting opinions. The discussions were sometimes called forth in the consideration of the question whether or not one not a party to a writ of replevin, whose property had been seized under it, could himself maintain an independent action of replevin against the officer for its recovery; the courts assuming the question depended upon the other one,—whether or not the writ authorized the taking of the property,—and deciding the cases before them according to their views upon the latter question. Other courts have, however, held, upon different grounds, that the second action of replevin could not be maintained against the officer, the conflict of opinion being even greater on this point than on the other. It seems to us that the proposition affirmed by the authorities first referred to is based upon the mere assumption that the writ obliges the officer to seize the property, whether found in the possession of the defendant in the writ or in that of a third person owning it. We do not believe such to be the scope of the writ of sequestration. It is sued out as an auxiliary writ, merely to preserve the property pending the suit, by which the plaintiff seeks to recover the title or possession of it from the defendant, whose title to hold it is put in issue. The cause of action is stated, and the affidavit made against, and the bond given to secure, only the party sued. While the writ commands the officer to seize the property sued for, it is intended only to enforce the right to its seizure which plaintiff has acquired as against the defendant by complying with the statute. To say that

the writ authorizes the sheriff to take the property of another from his possession seems to us equivalent to saying that the plaintiff has the right to such action when he has not taken the steps required by law to entitle him to it. How can it be the duty of the sheriff to make such a seizure unless it is the right of the plaintiff to have him do so? The history of our legislation shows that it was never allowable to take the property of a citizen from his possession without a proper proceeding against him, in which security was given for damages and costs which might result. The 143d section of the act of May 13, 1846, to regulate proceedings in district courts, provided: "That no writ of quia timet, attachment, or any other original writ or process, whereby the property of any citizen of this state shall be ordered to be seized or taken into custody, shall be issued by any civil officer of this state, or by order of any judge of the same, unless the party applying for such writ or process shall first make affidavit in writing of the truth of the matter set forth in his or her petition, and shall file in the clerk's office of the court where the same is to be sued out and entered, a bond with good security, and in a sum at least double the value of the property to be seized and taken, or of the debts and damages claimed to be due; conditioned to pay all costs and damages which the party against whom such writ or process may be sued out shall sustain, by reason of the wrongfully and unjustly suing out of the same; provided, that this section shall not be construed to prevent the issuing of attachments by justices of the peace, under the provisions of any statute authorizing such attachments; and provided also, that it shall not be so construed as to prevent the issuing of any writ or process to compel the attendance of defaulting witnesses or jurors in any court or tribunal to which they may have been legally summoned, or to any writ or process authorized by law in criminal cases." The next section of the statute provides for the issuance of writs of sequestration upon prescribed conditions, and this was amended by the act of 1848, but the requirements of article 143 were left in force. *Cheatham v. Riddle*, 8 Tex. 165. The plain purpose of these provisions was to require a suit with a verified petition against and a bond to the person whose property was to be seized, before its seizure under any writ was authorized. In the revisions of the laws that have since been made the provisions of article 143 have been distributed, so that its requirements applicable to a particular writ have been embodied in the statute regulating that writ. All of the substantial requirements of that article affecting this question have been carried into the present statute concerning sequestration. While a sworn petition may not be necessary, a suit is re-

quired, with an affidavit and bond which would meet the purposes of the former law. The sequestration law requires no bond to secure any person but the defendant. It authorizes the defendant, and no one else in the first instance, to give a replevy bond, and retain the property; and, if he fails to do so, it authorizes the plaintiff to replevy. It provides for a sale of the property, if it be perishable, in case the defendant does not replevy. There is no provision whatever in this state for the protection of the rights of any but the parties to the suit. If it be true that the officer is authorized to invade the possession of a stranger to the action, and take his property, it may be replevied by either party to the suit, or sold as perishable; and, in case of insolvency of the plaintiff, its owner would be left without substantial redress. In our opinion, the statute contemplates no such result. It requires the party desiring to sue for property to bring his action against him who holds it, and to direct his oath against him, and to make his bond payable to him. When he has complied with these requirements, he has entitled himself to a writ to take the property from the defendant for the purposes of preserving it, or securing the fruits of the litigation pending the action; but he has not entitled himself, and therefore cannot require the officer, to take the property of any other person. The officer may protect himself, if he finds the property in the possession of a third party, and is doubtful as to the ownership, by requiring indemnity. *Illies v. Fitzgerald*, 11 Tex. 417. The statute regulating the trial of the right of property gives to the owner of personal property taken under a writ against another a remedy by which he may regain possession and establish his ownership; but this has never been regarded as depriving him of any remedy given by law to owners of property for the conversion of their goods. It is as applicable in levies under attachments and executions as to those made under sequestrations, and can no more be held exclusive in one case than in the other. It cannot be made available without a bond, and the right of the owner to elect whether he will pursue it or resort to his action for damages against the person who has taken his property is an important one, which may, in many cases, be essential to complete redress. It may be true, also, that a third party may intervene in a sequestration suit involving title to personal property, and have his rights adjudicated; but, if he may do this, he may also maintain a separate action. In any of these proceedings he may fail of complete satisfaction for the wrong done him unless he can hold the officer responsible, while the latter may protect himself in the way indicated. We answer the question in the negative.

KENTUCKY COURT OF APPEALS.

SUPREME COUNCIL CATHOLIC
KNIGHTS OF AMERICA, *Appt.*,

v.

Josephine DENSFORD *et al.*

(.....Ky.....)

The share of one of the beneficiaries of a benefit certificate, who dies, leaving issue, during the life of the insured, is in the nature of a testamentary gift, and will therefore pass to such issue in accordance with the rule as to a devise or legacy declared by Stat. § 4841, providing that it shall pass to the issue of a devisee or legatee who dies during the life of testator, although a by-law of the society is to the effect that the share of a beneficiary who dies during the life of the insured shall go to the other beneficiaries *pro rata*, since this must be construed, in the light of the statute, to apply only when the deceased beneficiary leaves no issue.

(Du Rolle, Guffy, and White, JJ., dissent.)

(March 17, 1900.)

A PPEAL by defendant from a judgment of the Common Pleas Division of the Circuit Court for Jefferson County in favor of plaintiffs in an action brought to recover a share of a benefit certificate issued by defendant. *Affirmed.*

The facts are stated in the opinions.

Mr. Newton G. Rogers, for appellant:

The constitution, by-laws, rules, and regulations of the appellant, the Supreme Council, govern its members.

The law of the society provided that the fund "shall be paid in full to the surviving beneficiary or beneficiaries, each sharing *pro rata*, as provided in the benefit certificate."

Messrs. C. G. Hulsewede and L. A. Douglass, for appellees:

The charter of the appellant company provides that the appellant association is "to establish and maintain a benefit fund, from which a sum not to exceed \$2,000 shall be paid, at the death of each member, to his family, or to be disposed of as he may direct."

Under this section of the appellant's charter the only persons who can take are members of the insured's family, as the insured may direct.

Wintergurst directed the insurance to be paid to his three daughters, and never made any further direction in regard to the payment of the same.

The charter prescribes who shall be the beneficiaries of the membership after the death of the member, and it is not in the power of the company, or of the member, or of both, to alter the rights of those who by the charter are declared to be the beneficiaries, except in the mode and to the extent as indicated in said charter.

Kentucky Masonic Mut. L. Ins. Co. v. Mil-

NOTE.—As to transmission of interest in benefit certificate in case of death, see also *Thomas v. Cochran* (Mass.) 46 L. R. A. 160.
49 L. R. A.

ler, 13 Bush, 494; *Duvall v. Goodson*, 79 Ky. 229.

A life policy for the benefit of the family of the person procuring it is in the nature of a testament, and in construing it the courts should treat it, as far as possible, as a will.

Duvall v. Goodson, 79 Ky. 229; *Continental L. Ins. Co. v. Palmer*, 42 Conn. 60, 19 Am. Rep. 530; *Niblack*, Ben. Soc. § 245a.

Barnam, J., delivered the opinion of the court:

The appellees sought in this suit to recover one third of a benefit certificate for \$2,000, issued by the appellant association to their grandfather, Frank Wintergurst. The facts set out in the petition are that he (Wintergurst) became a member of the appellant association, and had the benefit certificate issued upon his life, payable to his three daughters, Emma, Minnie, and Clara Wintergurst; that some time after the issuing of this benefit certificate, and during the life of the insured, his daughter Clara married, had three children, and died before her father, who died several years after her, a member in good standing in appellant association, without having changed the beneficiaries in the certificate taken out by him: and that the three children of Clara are the appellees in this action. Appellant admitted the facts set out in the petition to be as stated, but by the second paragraph of its answer denied liability to appellees growing out of the issuing of the certificate, because of § 173 of its by-laws, which provides as follows: "In the event of the death of one or more of the beneficiaries selected by the member before the decease of such member, if he shall make no further disposition thereof, upon his death such benefit shall be paid in full to the surviving beneficiary or beneficiaries, each sharing *pro rata*, as provided in the benefit certificate. In the event of the death of all beneficiaries selected by the member before the decease of such member, if he shall make no other or further disposition thereof, the benefit shall be paid to the heirs of the deceased member, and, if no person or persons shall be entitled to receive such benefit by the laws of this order, it shall revert to the sinking fund of the Catholic Knights of America." And appellant alleged that, acting under this by-law, it paid to the surviving beneficiaries, Emma and Minnie Wintergurst, the full amount of the benefit certificate; that it received their receipts therefor, and also the benefit certificate, properly canceled, and that this ended all demands against it. A demurrer was entered to this paragraph of appellant's answer, which was sustained by the chancellor, and, appellant refusing to plead further, the judgment appealed from was entered.

A copy of the benefit certificate, and also of the charter and by-laws of the appellant association, is filed with the answer. Section 2 of their charter provides, among oth-

er things, that "the object of the corporation shall be to establish and maintain a benefit fund, from which a sum, not to exceed \$2,000, shall be paid at the death of each member, to his family, or be disposed of as he may direct." It is insisted for appellees that the children of the deceased daughter, under appellant's charter, are the surviving beneficiaries of that portion of the insurance money which the policy provided should be paid to their mother, their grandfather never having made any additional direction with reference thereto; and it is also insisted that appellant had no right to establish a by-law naming who should be the beneficiaries of a certificate issued by it, contrary to the provisions of the certificate itself. In the case of *Duwall v. Goodson*, 79 Ky. 228, this court said: "A life policy for the benefit of the family of the person procuring it, though not a testament, is in the nature of a testament, and in construing it the courts should treat it, as far as possible, as a will, as in doing so they will more nearly approximate the intention of the persons, the destination of whose bounty is involved in such cases. . . . It is not to be supposed that a father, in procuring insurance on his own life for the benefit of his family, or in keeping such a policy alive, intends to benefit himself or his estate." And in the case of *Kentucky Masonic Mut. L. Ins. Co. v. Miller*, 13 Bush, 494, it was held that a certificate of membership obligating the company to pay to a member's heirs, or as he may direct in his will, the sum of \$—, upon his dying intestate, did not entitle his administrator to recover the fund required by the charter of the company to be paid by the company at his death. In the case of *Continental L. Ins. Co. v. Palmer*, 42 Conn. 60, 19 Am. Rep. 530, a wife procured a policy of insurance upon the life of her husband, payable to her if living; if not, to her children. Both she and one of the children died before the husband. The court held that the heirs of the deceased child took by descent its interest, and were entitled to a portion of the amount insured, and in the opinion uses the following language: "This instrument, being testamentary in its nature, should be interpreted by the same rules. Therefore, as in wills of doubtful meaning, one construction being in harmony with the statute and the other contrary to it, preference is given to the former, so this contract should receive an interpretation if possible, which will dispose of the fund according to the law of descent. . . . There is a natural presumption that the party so intended it. When we consider that it was a mother who made this contract and who paid the premiums, we cannot possibly presume that she, had her attention been called to it, and had she known that the child of one of her children would become an orphan before the policy became payable, would intentionally deprive such child of all interest in the policy. Had such been her intention, it would have been easy to express it in unmistakable terms. Had the policy been payable to her 'surviving children,' or to those

'who should be living' at the death of the insured, it would have removed all doubt. But supposing (as she doubtless did) that all of her children would survive, the policy was made payable to them generally. And now a contingency has arisen which manifestly was not contemplated. If the natural presumption cannot be regarded as a legal presumption, and the law, to meet the contingency, is compelled to interpolate in the contract a provision either limiting the payment to the surviving children or including as payee the issue of a deceased child, we think both reason and justice require the latter." The insured, at the time the benefit certificate was taken out, provided that the fund arising therefrom should be payable at his death to his three daughters jointly, manifesting an intention to provide for them equally, and the certificate provides for no other disposition of the fund. If it had been his purpose to provide exclusively for the surviving beneficiaries named in the certificate, it could have been so expressed, or he could have had a new certificate issued after the death of his daughter Clara, payable to the surviving daughters. The mother of appellees, by the terms of this certificate, was vested with a definite interest in the fund, which would be due thereon at the death of her father, and which could only have been defeated by some action on his part making other or different disposition of the part secured to her. As suggested in the Connecticut case quoted above, and also in the two opinions of Judge Cofer, cited *supra*, a policy of insurance, payable at the death of the insured, is testamentary in its nature, and should be given the construction of a will. Section 4841 of the Kentucky Statutes provides that, "if a devisee or legatee dies before the testator, or is dead at the making of the will, leaving issue who survive the testator, such issue shall take the estate devised or bequeathed, as the devisee or legatee would have done if he had survived the testator, unless a different disposition thereof is made or required by the will;" and this section was a part of the statute law of this state long prior to the taking out of the policy sued on, and, unquestionably, a devise in the exact language of the certificate would be construed to include the children of the dead daughter. See *Sheets v. Grubbs*, 4 Met. (Ky.) 339; *Chenault v. Chenault*, 88 Ky. 83, 11 S. W. 424; *Thompson v. Myers*, 95 Ky. 597, 26 S. W. 1014. It is the duty of courts, as far as practicable, to give effect to the intention of the deviser, and we think it fair to presume that the father believed that under this provision of the statute his grandchildren would inherit the provision made by him for their dead mother. And, under this construction, by-law 173 is not inconsistent with the provision of the charter, the statute law, or adjudications of this court. If the mother of appellees had died childless, then the fund would have gone to the surviving beneficiaries, but, as she left children surviving her, they stand in her shoes, and

are entitled to one third of the fund provided for by the certificate.

For the reasons indicated, *the judgment is affirmed.*

Hobson, J., concurring:

Frank Wintergurst was a member of the Supreme Council Catholic Knights of America, and held a benefit certificate for \$2,000, issued to him upon his life by the association, payable to his three daughters, Emma, Minnie, and Clara. During the life of her father, Clara married, had three children, and died. After this, her father died, a member in good standing, without having changed the beneficiaries in the certificate. The infant children of Clara seek in this action to recover the one third of the \$2,000, which, by the certificate, was payable to their mother if she had survived her father.

The first question to be determined is, What effect, under the certificate, had the death of Clara in the lifetime of her father? In *Duval v. Goodson*, 79 Ky. 228, in determining the rights of the parties in a certificate of membership in the Kentucky Masonic Insurance Company, a similar organization to appellant, this court said: "A life policy for the benefit of the family of the person procuring it, though not a testament, is in the nature of a testament, and in construing it the court should treat it, as far as possible, as a will, as in so doing they will more nearly approximate the intention of the person, the destination of whose bounty is involved in such cases." The same principles were announced in the case of *Continental L. Ins. Co. v. Palmer*, 42 Conn. 60, 19 Am. Rep. 530, where the court said: "This instrument, being testamentary in its nature, should be interpreted by the same rules." These cases are cited with approval in 1 Bacon, Ben. Soc. § 255, and a number of other authorities are referred to as sustaining this rule, which seems to us a sound one. The question presented is, therefore, What is the proper construction of the certificate in this case, if it be construed as a will? Section 2064 of the Kentucky Statutes provides: "When a devise is made to several as a class, or as tenants in common, or as joint tenants, and one or more of the devisees shall die before the testator and another or others shall survive the testator, the share or shares of such as so died shall go to his or their descendants, if any; if none, to the surviving devisees, unless a different disposition is made by the deviser." Section 4841, Id., also provides: "If a devisee or legatee dies before the testator, or is dead at the making of the will, leaving issue who survive the testator, such issue shall take the estate devised or bequeathed as the devisee or legatee would have done if he had survived the testator, unless a different disposition thereof is made or required by the will." These statutes changed the common-law rule, and, under them, if the certificate be construed as a will, the children of Clara take their mother's interest, just as she would have done if living at her father's death. *Fuller v. Martin*, 96 Ky. 500, 29 S. W. 315. 49 L. R. A.

We are aware that there are a number of decisions holding that upon the death of a beneficiary in the life of the member without some further designation of a beneficiary by him, the benefit lapses, and is not to be paid by the association at all. 1 Bacon, Ben. Soc. § 243. But these decisions rest upon the common-law rule, which was abrogated in this state by the statute we have quoted.

But it is insisted that appellees are not entitled to recover by reason of the following by-law made by the association: "In the event of the death of one or more of the beneficiaries selected by the member before the decease of such member, if he shall make no further disposition thereof, upon his death such benefit shall be paid in full to the surviving beneficiary or beneficiaries, each sharing *pro rata*, as provided in the benefit certificate. In the event of the death of all beneficiaries selected by the member before the decease of such member, if he shall make no other or further disposition thereof, the benefit shall be paid to the heirs of the deceased member; and, if no person or persons shall be entitled to receive such benefit by the laws of this order, it shall revert to the sinking fund of the Catholic Knights of America." This by-law was, no doubt, made in view of the rule declared in the decisions referred to above, to prevent the lapsing of the benefit in case of the death of the beneficiary in the lifetime of the member, where he had failed to make any other disposition of the fund. In so far as the by-law operated upon money which would otherwise belong to the association, it would be clearly valid, for the association plainly had the right by its by-laws to dispose of a fund that would otherwise revert to it. In doing this it would invade the rights of no third persons. But if the benefit, on the death of the beneficiary, went to his children, and not to the association, the power of the association to take from the children a right which the law vested in them cannot exist, unless conferred by the charter. The charter is the fountain of authority for the corporation. One who asserts a claim to money due from a corporation occupies a very different position from one who presents a question of policy of the order of which he belongs. Associations like appellant, in matters of this sort, are governed by the same rule as other insurance companies. 1 Bacon, Ben. Soc. §§ 48, 61a, 78. "The prime essential of a valid by-law is that it be consistent with the charter or articles of the association. . . . By-laws in contravention of the provisions of a charter are void." Id. § 83. The charter of this association confers on it no power to control or direct how or to whom the benefit shall be paid at the death of the member. The only provision on this subject is: "The object of the corporation shall be to establish and maintain a benefit fund, from which a sum not to exceed \$2,000.00 shall be paid at the death of each member to his family, or be disposed of as he may direct." In *Kentucky Masonic Mut. L. Ins. Co. v. Miller*, 13 Bush, 494, this court said: "The charter prescribes who may become members

of the company, and their obligation, and who shall be the beneficiaries of the membership after the death of the member, and it is not in the power of the company, or of the member, or of both, to alter the rights of those who, by the charter, are declared to be the beneficiaries, except in the mode and to the extent therein indicated." This ruling was approved in the subsequent case of *Duvall v. Goodson*, 79 Ky. 220; and in *Van Bibber v. Van Bibber*, 82 Ky. 350, the court further said: "It is a general rule, as to an ordinary life insurance policy, that the person originally designated in it as the beneficiary is entitled to the benefit, that the right to it vests in him the moment it is issued, and that neither the insured nor the insurer can change it to the detriment of this third party. This rule applies to policies issued by mutual benefit associations, and must govern in this instance, unless the charter provides differently. The certificate of membership constitutes the contract, but it is to be construed and governed by the company's charter." The charter in the case before us conferred upon the member and the member alone the power to direct how his benefit fund should be disposed of. He might have made it, but no such power was conferred on the corporation. The necessary legal inference from the words of an instrument is of as much force as if stated in express terms. If, in this case, the member had stated in the certificate that, if either of his daughters died, her part of the fund should go to her children, if any, the legal effect of the instrument would have been just the same as it now is. If he had so stated in the certificate, a by-law of the association could not have defeated this disposition made by him, and it is equally ineffectual on the certificate as it stands; for this is what he did say in legal effect. When a member disposes of a fund, the law of the land must determine the legal effect of the words he uses, and not the by-laws of the corporation, where, by the charter, it is not allowed to regulate the subject in any way. If it can, by a by-law, abrogate the legal effect of the instrument, why may it not abrogate its express terms by adding other conditions not expressed therein,—as that, if the beneficiaries become infidels, or are convicted of felony, they shall lose all interest in the fund? There is no middle ground. The words of an instrument are no more sacred than its legal effect, and, when the certificate is not enforced according to its real meaning, the power to dispose of the fund which the charter vests in the member is *pro tanto* taken from him. It is true that a member is presumed to know the by-laws of the association, and is bound by them. But this rule only applies to valid by-laws. If a by-law is void for want of power in the association to make it, it is a nullity, and the member may ignore it. When he had disposed of the fund in words to which the law gave the legal effect he desired, he was not bound to make a further disposition of it to avoid a nullity. The association could, under the charter, put no such onus

upon him. He might have disposed of this fund by will, if he had seen fit to do so. If he had disposed of it by will, that disposition of it would have been no less free from modification by the association than his disposition of it by the certificate before us. When he had disposed of it by the acceptance of the certificate, his daughters took an interest which could only be defeated, under the charter, by his making some other disposition of it in his lifetime. When he failed to do this, Clara's children, at her death, took, by virtue of the statute quoted, all the rights their mother would have had if living. If the by-law was intended to change the disposition of the benefit fund made by the member, and gave it a different effect from that the law gave it, it was simply an attempt on the part of the association to regulate a matter over which, under the charter, it had no jurisdiction. For these reasons, I am of opinion that under either construction of the by-law, the judgment of the chancellor is right, and should be affirmed.

Du Relle, J., dissenting (filed March 29, 1900):

The object of the appellant corporation, as by its charter provided, is to unite fraternally all acceptable Catholics, etc.; to establish "and maintain a benefit fund from which a sum not to exceed \$2,000 shall be paid at the death of each member to his family, or be disposed of as he may direct," etc. By § 6 of the constitution adopted by the order the object is stated to be: "To establish a benefit fund, from which, on satisfactory evidence of the death of a beneficiary member of the order, a sum not exceeding \$2,000 shall be paid as he may have directed in his benefit certificate," etc. By § 107 of the constitution it is required that "the name or names of the person or persons to whom the benefit is to be paid, as directed by the member, shall appear on the application." The benefit certificate is, by § 37, required to be "made payable as the member may have directed in his application," etc. By § 172 of the constitution, "a member may at any time, when in good standing, change his beneficiary upon complying with the requirements hereinafter provided, and upon surrender of his benefit certificate and payment of a fee of \$1.00." By § 173 it is provided that, "in the event of the death of one or more of the beneficiaries selected by the member before the decease of such member, if he shall make no further disposition thereof, upon his death such benefit shall be paid in full to the surviving beneficiary or beneficiaries, each sharing *pro rata*, as provided in the benefit certificate." By the benefit certificate, or contract of insurance, the appellant agrees "to pay to Emma Wintergurst, Minnie Wintergurst, and Clara Wintergurst, the beneficiary designated by said assured in his application, upon due proof of the death of said assured, he being in good standing in the order, the sum of \$2,000." After a provision for surrender of the certificate and substitution of another beneficiary or bene-

ficiaries, if the assured so desires, by complying with the laws of the order, follows this provision: "And it is expressly understood that this is a contract between the Supreme Council of the Catholic Knights of America and assured alone, and not a contract between said council and the beneficiaries herein named." The provisions of the constitution adopted by the order, if not in conflict with the Constitution and laws of the United States and the state, are binding upon the members. Whether called by the name of constitution or by-laws, they have been appropriately described as "the law unto the members." *Supreme Commandery K. of G. R. v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332. This company was, by its charter, authorized to organize subordinate branches—of one of which the assured in this case was a member—"as it may see fit, under such laws, rules, and regulations as the corporation may enact, not in conflict with the laws of this state and of the United States." "The contract of membership in a mutual association is always made with reference to, and always includes, the constitution and by-laws, of which every member is bound to take notice, whether they are specially referred to in the contract or not, and whether or not they are in fact known to the member." 3 Am. & Eng. Enc. Law, 2d ed. p. 1081. "Members are presumed to have notice of, and are bound by, all the valid rules and laws of the association affecting their rights or interests. It is their duty to inform themselves, and they cannot, by reason of a lack of knowledge, escape the operation of such rules and laws." Bliss, Ins. § 463; May, Ins. § 552. Abundant authority upon this proposition can be found in almost every state of the Union. Under the charter, the assured had the right to name the beneficiary or beneficiaries. He did so. He was required to state the name or names of the beneficiary or beneficiaries in his application. He did so. These names were copied into the contract, called a "benefit certificate," and when he entered into that contract it was to be read and should be now construed, as if there had been written in it the provisions of the constitution which I have quoted; i. e. that if any one of the beneficiaries, whose names he was required to state, and whose names were written in the certificate, should die before the assured, the benefit should be paid to the surviving beneficiary or beneficiaries. What beneficiaries? As matter of course, and by every rule of fair construction, the beneficiaries that had been spoken of before,—the beneficiaries named in the benefit certificate,—the only beneficiaries spoken of anywhere in the contract, or in the constitution, which forms a component part of it. But in the opinion of a majority of the court it is claimed that "beneficiaries selected by the member," as used in § 173, means something different from what it means in other places in the constitution, and, at all events that where that section

provides that on the death of one or more of the beneficiaries selected by the member before the decease of such member, if he shall make no further disposition thereof, upon his death such benefit shall be paid in full to the surviving beneficiary or beneficiaries, the words "surviving beneficiary or beneficiaries"—who are to share *pro rata*—do not mean those who had been selected by the member, and who did not die before him, but mean the children, sisters, cousins, aunts, or other relatives of the dead beneficiary selected by the member, who may stand to such dead beneficiary in the relation of his heirs at law.

In the separate concurring opinion of a minority of the majority of the court it is maintained that § 173 of the constitution is invalid, because, it is urged, it takes from the member the right of selection of the beneficiary of the benefit certificate secured to him by the charter in the words, "or be disposed of as he may direct." Let us examine this contention a little. As we have seen, when he makes the contract he agrees to the constitution. If, with this provision of the constitution written into the contract, the member still has the absolute right to direct to whom the benefit shall go at his death, then this section is not in conflict with the charter, and is valid, and is a part of the contract. With the section written into the contract, the member may provide to whom the benefit shall go by simply stating to whom he wishes it to go. He may provide limitation over after limitation over, so long as he does not violate the rule as to perpetuities; or, he may name a number of beneficiaries, and may say (as he did in this case when he signed the contract into which is written § 173 of the constitution): "If any of the persons I have named as beneficiaries shall die before me, the survivor or survivors of those I have named shall take. In the event they shall all die before me, the benefit shall go to my heirs at law; and, should I have no heirs at law, it shall go to the society." This could have been written *ipsisimis verbis* in the benefit certificate. How, then, if, by implication of the constitution into the contract, he did what he had a right to do in express words, was his power to name his beneficiary limited, or taken from him? Such constructions are a perversion of good plain language. No such question as this was presented in any of the Kentucky cases cited in the two opinions of the majority. The circumstances of this case, so far as they appear, are such as appeal to the sympathies. Three children, under twenty-one, are, by the terms of the contract, prevented from taking the share of their grandfather's bounty, which their mother would have taken had she survived him. But we do not know all the circumstances. We do not know whether their father is not richer than both their aunts. We do not know whether they are not amply provided for otherwise. The facts as to these matters

are not before us, and could not properly be brought before us in this case. Speculation as to whether the language of a contract may work a hardship should not influence its construction. For the reasons stated, I dis-

sent from the opinions filed by the majority of the court.

Guffy and White, JJ., concur in this dissent.

NEW YORK COURT OF APPEALS.

Re Petition of John B. TUTHILL *et al.*, for Appointment of Commissioners to Drain Lands in Orange County.

(163 N. Y. 133.)

1. The drainage of agricultural lands by "necessary drains, ditches, and dykes, upon the lands of others, under proper restrictions, and upon just compensation," for which provision may be made by general laws under the amendment of Const. art. 1, § 7, adopted in 1894, is a taking of private property for a private use, in violation of U. S. Const. 14th Amend., prohibiting a state from depriving any person of his property without due process of law. [Per Gray, J.]
2. The assessment of the expense of constructing a drain upon other landowners deemed benefited thereby, as well as upon the petitioner, for which provision is made by Laws 1895, chap. 384, permitting an owner of agricultural lands to institute proceedings for the drainage of such lands or the protection thereof from overflow by the construction of drains or dykes upon the lands of other persons, is not authorized by Const. art. 1, § 7, providing for the passage of general laws for the construction of such drains and dykes, since the Constitution contemplates that the expense shall be borne by the petitioner.

(May 15, 1900.)

NOTE.—Drainage of private lands as public purpose for which power of eminent domain may be exercised.

It is settled that the power of eminent domain may be employed to effect the drainage and reclamation of lands so far as such drainage is for a public purpose.

Land may be taken by a municipal corporation under the power of eminent domain, which, because of its low and wet condition, constitutes a nuisance, for the purpose of being filled up so as to abate the nuisance. *Sweet v. Rechel*, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 48; *Dingley v. Boston*, 100 Mass. 544.

The drainage of land, when conducive to the public health, and resulting necessarily in the public convenience and welfare, comes within the scope of legitimate legislative action, and may rightfully call into exercise the power of eminent domain. *Duke v. O'Bryan*, 100 Ky. 710, 39 S. W. 444, 824.

If lands are swamp, marsh, or wet, disease may be engendered, and the public health may require that they shall be drained, and, if necessary such drain may be constructed through the lands of others. *Fleming v. Hull*, 73 Iowa, 598, 35 N. W. 673.

The entry upon land for the construction of a ditch for drainage is a taking of property within the constitutional requirement that compensation must first be made. *People ex rel. Cook v. Nearing*, 27 N. Y. 306; *People ex rel. Williams v. Haines*, 49 N. Y. 587, 49 L. R. A.

A PPEAL by petitioners from an order of the Appellate Division of the Supreme Court, Second Department, reversing orders of the County Court for Orange County in proceedings to drain lands in the towns of Chester and Blooming Grove. *Affirmed.*

The facts are stated in the opinion.

Messrs. John G. Milburn and F. V. Sanford, for appellants:

The presumption of constitutionality attaches to every statute enacted by the legislature.

People ex rel. Henderson v. Westchester County Supers. 147 N. Y. 15, 30 L. R. A. 74, 41 N. E. 563; *People ex rel. Carter v. Rice*, 135 N. Y. 473, 16 L. R. A. 836, 31 N. E. 921.

Where a general power is conferred, or duty enjoined by a Constitution, "every particular power necessary for the exercise of the one, or the performance of the other, is also conferred."

Cooley, Const. Lim. 6th ed. p. 78; *Kilgour v. Montmorency Twp. Drainage Comrs.* 111 Ill. 350; *Huston v. Clark*, 112 Ill. 349.

The Constitution contemplated and authorized a general law providing for the necessary drainage of tracts of land, and for the distribution of the expense among the owners of the lands benefited.

The history of the drainage legislation in this state confirms this view of the act.

Taking private property for a drainage ditch may be authorized when necessary for the public welfare. *Thompson v. Wood County Treasurer*, 11 Ohio St. 678.

Under power of eminent domain the taking must be for a public purpose.

To justify the exercise of the power of eminent domain the taking must be for a public purpose. Under this rule, it is generally held that such power cannot be exercised for procuring a right of way for a drainage ditch, where the ditch is solely for private benefit.

Taking the property of one man and giving it to another is not making a law or rule of action; it is not legislation, it is simply robbery. *Coster v. Tide-Water Co.* 18 N. J. Eq. 54.

A statute providing that any person who may desire to do so may drain his land through that of another provides for a taking of private property for a private use, and is unconstitutional. *Fleming v. Hull*, 73 Iowa, 598, 35 N. W. 673.

A drainage law, in so far as it authorizes the construction of such improvement because of private benefits solely, is violative of the spirit of a constitution which provides that private property shall not be taken for public use without compensation. *Duke v. O'Bryan*, 100 Ky. 710, 39 S. W. 444, 824.

Drains for the reclamation of wet or overflowed lands can be constructed across the lands

White v. White, 5 Barb. 483; *Re Ryers*, 72 N. Y. 1, 28 Am. Rep. 88; *Hartwell v. Armstrong*, 19 Barb. 166; *People ex rel. Parker v. Jefferson County Ct.* 55 N. Y. 604; *French v. Kirkland*, 1 Paige, 117; *People ex rel. Cook v. Nearing*, 27 N. Y. 306.

Experience has shown to be necessary a board of commissioners to determine what drainage is necessary, and to construct it, and for the assessment of the expense on the property benefited; and that is the legislation the amendment authorized.

People ex rel. McClelland v. Roberts, 148 N. Y. 360, 31 L. R. A. 399, 42 N. E. 1082; *People ex rel. Jackson v. Potter*, 47 N. Y. 375; *Smith v. People*, 47 N. Y. 330; *Re Drainage between Lower Chatham and Little Falls*, 35 N. J. L. 497; *Re Drainage on Pequest River*, 39 N. J. L. 433; *Ross v. Davis*, 97 Ind. 79; *Poundstone v. Baldwin*, 145

Ind. 139, 44 N. E. 191; *Kilgour v. Montmorency Twp. Drainage Comrs.* 111 Ill. 342; *Hatch v. Pottawattamie Co.* 43 Iowa, 442; *Richman v. Muscatine County Supers.* 77 Iowa, 513, 4 L. R. A. 445, 42 N. W. 422; *Yeomans v. Riddle*, 84 Iowa, 147, 50 N. W. 886; *Sessions v. Crunkilton*, 20 Ohio St. 349; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Coomes v. Burt*, 22 Pick. 422; *Day v. Hulburt*, 11 Met. 321; *Rutherford v. Maynes*, 97 Pa. 78.

The prior state of the law, the defect to be remedied, and the purpose to be accomplished are proper to be considered in construing and applying a constitutional amendment.

Cooley, Const. Lim. 6th ed. p. 79.

The act as a measure for the drainage of

of others, except by consent, only in cases where the public welfare will be subserved. *Jenal v. Green Island Drainage Co.* 12 Neb. 163, 10 N. W. 547.

A right of way for a drainage ditch cannot be taken without consent of the landowner for the exclusive benefit of the persons whose land is to be improved by the work done. *People ex rel. Pulman v. Henlon*, 64 Hun, 471, 19 N. Y. Supp. 488.

A ditch cannot be constructed over the land of another person without his consent merely for the benefit of adjoining land. *Gilbert v. Foote*, cited in 5 Barb. 474, 483.

A statute cannot be upheld which authorizes the taking of a right of way over land for a drain when demanded by private interest merely, without reference to the public interest, convenience, or welfare. *Reeves v. Wood County Treasurer*, 8 Ohio St. 333.

A drainage statute the object of which is merely to improve the property of individuals is void, although it provides for compensation to the owner of the land across which the ditch runs. *Woodruff v. Fisher*, 17 Barb. 224.

The mere fact that larger and better crops will be raised on two farms sought to be drained does not authorize the establishment of a ditch. *McQuillen v. Hatton*, 42 Ohio St. 202.

A statute authorizing drains for agricultural, sanitary, or mining purposes, without requiring it to be necessary or desirable to promote any public interest, convenience, or welfare, is not valid. The court says no doubt such an improvement may be useful to some, or perhaps many, private owners of land by way of increasing the usefulness and value of their lands. But that is merely a private advantage. It interests the public only indirectly or remotely in the same way and sense in which the public interest is advanced by the thrift and prosperity of individual citizens. Some home or homes might be made more cheerful and healthful. But one man's property cannot be taken to make another man's home more cheerful or healthful. It is only when it will make the homes of the public more healthful, that any man's property can be taken for sanitary purposes. *Re Theresa Drainage Dist.* 90 Wis. 301, 63 N. W. 288.

But if the principal object intended by the statute is the public welfare, the statute will not be rendered void by the promotion of private interests as incidental thereto. *Sessions v. Crunkilton*, 20 Ohio St. 349; *State ex rel. Holtz v. Henry County Comrs.* 41 Ohio St. 423.

In *Sherman v. Tobey*, 3 Allen, 7, the court, without considering its constitutionality, con-

strued a statute which provided for the draining of wet private lands over the land of adjacent owners.

The taking of property authorized by the Indiana drainage laws is for a public, and not for a private, use. *Poundstone v. Baldwin*, 145 Ind. 139, 44 N. E. 191.

In *Chambers v. Kyle*, 67 Ind. 206, the court, in speaking of the drainage law of 1867, says it has uniformly been held that a ditch cannot be established under it without proof made that it is of public utility.

The Indiana act of 1875 provided that a proceeding for the construction of a drain could not be maintained unless it was shown that it would be conducive to the public health, convenience, or welfare, or that the same would be of public benefit or utility. *McKinsey v. Bowman*, 58 Ind. 88; *Tillman v. Kircher*, 64 Ind. 104; *Bate v. Sheets*, 64 Ind. 209; *Deisner v. Simpson*, 72 Ind. 435.

Under the act of 1881, it must appear that the public health will be improved, or one or more public highways of the county or streets of a town or city will be benefited, by the proposed drainage, or the proposed work will be of public utility. *Ross v. Davis*, 97 Ind. 79.

Under the Wisconsin statute, authority is conferred to lay out drains only where they are demanded by, or will conduce to, the public health or welfare. *State ex rel. Witte v. Curtis*, 86 Wis. 140, 56 N. W. 475.

Necessity must exist.

In addition to the requirement that the drain must be for a public purpose, it must also be necessary. For if the object can be effected practically as well in some other way private property cannot be seized for the right of way.

Under the Ohio statutes, before the ditch can be located, it must be found necessary, as well as conducive to the public health, convenience, and welfare. *Rice v. Wellman*, 5 Ohio C. C. 334; *Caldwell v. Harrison Twp.* 2 Ohio C. C. 10.

Private property can only be taken under a statute providing for the drainage of water from highways when a necessity for such drainage appears. Private property can only be condemned for public use. The public will not be benefited by the ditch if no necessity exists for draining the water from the highway, which belongs to the public. *Chaplin v. Wheatland Highway Comrs.* 129 Ill. 651, 22 N. E. 484.

One of the jurisdictional facts under the Nebraska statutes is that the drain is necessary, and will be conducive to the health, conveni-

wet lands for agricultural purposes is not violative of the Federal Constitution.

Wurts v. Hoagland, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; *Head v. Amoskeag Mfg. Co.* 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441.

If the act be susceptible of a constitutional, as well as an unconstitutional, operation, it may not be held to be unconstitutional.

Cooley, Const. Lim. 6th ed. 213, 214; *People ex rel. Hayden v. Rochester*, 50 N. Y. 525; *People ex rel. Rochester v. Briggs*, 50 N. Y. 553; *People ex rel. Sinkler v. Terry*, 108 N. Y. 1, 14 N. E. 815.

It is always within the power of the court to restrict such an act to its constitutional operation.

Re Ryers, 72 N. Y. 1, 28 Am. Rep. 88; *Re Niagara Falls & W. R. Co.* 108 N. Y. 375, 15 N. E. 429.

ence, and welfare of the public. *Dakota County v. Cheney*, 22 Neb. 437, 35 N. W. 211; *Darst v. Griffin*, 31 Neb. 668, 48 N. W. 819.

Land cannot be condemned for the drainage of adjacent land through it, where the owner of the land sought to be drained can construct the drains through his own lands with but little less convenience and at but little more expense than through the lands sought to be condemned. *Re Rochester & G. H. R. Co.* 33 N. Y. S. R. 1085, 12 N. Y. Supp. 566.

It has been held, however, that the ditch need not be absolutely necessary to the public, but it will be sufficient if it is essentially requisite. If it will benefit the public, and conduces to the general health and welfare, it will be regarded as possessing the quality of being necessary. *Corey v. Swagger*, 74 Ind. 211; *Coolman v. Fleming*, 82 Ind. 117; *Blissard v. Riley*, 83 Ind. 300.

Unless a general law for the drainage of wet lands makes proper provision for the determination in each proceeding of the question whether the particular ditch or system of drainage will be of public utility or promote the public health, welfare, and convenience, it will be unconstitutional and void. *Gifford Drainage Dist. v. Shroer*, 145 Ind. 572, 44 N. E. 636.

What is a public purpose?

There has been some difference of opinion as to what is a public purpose. Some courts have held that to make the purpose public the drain must be necessary to preserve the public health. Other courts have regarded the reclamation of large tracts of land sufficient to make the purpose public, while still others have held that there was no difference in principle between the reclamation of large and small tracts of land; so that, if the exercise of the power is justifiable for any reclamation, it is justified for all. Other courts still have found a public purpose in subserving the public convenience or welfare, as by preserving highways.

Public health.

Drainage laws which take from the citizen his private property against his will can be upheld only upon the ground that such drains are necessary for the public health. They proceed upon the basis that low, wet, and marsh lands generate malaria, causing sickness and danger to the health and life of the people; that when they are of such character as to injure the health of the community they become, and are, public nuisances which ought to be abated, and the legislature have the right, under the police

power inherent in the government, to protect the people from plague and pestilence, and to preserve the public health. But drainage for the purpose of private advantages, such as improving the quality of the land, or rendering it more productive or fit for cultivation, cannot be justified under the police power. Neither public convenience nor public welfare, independent of considerations of the public health, will justify the legislature in the enactment of laws for the construction of drains. *Kinnie v. Bare*, 68 Mich. 625, 36 N. W. 672.

Private property cannot be taken for a right of way for a drainage ditch unless it is found that the lands to be drained are a source of disease, and that the draining of them will promote the public health. *Hull v. Baird*, 73 Iowa, 528, 35 N. W. 618.

A drainage law authorizing the taking of private property for a right of way for a ditch can be sustained only upon the ground that it serves to preserve or promote the public health. *Re Ryers*, 72 N. Y. 1, 28 Am. Rep. 88; *Burk v. Ayers*, 19 Hun, 17; *Catlin v. Munn*, 37 Hun, 23; *Re Drainage in Penfield*, 8 App. Div. 80, 37 N. Y. Supp. 1056.

The benefit of the public health is a necessary element of a valid drainage law by which the power of eminent domain is authorized to be exercised. *Re Draining in Chili*, 5 Hun, 116.

The drainage of a swamp is a public purpose for which the right of eminent domain may be exercised. *Hartwell v. Armstrong*, 19 Barb. 166.

Reclamation of large tracts.

In *Talbot v. Hudson*, 16 Gray, 417, which involved the validity of a statute providing for the removal of a dam to relieve property bordering on certain rivers from the water thrown back on them by the dam, the court says, in the present case there can be no doubt that every owner of meadow land bordering on these rivers will be greatly benefited to a greater or less extent by the reduction of the height of the dam. The act is therefore in a certain sense for a private use, and inures to the individual advantage of such owners. But this is by no means a decisive test of its validity. Many enterprises of the highest public utility are productive of great and immediate benefits to individuals. We are to look further into the probable operation and effect of the statute in question, in order to ascertain whether some public interest or benefit may not be likely to accrue from the execution of the power conferred upon the commissioners. If any such can be found, we are bound to suppose that the

E. 246; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56.

The act may be sustained on the ground that it is a proper exercise "of the power of the legislature to establish regulations by which adjoining lands held by various owners in severalty, and in the improvement of which all have a common interest, but, which, by reason of the peculiar natural condition of the whole tract, cannot be improved or enjoyed by any of them without the concurrence of all, may be reclaimed and made useful to all at their joint expense."

Wurts v. Hoagland, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; *Louell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Head v. Amoskeag Mfg. Co.* 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441; *Henry v. Thomas*, 119 Mass. 583.

act was passed in order to effect it. The improvement of a large tract of territory situated in several towns and owned by a great number of persons, by draining off the water and thereby rendering the land suitable for tillage, which could not otherwise be usefully improved at all, would seem to come fairly within the scope of legislative action, and not to be so devoid of public utility and advantage as to make it the duty of the court to pronounce a statute, which might well be designed to effect such a purpose, invalid and unconstitutional. The act would stand on different grounds if it appeared that only very few individuals, or a small adjacent territory, were to be benefited by the taking of private property. The advantages which may result from the removal of the obstruction are not local in their nature, nor intended to be confined to a single neighborhood. They are designed to embrace a large section of land lying in one of the most populous and highly cultivated counties of the state, and by increasing the productive capacity of the soil to confer a benefit, not only on the owners of the meadows, but on all those who will receive the incidental advantage arising from the development of the agricultural resources of so extensive a territory.

For the purpose of reclaiming large tracts of land the right of eminent domain may be employed. *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634.

If draining of large swamps would add largely to the area of valuable lands in the state, and increase its resources, private property may be taken for that purpose. Millions of acres of such land have been redeemed, and there is no question but what the legislature has this authority which has been sanctioned by the usage of the whole civilised world. *Batchelder v. Hibbard*, 58 N. H. 269.

An act for the drainage of thousands of acres of land lying in a low portion of the state must be deemed of general and public utility. The right of the state to condemn lands for drains rests on the same foundation as its right in case of public roads, mills, railroads, causeways, schoolhouses, forts, lighthouses, etc. *Nordfleet v. Cromwell*, 70 N. C. 634, 18 Am. Rep. 787.

The purpose of draining large districts of land lying within several counties of the state, embracing thousands of acres, is sufficiently public to justify the exercise of the power of eminent domain. *Re Drainage between Lower Chatham and Little Falls*, 35 N. J. L. 497; *Re Drain on Pequest River*, 39 N. J. L. 433.

If a ditch will drain any considerable body

Messrs. Henry Bacon and Joseph Merritt, for respondents:

Prior to the Constitution of 1895 this state had settled beyond all question that a drain should not be cut by any man upon the lands of his neighbor without the consent of the latter.

Re Ryers, 72 N. Y. 1, 28 Am. Rep. 88; *White v. White*, 5 Barb. 474; *Woodruff v. Fisher*, 17 Barb. 224; *Re Draining in Chili*, 5 Hun, 116; *Burk v. Ayers*, 19 Hun, 17; *People ex rel. Pulman v. Henion*, 64 Hun, 471, 19 N. Y. Supp. 488; *Re Drainage in Penfield*, 3 App. Div. 30, 37 N. Y. Supp. 1056, Affirmed in 155 N. Y. 703, 50 N. E. 1116.

When it is proposed to take private property, either by the exercise of the right of eminent domain, or the power of taxation, it is always a question which the citizen whose property is to be taken has the right

of wet lands, it will be of public utility and benefit. *Zigler v. Menges*, 121 Ind. 99, 22 N. E. 782.

The New Jersey court has referred the right to reclaim the land to an authority more ancient than the provisions of the constitutions for the exercise of the right of eminent domain. It says: To effect the object of drainage of a tract of land the statutes provide that the works to effect the drainage may be located in any part of the lands drained, paying the owner of the land thus occupied compensation for the damage by such use. So far private property is taken by them; further it is not. In none of them is the owner divested of his fee. To effect such common drainage, power is in some cases given to continue the drains through adjacent lands, not drained, upon compensation. All this is an ancient and well-known exercise of the legislative power, and may well be considered as included in a grant of legislative power in the Constitution. Beyond this, private property cannot be taken for private uses, even with compensation. *Coster v. Tide-Water Co.* 18 N. J. Eq. 54.

For all drainage purposes.

Some of the courts have not been content to limit the right in cases involving only the reclamation of land, to the drainage of large tracts, but have held that the power may be exercised in all cases of drainage.

If the general assembly has power to make regulations for draining a swamp containing 10,000 acres, it has the same power in regard to a swamp containing 1,000 acres; so of 100 acres or of 1 acre. There is no distinction in the principle; the only difference is in regard to the degree. Such drainage may be provided for under the police power. The two powers of eminent domain and police regulation are distinct. By the one, property of A is given to B. By the other the property of A is left in him, but is made subservient to the general welfare. The power of the general assembly to make the land of A subservient to the land of B for the purpose of drainage must be yielded upon the authorities and upon the reason of the thing. *Pool v. Trexler*, 76 N. C. 287.

In *Ellinghouse v. Taylor*, 19 Mont. 463, 48 Pac. 757, the court, in considering the validity of a law providing for the condemnation of a right of way for an irrigation ditch, says: What real distinction is there, so far as the term "public use" is concerned, between the benefit that results to a state from the reclamation by artificial irrigation of 160 acres of agri-

to submit to the court, whether the purpose is a public one.

Re Townsend, 39 N. Y. 171; *Re Deansville Cemetery Assn.* 66 N. Y. 569, 23 Am. Rep. 36; *Re Niagara Falls & W. R. Co.* 108 N. Y. 375, 15 N. E. 429; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

Under the amendment to the Constitution and the statute, an attempt has been made to authorize the taking of private property for a use not public, but strictly private, by the exercise of the right of eminent domain. The right of eminent domain is one residing in the state, which can be used only for public purposes; and any attempt to exercise that right for any other than a public purpose violates the Constitution of the United States.

U. S. Const. art. 1, § 10, U. S. Const. Amend. arts. 5, 14; Cooley, Const. Lim. p.

cultural land owned by one or two persons, and the reclamation by the same means of thousands of acres owned by many different persons living together in one subdivision of the state? We do not think there is any in principle. The reclamation of one small field by means of artificial irrigation promotes the development, and adds to the taxable wealth, of the state, as well as the reclamation by the same means of a number of fields. This ruling was made under a constitution which provides that the purpose of irrigating lands shall be a public use.

The construction of ditches for the drainage of land otherwise useless for agricultural purposes is a public use. And it is not necessary that the public at large shall be benefited, but only that part of the public affected by want of proper drainage, or by the improvement to be made. The public has an interest beyond that of the mere sanitary condition of the land, founded upon other and different principles than the controlling or abatement of nuisances, where any considerable number of persons are concerned, or a tract of land is useless. *Lewis County v. Gordon*, 20 Wash. 80, 54 Pac. 779.

When the New York Constitution was changed a provision for drainage was inserted which would seem to require an abandonment of the old rule in force in that state, that private property could be taken only when the drainage was necessary for public health. The lower court, in the case of *Re Tuthill*, 36 App. Div. 492, 55 N. Y. Supp. 657, deals with the question as follows: The Constitution of 1894 provided that general laws may be passed permitting the owners of agricultural land to construct and maintain for the drainage thereof necessary drains, ditches, and dikes upon the land of others with just compensation. Of this provision the court says: If the effect of this provision is to authorize the appropriation of the land of one man, and the application of it to the private use of another, then it is void. All of the authorities of all jurisdictions agree that no necessity, however great, can authorize the legislature to take the property of one man and give it to another with or without compensation. An organic law which grants the exercise of such power is void by the provisions of the Federal Constitution as depriving the citizen of his property without due process of law. Under the operation of that provision, we may no longer assert that the drainage of swamp lands may not be had, unless it be justified as a measure to preserve the public health, and we become bound to justify it, and not only to justify it, but to accept it, as it is the voice of sovereign authority. It may be justified upon the ground

655; *Terrett v. Taylor*, 9 Cranch, 43, 3 L. ed. 650; *Wilkinson v. Leland*, 2 Pet. 627, 7 L. ed. 542; *Cole v. La Grange*, 113 U. S. 1, 28 L. ed. 896, 5 Sup. Ct. Rep. 416; *Cypress Pond Draining Co. v. Hooper*, 2 Met. (Ky.) 350; *Reeves v. Wood County Treasurer*, 8 Ohio St. 333; *Beekman v. Saratoga & S. R. Co.* 3 Paige, 45, 22 Am. Dec. 679.

If the purpose was not public, the exercise of the right of eminent domain has always been denied, or restricted to the public purpose, and denied for the excess.

Varick v. Smith, 5 Paige, 137, 28 Am. Dec. 417; *Re Albany Street*, 11 Wend. 149, 25 Am. Dec. 618; *Embury v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325; *Re Eureka Basin Warehouse & Mfg. Co.* 96 N. Y. 42; *Re Niagara Falls & W. R. Co.* 108 N. Y. 375, 15 N. E. 429; *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634; *Bloodgood v. Mo-*

that the reclamation of land for purposes of agriculture and habitation is a public purpose. It is not at all certain that the authority may not be supported under the exercise of the police power. It was not within the fair purport of the 14th Amendment to the Federal Constitution that it should prevent this class of legislation. If the authority is sought to be exercised by the individual owner, his position would come squarely within the principle which supports the exercise of the right in respect to the private right of way; that is, it rests upon the ground *ex necessitate*, and is founded in the public policy of the state. The right of the citizen to enjoy the use of his lands, to bring them under cultivation, and to distribute the product of his land among people generally, is, to a limited extent, a matter in which the general public have an interest. This, when coupled with the performance of those duties which the law devolves upon him as a citizen of the state, makes the exercise of the right a matter of public benefit and utility, sufficient to support the authority which underlies the exercise of the right. The principle of *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 869, 17 Sup. Ct. Rep. 56, with reference to the irrigation of land, would seem to authorize the exercise of the power of eminent domain in a case where a considerable tract of land may be reclaimed, as there the public good would be conserved, and it might authorize its application to a small tract, where the necessity was urgent, and a considerable body of people would be favorably affected thereby. Landowners may need places of habitation or the products of the land for their comfort and prosperity, which may be denied in whole or in part if the improvement cannot be made, so that the principle applies. As the proceeding before it, however, involved the question of taxation, rather than that of eminent domain, the court held that the statute was ineffectual because it authorized the exercise of the taxing power in favor of a single person for the improvement of a single acre of agricultural land, a result which was held not to be within the contemplation of the framers of the Constitution.

The adoption of the rule that the power of eminent domain may be exercised for the drainage of small tracts of land would seem to be subversive of the rule that private property cannot be taken for private use, because, although the prosperity of individuals may conduce to the welfare of the state, it has never been considered in other connections that the promotion of individual prosperity was of sufficient importance to call in the aid of the power of

hawk & H. Rivers R. Co. 18 Wend. 9, 31 Am. Dec. 313.

The Federal Constitution is of paramount authority upon all subjects with which it deals. The Constitutions of the states, as well as their statutes, are invalid when found to be in conflict with its provisions.

U. S. Const. art. 6, § 2; *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Cook v. Moffat*, 5 How. 295, 12 L. ed. 159; *Dodge v. Woolsey*, 18 How. 331, 15 L. ed. 401; *Railroad Tax Case*, 13 Fed. Rep. 767, 8 Sawy. 238; *San Francisco & N. P. R. Co. v. Dinwiddie*, 13 Fed. Rep. 789, 8 Sawy. 312; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Gonzales v. Ross*, 120 U. S. 605, 30 L. ed. 801, 7 Sup. Ct. Rep. 705; *People v. Hawkins*, 157 N. Y. 1, 42 L. R. A. 490, 51 N. E. 275.

The authority to make these assessments is void as against the Federal Constitution,

eminent domain. The Ohio court has held that the prosperity of each individual conduces in a certain sense to the public welfare, but this fact is not a sufficient reason for taking other private property to increase the prosperity of individual men. *McQuillen v. Hatton*, 42 Ohio St. 202.

Some of the courts which have upheld private drainage laws have felt the force of this objection, and have sought to uphold the laws as an exercise of police power.

The legislature, in the exercise of the police power, has authority to enact drainage laws with a view to the promotion of the general welfare, and the mere fact that one or more individuals may derive from it pecuniary and particular benefits and advantages does not destroy its validity. *Winslow v. Winslow*, 95 N. C. 24.

The construction of drains demanded by, or which will conduce to, the public health or welfare is within the police power of the state. *Donnelly v. Decker*, 58 Wis. 461, 46 Am. Rep. 637, 17 N. W. 389; *State ex rel. Baltzell v. Stewart*, 74 Wis. 620, 6 L. R. A. 394, 48 N. W. 947; *State ex rel. Gordon v. McNay*, 90 Wis. 104, 62 N. W. 917.

In *Donnelly v. Decker*, 58 Wis. 461, 46 Am. Rep. 637, 17 N. W. 389, the court says it requires but a casual examination of the statutes for the draining of swamp and overflowed lands to be apparent that such ditching and draining are for no public use whatever within the legal meaning of the term. The primary object is solely to restore such lands to a proper condition for tillage and agriculture by the several owners and for their use alone. It enhances their value, intrinsic and market. This is the only object which concerns their use, and that use is strictly private. This legislation may be referred to the police power by providing for the public health. If it were not for this purpose of the law it would not be endured for a moment, because it would provide for a despotic and most unlawful interference with private property for strictly private purposes and uses, in which neither the people of the state, nor the state itself, nor the public have any interest whatever. It seems marvelous that any court should ever attempt to justify such laws, which are merely and essentially for private purposes, confined to the owners of the lands drained and improved, under the power of eminent domain.

A change from the power of eminent domain to the police power to uphold private drainage 49 L. R. A.

because it authorizes a tax for a private, not a public, purpose.

Cooley, Taxn. pp. 103-113; *Cooley*, Const. Lim. p. 606; *Citizens' Sav. & L. Asso. v. Topoka*, 20 Wall. 655, 22 L. ed. 455; *Cole v. La Grange*, 113 U. S. 1, 28 L. ed. 896, 5 Sup. Ct. Rep. 416; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. Rep. 442; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *Weisner v. Douglas*, 64 N. Y. 91, 21 Am. Rep. 586; *People ex rel. Butler v. Saginaw County Supers.* 26 Mich. 22; *Jenal v. Green Island Draining Co.* 12 Neb. 163, 10 N. W. 547.

The statute is unconstitutional because the assessment is not limited to benefits received.

Re Fourth Avenue, 3 Wend. 452; *Re Drainage on Pequest River*, 39 N. J. L. 433; *State, Kean, Prosecutor, v. Driggs Drainage Co.* 45 N. J. L. 91; *Tidewater Co. v. Coster*, 18 N. J. Eq. 519, 90 Am. Dec. 634; *People*

laws does not seem to make the foundation much more substantial. If the public health or welfare is involved the drainage may perhaps be referred to either power. As said by the Arkansas court, where the express object of the taking is the public welfare, the power to take land is referable to the eminent domain or to the police power. *Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707.

But where the matter involved is merely the drainage of a private farm, which is not necessary to the public health, the branch of police power resting on the preservation of the public health is not involved; and if the drainage of a private farm is not sufficiently necessary to uphold an exercise of the power of eminent domain, it can hardly be said to be sufficient to require an exercise of police power.

Other purposes.

In order to uphold drainage laws the courts have regarded almost any purpose as sufficient which was conducive to the public welfare.

The taking of land for a ditch to drain a public highway is a taking for a public purpose. *Smeaton v. Martin*, 57 Wis. 864, 15 N. W. 403.

The power of eminent domain, which is called into exercise to some extent in a proceeding to establish a drain, can be exercised only when the work to be accomplished inures, either directly or indirectly, to the benefit of the public, or involves some public use. But it is of sufficient public utility if it benefits a public highway of the county. *Helck v. Voight*, 110 Ind. 279, 11 N. E. 806.

The property of a citizen cannot be taken for the mere private advantage of another citizen. But drains may be constructed if they will be of public utility, or if by their construction the public health will be improved, or one or more of the highways of the county will be benefited. *Anderson v. Baker*, 98 Ind. 587.

It is sufficient if the proposed ditch will contribute in any reasonable degree to the public health, convenience, or welfare. It is not sufficient that the ditch will drain the lands adjacent to it, or enable the owners of adjacent lands to raise larger and better crops, but the public health, convenience, or welfare must in some way suffer for want of the ditch. The public convenience may be subserved by the fact that in times of freshets water which overflows turnpikes and bridges, will be carried away more rapidly, and with less injury to such roads and bridges. If the construction of the ditch will

ex rel. Griffin v. Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; *Genet v. Brooklyn*, 99 N. Y. 296, 1 N. E. 777; *Bohm v. Metropolitan Elev. R. Co.* 129 N. Y. 576, 14 L. R. A. 344, 29 N. E. 802; *Bush v. Orange County Supers.* 159 N. Y. 212, 45 L. R. A. 556, 53 N. E. 1121; *Taber v. Erie County Supers.* 131 N. Y. 432, 30 N. E. 177.

Gray, J., delivered the opinion of the court:

This was a proceeding instituted by the petitioners for the purpose of causing certain low and wet lands in the county of Orange, in this state, of which they were the owners, to be drained through ditches to be constructed over the lands of others; and the warrant for its commencement, and for the various steps which have been taken, is claimed to be found in chapter 384 of the Laws of 1895. The act provided, in its first section, that "a person owning agricultural lands within this state may institute pro-

ceedings for the drainage of such lands or the protection thereof from overflow, by the construction and maintenance of a drain or dyke, on the lands of another person, or the use of mechanical devices, by presenting a verified petition to the county court of the county in which such lands are located, or, if in more than one county, to a special term of the supreme court of the district where the lands or a part thereof are situated, setting forth a general description of the lands to be drained or protected, the names and places of residence of the owners of all lands affected by the proceeding, so far as the same can with reasonable diligence be ascertained, and a prayer for the appointment of three commissioners." Other sections provide for the service of a notice of the time and place of the presentation of the petition, and regulate matters of procedure. They provide for the appointment of three disinterested and resident commissioners, who are to hear the parties and determine whether the lands

lead to a more healthful community and a more prosperous neighborhood, and will result in the reclamation or bettering of a considerable quantity of low, wet, or swamp lands, or drain stagnant ponds, thereby improving the public highways of the vicinity and health of the community, and increasing the value of the land of the surrounding country of the proposed ditch, the ditch will be conducive to the public health, convenience, or welfare. *Thomas v. County Comrs.* 5 Ohio N. P. 449.

Limited public sufficient.

It is not necessary that the entire public or all the people of the state should be directly affected by the drainage. It is sufficient if a particular community is affected.

It is not necessary, in order that a use may be regarded as public, that the whole community, or any large portion of it, may participate in it. If the drain is of public benefit the fact that some individuals may be specially benefited over others affected by it will not deprive it of its public character. *Ross v. Davis*, 97 Ind. 79.

Private property may be appropriated for a drainage ditch if it will be conducive to the public health, convenience, or welfare of the neighborhood through which it is located. A more general necessity is not required. *Lake Erie & W. R. Co. v. Hancock County Comrs.* (Ohio) 57 N. E. 1009.

It is the public health, convenience, and welfare of the community to be affected by the proposed ditch, and not that of the public at large, that is to be regarded in determining the power of the legislature. *Chesbrough v. Putnam & P. Counties Comrs.* 37 Ohio St. 508.

Although the drainage may be confined to a specific district, the work may still be public. *Hartwell v. Armstrong*, 19 Barb. 166.

That the works authorized to effect drainage of land do not extend beyond a particular, and it may be a small, district, does not prevent the purpose from being public. *Re Ryers*, 72 N. Y. 1, 28 Am. Rep. 88.

The question of public utility has reference to the drain as a whole, without regard to the county lines which may cross it. *Meranda v. Spurlin*, 100 Ind. 380.

In *Coomes v. Burt*, 22 Pick. 422, the court, without considering the question of the constitutionality of the statute, explains its purpose as follows: The legislature provided that,

so far as the lands of the proprietors to be benefited were concerned, treating them as owners of a common property, and regarding the common and general benefit of all, such ditches might be cut as the common interest might require. So far as they had an interest in the watercourse leading from the premises or lands to be benefited by the improvement, they should have, through the agency of the commissioners, an unobstructed enjoyment of this outlet.

Under a scheme by which a corporation is created for the drainage of land having no interest in the property other than it can make out of the execution of the work with full power to initiate proceedings without the consent of those most deeply concerned in it, the power of eminent domain cannot be exercised. *State, Kean, Prosecutor, v. Driggs Drainage Co.* 45 N. J. L. 91.

The legislature cannot place private property in the hands of a commission to be drained for the benefit of its owner against his consent, upon application of persons who make a contract for the work, and who are to receive compensation for doing the work. *Coster v. Tide-Water Co.* 18 N. J. Eq. 54, *Affirmed in Tide-Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634, upon the ground that no provision was made for the indemnification of the owner of land subjected to the operation of the law in case the expense of the improvement should exceed the benefits which should be conferred.

Presumption as to public character.

The presumption is in favor of the public character of a use which is declared to be public by the legislature. *Heick v. Voight*, 110 Ind. 279, 11 N. E. 306.

The case must be very clear to authorize the court in interfering with the action of the legislature in providing for drainage. *Hartwell v. Armstrong*, 19 Barb. 166.

The presumption is that a municipal corporation, when constructing a sewer in its corporate capacity, acts for a public purpose, and for the benefit of the community at large or the people generally in the locality of the improvement, and not merely in the interest of a particular individual who may petition for such improvement, and who may be specially benefited thereby. *McDaniel v. Columbus*, 91 Ga. 462, 17 S. E. 1011.

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shall be drained; whether for that purpose it is necessary that a drain shall be opened through the lands of another; what the amount of damage, if any, sustained by other landowners by reason of the opening of the drain; and any other and further steps with reference to the proceeding. They provide for the organization of the commissioners as a board, and, after viewing the premises, and taking proofs for a determination as to the necessity for the opening of the drain as prayed; for the filing of that determination, and for publication of a notice thereof; for further proceedings thereafter in the making of maps and surveys; for the construction of the work; and, in the case of an inability to agree upon the amount of compensation and damages, for the determination thereof by the commissioners, and an assessment upon the lands to be benefited. The commissioners are to take into account any benefits accrued, and may deduct the amount of the benefit from the amount of the damage. The damages and expenses are to be assessed in proportion to the amount of benefit received. Notice is to be given to the persons whose lands are affected and who have appeared on a hearing upon the assessment, and thereafter a corrected assessment roll is to be filed, and personal notice thereof given. Provision is made for an application by the commissioners for judgments against any persons not having paid the assessment, and such judgments shall be docketed and become a lien upon lands, enforceable as provided in such cases by the Code of Civil Procedure. As briefly as possible, this survey of the act presents its principal features. The petitioners in this proceeding followed the procedure of the act, and commissioners were appointed by the county court, who determined in favor of the drainage prayed for and as to its manner, and who borrowed moneys, under orders of the county court, and caused the ditches to be constructed. They made an assessment of the damages and expenses upon the lands of various persons, including these respondents, and gave notice of a hearing of any person aggrieved by the same, which was had, and a corrected assessment roll was thereafter made and filed. Subsequently an application was made by the commissioners to the county judge for an order directing the entry of judgments against various landowners who had not paid their assessments, which was granted. These respondents, who opposed the assessment and the application of the commissioners for the judgments, appealed from the order of the county judge and from the judgments entered thereupon to the appellate division, where the order and the judgments were reversed and the proceeding was dismissed, upon the ground, in substance, that the act of 1895 was unconstitutional for authorizing the exercise of the power of taxation in favor of a single person. The commissioners and certain of the petitioners then appealed to this court.

The question which we have before us involves primarily the consideration of the amendment of § 7 of article 1 of the state 49 L. R. A.

Constitution adopted in 1894, which is relied upon as validating the enactment by the legislature of the drainage act of 1895. The section of the Constitution referred to reads in its entirety as follows: "When private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the state, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law. Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road and the amount of all damage to be sustained by the opening thereof shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefited. *General laws may be passed permitting the owners or occupants of agricultural lands to construct and maintain for the drainage thereof, necessary drains, ditches, and dykes upon the lands of others, under proper restrictions and with just compensation, but no special laws shall be enacted for such purposes.*" The portion of the section italicized contains the amendment in question, and it is objected to it that it is violative of the Federal Constitution, in that the taking of private property for a use not public, but strictly private, is authorized, by the exercise of the right of eminent domain. If the amendment is in conflict with any of the provisions of the Federal Constitution, it must fail; for, within its sphere of operation, that instrument is supreme, and no more by constitutional provisions than by legislation can the states of the Union override its prohibitions. It is an ancient principle, which entered into our social compact, that the use for which private property may be taken must be a public one, whether the taking be by the exercise of the right of eminent domain, or by that of taxation. The sovereign power is incapable of conferring any right to interfere with private property, except it be needed for public objects. To take land for any other than a public use; to take it from one citizen and to transfer it to another, even for full compensation,—would be to violate the contract by which the land was originally granted by government. *Beekman v. Saratoga & S. R. Co.* 3 Paige, 45, 73, 22 Am. Dec. 679; *Bloodgood v. Mohawk & H. Rivers R. Co.* 18 Wend. 9, 31 Am. Dec. 313. The 14th Amendment of the Federal Constitution, in prohibiting a state from depriving any person of life, liberty, or property without due process of law, protects the citizen against the taking of his property for any other than a public use, either under the guise of taxation, or by the assumption of the right of eminent domain. *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 158, 41 L. ed. 388, 17 Sup. Ct. Rep. 56. It is a security against the arbitrary spoliation of property, or any abridgment of the immunities of citizens of the United States. The state Constitution, from the beginning, by authorizing the appropriation of private

property for public use, impliedly declared that for any other use private property should not be taken from one, and applied to the private use of another. *Re Albany Street*, 11 Wend. 149, 25 Am. Dec. 618. It was observed by Judge Denio in *People ex rel. Herrick v. Smith*, 21 N. Y., at page 598, that it would not be due process of law to "appropriate the property of one citizen for the use of another, or to confiscate the property of one person or a class of persons, or a particular description of property, upon some view of public policy, where it could not be said to be taken for a public use." Whether that is a public use, for which private property is authorized to be taken, will depend upon the object aimed at, and whether the plan has such an obvious or recognized character of public utility as to justify the exercise of the right of eminent domain or of the power of taxation in its favor. I suppose, in that consideration, when some new constitutional provision is in question, regard should be had to prior conditions in the laws and in the decisions of the courts of the state upon the subject, which illustrate some settled policy of the community. That can be understood by reference to the cases which arose under the mill acts in the New England states, the irrigation acts in the Western states, and the drainage statute of New Jersey. *Head v. Amoskeag Mfg. Co.* 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441; *Wurts v. Hoagland*, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56. The statutes in those cases were justified, either in view of a policy in force prior to the adoption of the state Constitutions, or, within a similar principle, by long exercise of a legislative power which the state courts had sustained. In *Wurts v. Hoagland* the New Jersey drainage statute discussed was framed in the public interest. It authorized the board of managers of the geological survey, "upon the application of at least five owners of separate lots of land," etc., to examine the tract, and, if they deemed it for the interest of the public and the landowners affected thereby, to adopt a system of drainage, and to report it to the supreme court of the state, etc. It was observed in the opinion that several drainage laws, and the assessment of the expense of the work upon all the lands in the tract in question, "have long existed in the state of New Jersey, and have been sustained and acted on by her courts under the constitution of 1776, as well as under that of 1844," and the case was held to come "within the principle upon which this court upheld the validity of general mill acts in *Head v. Amoskeag Mfg. Co.* 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441. In *Fallbrook Irrig. Dist. v. Bradley*, the California irrigation act was upheld, in view of the various enactments, constitutional and legislative, together with the decisions of the state court that such a use of water was a public one. It was observed that they were 49 L. R. A.

not binding upon the court; but in their light and under the facts and circumstances surrounding the subject-matter, in regard to which the use was questioned, there could be little difficulty in arriving at the same conclusion as the California court. The provision for the opening of private roads in the constitutional section under consideration represented a public policy dating from 1772, when the first statute upon the subject was enacted. This statute continued in full and active operation as a law of the state upon the adoption of our Constitution in 1777, which continued such parts of the common law in force as had formed the law of the colony. It was embodied in the Revised Statutes (1 Rev. Stat. 513, §§ 54, 77, 79), and then, in 1846, was added to the Constitution. It was an evident public policy of the state, long acquiesced in, that facilities should be furnished for private ways, so that the property of citizens might be made accessible. *Satterly v. Winne*, 101 N. Y. 218, 225, 4 N. E. 185. Judge Cooley, in his work on Constitutional Limitations (*532), observed that the common law has never sanctioned an appropriation of property upon such considerations as the improvement and cultivation of the wild lands of the state, the drainage of low lands, etc., and that some further element must be involved before the appropriation can be regarded as sanctioned by our Constitutions. He further remarked that "the reason of the case, and the settled practice of free governments, must be our guides in determining what is or is not to be regarded a public use."

In this state, prior to the adoption of this constitutional amendment, a general drainage law appeared in the Revised Statutes (2 Rev. Stat. p. 548); but it was very early declared by this court to be unconstitutional, as authorizing the taking of the property of the owner of the land, and transferring it to the applicant for the ditch, against the consent of the owner. *Gilbert v. Foote*, not reported, but cited in *White v. White*, 5 Barb., at page 483, in 1849, and referred to in *Re Ryers*, 72 N. Y. 1, 28 Am. Rep. 88. It was said of *Gilbert v. Foote* by Judge Folger, in *Ryers' Case*, that "it is understood that the judgment of this court . . . went mainly upon the ground that the act sought to permit the taking of private property for a private use, which was not a use for a private way." In 1869 a general act for the drainage of swamps and the like was passed (chap. 888, Laws 1869), the constitutionality of which was challenged in *Ryers' Case*. It contained a provision that the commissioners appointed by the court upon the application of the petitioners should determine, not only the question of the necessity of the ditch for drainage purposes, but "whether it is necessary for the public health," and other provisions restricted the purpose of the proceeding to that of the benefit of the public health. Such provisions were doubtless inserted in amendment of the prior general drainage statute, and to obviate the objection

to its constitutionality. *Re Draining in Chili*, 5 Hun, 116. The opinion of this court in *Ryers' Case* proceeded upon the proposition of the right to take private property for public use, making due compensation therefor, and that the maintenance and promotion of the public health were matters of public concern. It was held to be a constitutional power of legislation to provide for removing or abating that which has become a public nuisance, injuring the public health. "We are not called upon in this case," Judge Folger observed, "to uphold an act which has for its purpose the benefit of individuals. As before said, it avows, and avows only, a public purpose. . . . We wish to be distinctly understood that we sustain this act as constitutional solely for that it plainly has for its purpose the preservation and promotion of the public health." A reading of the act of 1869 makes it perfectly apparent that, within its scope, the object of drainage proceedings was confined to cases where they were demanded in the interest of the public health. It must be conceded, therefore, that up to 1894 such a drainage proceeding as would be authorized under this amendment to our Constitution, being for a private purpose, was neither sanctioned by the laws, nor upheld by the courts. The policy of the state, thus evidenced, was manifestly founded on the sanctity of private property rights under the social compact, and was adverse to any legislation which would violate it. It was well within the legislative power to make the state the sole actor, and in the interest of a public necessity or convenience to authorize such interference by the public authorities with private rights as would abate conditions prejudicial to the health or comfort of the community, or to authorize private persons to take the initiative in the same direction of public utility. In the drainage statute in question in the *Nearing Case*, 27 N. Y. 306, for instance, the legislature appointed the commissioners to drain the wet and swamp lands of the town of Cicero, and directed their procedure. The state was the actor in the matter, and thus the presumption of a public purpose or necessity was conclusively furnished. The legislative action was similar in the acts referred to in *Hartwell v. Armstrong*, 19 Barb. 166, and in *People ex rel. Parker v. Jefferson County Ct.* 55 N. Y. 2. 604. But, lacking public ends, I find nothing in the past political history of the state which would justify laws by which a citizen may be authorized to take the property of his neighbor, by the exercise of the right of eminent domain, for a purpose which is primarily for his private benefit, although incidentally of such possible benefit generally as any improvement of agricultural lands would result in. Such legislation is not sound in principle, and we are not embarrassed by any long acquiescence, or by either judicial or legislative precedents, in so asserting, or in holding that no imperative reasons of public policy warrant the delegation

of the power to exercise the right of eminent domain in such cases.

When the Constitution of this state was amended in this way by the people in 1894, it was intended, undoubtedly, by embodying in the organic law an authorization for the passage of general laws permitting owners of agricultural lands to construct and maintain ditches for the drainage of their properties, to conclusively sanction such legislation thereafter. The probable intent of any law may often be stated from a consideration of the political conditions which existed, the presence of which might be deemed, not unnaturally, to operate upon the lawmakers. An amendment of the organic law of the state represents the expression of the dominant popular sentiment upon the subject, and in this instance it undoubtedly represents a purpose to make that lawful which before was not. The reasoning would be that if it was unconstitutional, and therefore unlawful, before, to authorize the taking of private property for the private purpose of the drainage of agricultural lands, by giving it constitutional warrant it would become lawful to do so, if, indeed, the plan might not be perforce invested with a public interest. But this result would and should not be attained if the constitutional amendment was in conflict with those provisions of the supreme law of the land, embodied in the Federal Constitution, which guarantee the citizen against the taking of his life, liberty, or property without due process of law. The amendment of our Constitution does not, in terms, declare its object to be a public one. Indeed, I think that its language, by a fair reading, rather negatives such an inference, and imports that the object is the private benefit of the landowner; for the purpose is stated to be the drainage, only, of his lands, and he is to make just compensation for the land appropriated to that purpose. I conceive the proper rule of construction to be that, if the amendment expressed a purpose theretofore recognized as public, it would afford that sufficient sanction for subsequent legislation on the subject which might be needed. But if the object had been theretofore deemed not of a public nature or of public concern, and it touches some personal immunity secured by the law of the land, its presence in the Constitution will not have the effect of removing the fundamental objection to it. I do not believe that the people of the state can affect or impair the obligation of the social compact by adopting as a part of the organic law a provision which will permit of the taking of private property for a purpose which is essentially of private benefit, and which has always been held to be such. When the amendment says that "general laws may be passed permitting the owners and occupants of agricultural lands to construct and maintain for the drainage thereof necessary drains," etc., it means that the legislature may authorize any such person to take another's land for a purely private purpose; and that is in conflict with the inhibition of the bill of rights,

and violates the guaranties of the Federal Constitution. If the citizen invokes the guaranties of the Federal Constitution for his protection against the enforcement of a law which an amendment of the state Constitution purports to authorize, I perceive no valid reason, if he is right in his claim to protection, that we should not recognize it. I am not able to resist the conclusion that the constitutional amendment in question is invalid and inoperative.

If, however, the amendment in question can be upheld as valid, upon the assumption that it removes a constitutional limitation upon legislation providing for the drainage of agricultural lands, and that it can rest for its justification upon a common local necessity, independent of the public health, and concerning the promotion of the prosperity of the community, then it seems clear to me that it affords no warrant for the enactment of this drainage law. The section of the article of the Constitution to which the amendment was added prescribed the tribunal which shall ascertain the compensation to be made for the private property "taken for any public use," and then proceeded to provide for the opening of private roads, and that the payment of the amount of the damage to be sustained by their opening and the expense of the proceeding "shall be paid by the person to be benefited." In this extension of the law of eminent domain to such a case in the Constitution of 1846 there was to be no assessment of damages and expenses upon the nonassenting owners of the lands taken for the private road; and the act passed in 1853 by the legislature, regulating the procedure, strictly followed the constitutional requirement in that respect. Laws 1853, chap. 174, § 14. When the amendment under consideration was added in 1894, by the force of its own language, as by necessary implication from its association with the other provisions of the section, the plain intent was that the landowner seeking to construct a drain through other lands, *in invitum* their owners, should make compensation for the land appropriated, and himself bear the expense. The only general laws authorized were those "permitting the owners and occupants of agricultural lands to construct . . . for the drainage thereof necessary drains," etc., "upon the lands of others, under proper restrictions and with just compensation." This language is not susceptible, by any fair reading, of a construction which warrants the assessment upon the landowner proceeded against of a proportionate share of the damages and expenses. The Constitution, as an instrument framed by the people for the regulation of the government, should be read with the usual significance given to words and phrases by persons of ordinary intelligence; and nothing should be implied which would add to the individual burden, or which would be in further derogation of individual rights. That which the words declare is the meaning of the instrument, and neither courts nor legislators have the right to add 49 L. R. A.

to or take from that meaning. *Newell v. People ex rel. Phelps*, 7 N. Y. 9, 97. If the amendment is so read, it only authorizes laws which will enable an agricultural landowner, desirous of draining his lands, to exercise the right of eminent domain, and thereunder to appropriate another's lands for the purpose, under such restrictions as shall be deemed proper to be made, and upon his making due compensation. No right is conferred or implied to assess a portion of the cost and expense upon the other landowners. Nor could it authorize such an assessment, without violating the Federal Constitution; for that would be to authorize the levying of a tax for a private purpose.

In the enactment of the drainage law of 1895, the legislature went far beyond the terms of the constitutional warrant; for the act provided, in addition to the exercise of the right of eminent domain, that a petitioner might compel the cost of the proceeding and of the work to be apportioned between all landowners deemed benefited by the commissioners. The scope and intentment of the law are that the expense of constructing the drain and the damage for the appropriation of property shall be borne by the petitioners jointly with the owners of the land taken, in proportion to benefits accrued. As we have pointed out, the amendment does not authorize this, and the legislature has only that general power with respect to taxation as would justify its exercise for public purposes. Private property may be constitutionally taken for public use by taxation, as it may by right of eminent domain, and the compensation which must be specially made in the latter case, when property is taken, is deemed to be received, when property is taken under the power of taxation, in the protection afforded by government to the life, liberty, and property of persons, or in the increase of the value of their possessions by the application of their moneys to the public purpose. *People ex rel. Griffin v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266. In taxation, or in taking private property for public uses, the individual is presumed to receive, or in fact does receive, some equivalent for his contribution. The legislature is doubtless the final judge as to what the public necessity and the general good require to be done, as to the extent of taxation therefor, and as to its apportionment, and it constitutes no objection to the exercise of the power of taxation that the burden thereof should be laid upon the territorial district which is exclusively affected by the legislative scheme. *Darlington v. New York*, 31 N. Y. 164, 88 Am. Dec. 248. That taxation can be authorized for a purpose not public is a contradiction in terms, and it would be an illegal assumption of power. Property is taken by assessment, which is a form of taxation, as much as if it were taken by right of eminent domain, and the warrant for it must be found in some public purpose. "The right of eminent domain or inherent sovereign power gives the legislature control of private property for public uses, and only for

such uses." Per Grover, J., in *Brevcoort v. Grace*, 53 N. Y. 245. The plan of the act of 1895 to permit the assessment of the owners of the lands taken for the construction of a drain was, in my opinion, plainly void, under the state and the Federal Constitutions, as involving the power to levy a tax for the private purpose of a landowner. If the legislature can enforce the construction of a drain at the instance of one person at the joint cost of himself and of the objecting landowners, the salutary checks imposed upon legislative power for the protection of the citizen become valueless. I quite agree, also, with the views expressed at the appellate division with respect to the power of taxation conferred by the act. To quote from the language of the opinion: "Under its provisions the authority to tax may be exercised in favor of a single person for the improvement of a single acre of agricultural land,—a result which we feel certain was not within the contemplation of the framers of the constitutional provision." As this act confers the right to take property in derogation of private rights, it is to be strictly construed. *People ex rel. More v. Jefferson County Ct.* 56 Barb. 136. It has but one object, and that is to enforce the construction of the work needed to drain or to protect agricultural lands at the joint cost of the petitioner or petitioners and of the owners of the lands taken for the purpose. All of its provisions are connected as parts of a single scheme, which, in any view, must fail for the reasons given.

Nor was there any waiver on the part of

the respondents of their right to object. They opposed the application of the commissioners to the county court for the order directing the entry of judgments against them for the amount of the assessment attempted to be levied upon them. It does not appear that they had consented to any procedure, or that they had estopped themselves by their conduct from opposing the attempt to assess them for the cost and expense of the work.

Upon either of the grounds that I have discussed, the conclusion must be reached that *the order and judgment appealed from should be affirmed*, with costs.

Haight, J., concurs.

O'Brien, Landon, and Werner, J.J., concur on second ground stated in opinion.

Parker, Ch. J., concurring:

While I agree with Judge Gray that the statute under consideration is violative of the state Constitution, and therefore concur with him in the result, I am at the same time confident that it was the design of the recent amendment to § 7 of article 1 of the Constitution to authorize legislation providing a workable scheme by which to secure the drainage of tracts of land, whether large or small, in order to provide for their proper utilization, thus establishing it to be a part of the fundamental law of the state that such drainage constitutes a public use, and that such section is not in conflict with the Federal Constitution.

INDIANA SUPREME COURT.

Lucy SHRUM, Admr., etc., of Moses Shrum, Deceased, Appt.,
v.

Joseph SIMPSON.

(.....Ind.....)

A contract by which the owner of a farm agrees with another person that the latter shall occupy and cultivate it, each furnishing a certain part of the seed, implements, and stock, and which provides that the products shall be divided at the end of a given term, or sold and the proceeds divided, does not make the occupant a partner of the owner, who will have the powers of a surviving partner on the owner's death, but only a tenant or agent.

(June 22, 1900.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Washington County in favor of defendant in an action brought

to compel defendant to account for crops raised under a farming contract. *Reversed.*

The facts are stated in the opinion.

Messrs. John L. Shrum and John C. Lawler for appellant.

Messrs. Morris & Hottel, for appellee:

The defendant and plaintiff's decedent were partners in the ownership of the property for which a recovery is sought in this action.

The parties were sharing both profits and losses equally, and under such circumstances a partnership will be presumed.

17 Am. & Eng. Enc. Law, p. 835.

It is necessary for plaintiff to allege and prove that all of the partnership debts have been paid; and she can have no right whatever to any portion of the proceeds from the partnership property until the partnership debts have been fully paid.

Powell v. Bennett, 131 Ind. 465, 30 N. E. 518.

The surviving partner has the right to the

NOTE.—On the question, What constitutes a partnership?—see *Magovern v. Robertson* (N. Y.) 5 L. R. A. 589; *Tyler v. Waddingham* (Conn.) 8 L. R. A. 657, and *note*; *Reed v. Meagher* (Colo.) 9 L. R. A. 455; *Seabury v. Crowell* (N. J. L.) 11 L. R. A. 136; *Flower v.* 49 L. R. A.

Barnekoff (Or.) 11 L. R. A. 149; *Dutcher v. Buck* (Mich.) 20 L. R. A. 776; *Webster v. Clark* (Fla.) 27 L. R. A. 126; *Carter v. McClure* (Tenn.) 36 L. R. A. 282; *Drovers' & M. Nat. Bank v. Roller* (Md.) 36 L. R. A. 767; *Ferguson v. Gooch* (Va.) 40 L. R. A. 234.

possession of the assets of the firm and to collect the debts, and he stands in the relation of trustee for the winding up of the firm's business, and all of the property of the firm goes to the surviving partner pending settlement.

Needham v. Wright, 140 Ind. 190, 39 N. E. 510; *McIntosh v. Zaring*, 150 Ind. 301, 49 N. E. 164; *Valentine v. Wyson*, 123 Ind. 47, 7 L. R. A. 788, 23 N. E. 1076; *Thompson v. Lowe*, 111 Ind. 272, 12 N. E. 476.

It is only by the appointment of a receiver that the settlement of partnership affairs can be taken out of the hands of the surviving partner.

Needham v. Wright, 140 Ind. 190, 39 N. E. 510.

A partnership may be created by parol, in relation to real estate as well as personal property.

Holmes v. McCray, 51 Ind. 358, 19 Am. Rep. 735.

A partnership may be inferred from the circumstances of the case.

Kenyon v. Williams, 19 Ind. 44.

But it does not matter whether the defendant and plaintiff's decedent held the property as partners or as joint owners; the rule is the same,—the survivor settles the business.

McIntosh v. Zaring, 150 Ind. 301, 49 N. E. 164.

Dowling, J., delivered the opinion of the court:

Appellant's decedent owned, and was in the possession of, a farm of 160 acres, in Washington county, Indiana. He entered into a farming contract with the appellee for the term of one year from March 1, 1898. The agreement was by parol. By its provisions, the appellee was to have the possession of the tract for one year from and after March 1, 1898. He was to cultivate the same, the decedent designating what crops should be planted, and in what fields they should be raised. Appellee was to have the house, the barn, and the garden plot, and was to pay \$2.50 per month as rent for them. He was to furnish all work, labor, and farming implements, excepting one half of a mowing machine; also one half of all seeds for all crops, excepting timothy seed for meadow, all of which was to be furnished by decedent in case he required the same to be sowed in wheat ground. Decedent was to furnish the other half of all seeds. Each crop grown on said lands was to be divided into two equal parts after it was harvested or gathered, and one of these parts was to belong to the decedent and the other to the appellee. Each party was to pay for threshing one half of the wheat, oats, and timothy seed, and, excepting such parts of said grain and seed as the parties mutually agreed to store for later disposition in the markets or otherwise, the said grains and seed were to be equally divided at the machine. Neither party was to haul away from said lands any of the hay, corn, straw, fodder, or unthreshed oats, but the same were to be fed to the stock on the said farm. One half of all live stock was to be furnished by each

party, and appellee was to care for and feed the same. Neither party was to create any indebtedness for which the other could be made liable. The decedent was to direct when any of the stock should be sold, and upon a sale of stock appellee was to pay decedent one half of the amount received therefor. All stock and fowls, hay, grain, and oats were to be divided, share and share alike, before March 1, 1899, and, if a division could not be agreed upon in any case, the stock not divided was to be sold, and the proceeds divided before March 1, 1899. It is alleged in the complaint that the appellee took possession of the land under this agreement, that each party furnished the seed, grain, live stock, and other articles required by its terms, and that appellant's decedent died March 11, 1898. It is further alleged that the appellant and appellee acted upon the agreement after the death of said decedent.

It is charged that appellee raised upon said lands, during said term, crops of wheat, oats, hay, corn, and stock of the value of \$800, bill of the particulars of which is filed with the complaint; that the appellee sold and disposed of all the stock, grain, and fowls, corn, hay, oats, and timothy seed; that appellant has demanded from the appellee one half of the amounts so received by him, due to said estate, but that, with the exception of one half of the wheat grown on said lands, the appellee wrongfully retains the same in his possession. The second paragraph of the complaint does not differ materially from the first, except that it alleges a demand for an accounting, and a refusal on the part of the appellee to account, and also that the money and property belonging to the estate of said decedent in the hands of the appellee are required to pay to the widow her statutory allowance of \$500. A demurrer to each paragraph of the complaint was sustained by the court, and judgment was rendered for appellee. These rulings are assigned for error.

The objections taken to each paragraph of the complaint are that it appears from the agreement sued upon that the appellee and the decedent were partners, or at least tenants in common of the property on the farm, and that in either case one of the parties having died, the appellee, as survivor, is entitled to the possession of the property so held until he has fully settled the business, and that until such settlement is made the appellant has no right to sue. 17 Am. & Eng. Enc. Law, p. 835; *Powell v. Bennett*, 131 Ind. 465, 30 N. E. 518; *McIntosh v. Zaring*, 150 Ind. 301, 49 N. E. 164; *Valentine v. Wyson*, 123 Ind. 47, 7 L. R. A. 788, 23 N. E. 1076; *Thompson v. Lowe*, 111 Ind. 272, 12 N. E. 476; *Needham v. Wright*, 140 Ind. 190, 39 N. E. 510; *Holmes v. McCray*, 51 Ind. 358, 19 Am. Rep. 735; and *Kenyon v. Williams*, 19 Ind. 44,—are referred to as sustaining these objections. Most of these cases decide nothing more than that, where a partnership is shown to exist, one partner cannot maintain an action against another for his share of the partner-

ship assets until the business of the firm has been wound up, the debts paid, and nothing remains to be done but to divide the residue of the partnership property. *Kenyon v. Williams*, 19 Ind. 44, holds that a partnership may assist in the business of buying and selling real estate. The main question here is not as to the rights of partners in partnership property, but whether the agreement between the decedent and the appellee created a partnership. While many definitions of the term "partnership" are given by jurists and courts, and various tests have been proposed by which its existence may be determined, no general rule on the subject has been or can be laid down which will apply to all cases. An author of great and exact learning states the law thus: "In short, the true rule, *ex æquo et bono*, would seem to be that the agreement and intention of the parties themselves should govern in all the cases. If they intended a partnership in the capital stock, or in the profits, or in both, then that that same rule should apply in favor of third persons, even if the agreement were unknown to them; and, on the other hand, if no such partnership were intended between the parties, then that there should be none as to third persons, unless where the parties had held themselves out as partners to the public, or their conduct operated as a fraud and deceit upon third persons." Story, Partn. § 49. Such intention must, of course, be legally ascertained; and mere declarations of the persons interested and uniting in the prosecution of a common enterprise that no partnership existed, would not be permitted to control the legal effect of acts or proceedings from which the existence of a partnership is by the law presumed. It is also to be observed that, where the rights of third parties are not involved, the contract will be liberally construed with reference to the actual understanding of the parties and the objects they had in view. *Hitchings v. Ellis*, 12 Gray, 449. There are obvious reasons for holding that farm contracts or agricultural agreements, by which the owner of lands contracts with another that such lands shall be occupied and cultivated by the latter, each party furnishing a certain proportion of the seed, implements, and stock, and that the products shall be divided at the end of a given term, or sold, and the proceeds divided, shall not be construed as creating a partnership between the parties. Such agreements are common in this country, are usually very informal in their character, often resting in parol as in the present case. In the absence of stipulations or evidence clearly manifesting a contrary purpose, it will not be presumed that the parties to such an agreement intend to assume the important and intricate responsibilities of partners, or to incur the inconveniences and dangers frequently incident to that relation. The parties to such agreements seldom contemplate anything more than a tenancy of the land, with provision for compensation

to the landlord from the fidelity, labor, and skill of the tenant. There is no community of interest in the land, which is the principal thing in the agreement, and a division and several ownership of the crops and other products are usually provided for. While the custom of renting farm lands upon shares is general, the courts have seldom held that such agreements create partnerships between the owner of the land and the tenant. A large majority of the cases construe them as creating tenancies only. *Chase v. Barrett*, 4 Paige, 148; *Quackenbush v. Sawyer*, 54 Cal. 439; *Chapman v. Eames*, 67 Me. 452; *Warner v. Abbey*, 112 Mass. 355; *Dixon v. Nicolls*, 39 Ill. 372, 89 Am. Dec. 312; *Alwood v. Ruckman*, 21 Ill. 200; *Putnam v. Wise*, 1 Hill, 234, 37 Am. Dec. 309. The agreement in question relates exclusively to the dealings of the parties with each other, and not with third persons. It distinctly separates their rights in the use and occupation of the land and in the ownership of its products. Such products and live stock were to be divided *in specie*, except that, where a division of the live stock could not be agreed upon, it was to be sold, and the amount received therefor divided. No debts were to be contracted by either party for which the other would be liable. Under this agreement the authority of the appellee to make sales of the live stock was that of an agent, and not that of a partner. Upon a fair construction of the agreement, it is evident that the appellee was the tenant and agent of the decedent, and in no sense a partner. The complaint disclosed that the appellee had in his possession moneys and property belonging to the estate of the decedent, to which the appellant, as administratrix, was entitled. The possession of the appellee of such money and property of his landlord being that of an agent, his failure and refusal to render an account of his dealings, and to make a settlement with the administratrix of the decedent, was a fraud upon the rights of the appellant. The situation of the parties and the circumstances set forth in the complaint render a discovery indispensable to establish the appellant's right, the appellee being liable for the amount realized from the sale of the property if such amount exceeded its market value, or for its market value if it was disposed of by the appellee for a less sum. Upon the face of the complaint no pretext appears for the failure of the appellee to render an account, turn over the property of the decedent to the appellant, and pay into her hands the moneys held by him belonging to the estate. The term of the tenancy has expired; all the crops and live stock have been sold, or are in a condition to be divided; there are no debts to be paid, and nothing remains to be done but to make the settlement.

The judgment is reversed, with instructions to overrule the demurrers to the complaint, and for further proceedings in accordance with this opinion.

City of SOUTH BEND *et al.*, Appis.,
v.
Edward B. REYNOLDS.

(.....Ind.....)

A city does not become indebted beyond its constitutional limit by a contract under which a person is to erect upon its land a city hall, to be leased to the city at an agreed and fair rental for a term of years, with the option to purchase the building, or, if this is not exercised, with an option to the lessor to remove it or buy the land at its statutory appraised valuation, where it does not appear that the current revenues of the city will not be sufficient to pay the indebtedness for rent each year, together with all other expenses for which the city is liable.

(June 19, 1900.)

A PPEAL by defendants from a judgment of the Circuit Court for St. Joseph County in favor of plaintiff in a suit brought to enjoin the execution of a contract for the construction of a city hall. *Reversed.*

The facts are stated in the opinion.

Messrs. O. M. Cunningham, Anderson, DuShane, & Crabill, and Howard & Orr, for appellants:

Common councils are given general control of the finances and property of cities, and they are particularly authorized to purchase, hold, or convey real estate for the purpose of constructing public buildings thereon, or using the same for other public purposes.

Burns's Rev. Stat. § 3541 (Horner's Rev. Stat. § 3106).

Discretionary powers vested by law in municipal corporations are not subject to judicial control, except in case of fraud or gross abuse of such discretion. Nor is mere difference of opinion sufficient reason for the interference of courts.

Richmond v. McGirr, 78 Ind. 192; *Foland v. Frankton*, 142 Ind. 546, 41 N. E. 1031; *Seward v. Liberty*, 142 Ind. 551, 42 N. E. 39; *High, Inj.* § 785.

When a municipal corporation contracts for a usual and necessary thing, and agrees to pay for it annually or monthly, as furnished, the contract does not create an indebtedness for the aggregate sum of all the instalments since the debt for each year or month does not come into existence until it is earned.

Laporte v. Gamewell Fire Alarm Teleg. Co. 146 Ind. 466, 35 L. R. A. 686, 45 N. E. 588; *Utica Water-Works Co. v. Utica*, 31 Hun, 426; *State v. McCauley*, 15 Cal. 430; *Rome v. McWilliams*, 67 Ga. 106; *New Orleans Gaslight Co. v. New Orleans*, 42 La. Ann. 188, 7 So. 559; *Smith v. Dedham*, 144 Mass. 177, 10 N. E. 782.

NOTE.—On the question, What constitutes an indebtedness within the meaning of the constitutional and statutory restrictions? see *Beard v. Hopkinsville (Ky.)* 23 L. R. A. 402, and *note*; *Brooke v. Philadelphia (Pa.)* 24 L. R. A. 781; *Saleno v. Neosho (Mo.)* 27 L. R. A. 769; *Carter v. Thorson (S. D.)* 24 L. R. A. 734; *Linn v. Chambersburg (Pa.)* 25 L. R. A. 217; 49 L. R. A.

Ordinary and necessary expenses are not included in restrictions upon municipal indebtedness.

Tucker v. Raleigh, 75 N. C. 267; *Rice v. Keokuk*, 15 Iowa, 579; *Grant v. Davenport*, 36 Iowa, 396; *Re Comstock*, 25 N. Y. S. R. 611, 5 N. Y. Supp. 874; *Capital City Water Co. v. Montgomery*, 92 Ala. 366, 9 So. 343; *Laycock v. Baton Rouge*, 35 La. Ann. 475; *Lott v. Waycross*, 84 Ga. 681, 11 S. E. 558; *Hequembourg v. Dunkirk*, 49 Hun, 550, 2 N. Y. Supp. 447; *Lehigh Coal & Nav. Co.'s Appeal*, 112 Pa. 360, 5 Atl. 231.

The circumstance that an incorporated town may be prohibited from incurring any debt without being authorized so to do by a petition from a majority of the resident owners of real estate does not prevent the trustees of such town from contracting for a term of years for articles of necessity.

Fowler v. F. C. Austin Mfg. Co. 5 Ind. App. 489, 32 N. E. 596; *Foland v. Frankton*, 142 Ind. 546, 41 N. E. 1031.

Even though a contract for the payment of money in excess of the constitutional limit be entered into by a municipality, yet there is no illegal indebtedness thereby created until some part of such contract obligation, in excess of such limit, is payable; and if such municipality then has in its treasury the amount necessary to make the payment then called for, and makes such payment from the money in its treasury, no illegal indebtedness will be created by such contract.

Winamac School Town v. Hess, 151 Ind. 229, 50 N. E. 81.

Messrs. Osborn & Sallwasser and Norman F. Wolfe, for appellee:

The Constitution applies, not only to present indebtedness, but also to such as is payable on a contingency, at some future day, or which depends upon some contingency before the liability is created.

Burlington Water Co. v. Woodward, 49 Iowa, 61; *Gates v. Green*, 4 Paige, 355; *McGlynn v. Brook*, 111 Mass. 219; *Harmony Lodge v. White*, 30 Ohio St. 569; *Bussman v. Ganster*, 72 Pa. 285; *Ely v. Ely*, 80 Ill. 532; *Kingsbury v. Westfall*, 61 N. Y. 356; *Smith v. Newburgh*, 77 N. Y. 130.

The allegations in the answer, that the city will have money on hand derived from the current revenues to be collected, to pay that proportion of the indebtedness which falls due each year, can have no influence upon the question.

It would be inconsistent with the objects of the constitutional provision enacted to protect municipal corporations, to make their liability depend upon some event that might or might not happen, and upon the honesty and integrity of its officials.

Doon Twp. v. Cummins, 142 U. S. 366, 35 L. ed. 1044, 12 Sup. Ct. Rep. 220.

Indianapolis v. Wann (Ind.) 31 L. R. A. 743; *McBean v. Fresno (Cal.)* 31 L. R. A. 794; *Lamar Water & Electric Light Co. v. Lamar (Mo.)* 32 L. R. A. 157; *Brashear v. Madison (Ind.)* 33 L. R. A. 474; *Kiehl v. South Bend (C. C. A. 9th Cir.)* 36 L. R. A. 228; and *National L. Ins. Co. v. Mead (S. D.)* 48 L. R. A. 785.

The question here is one of indebtedness, not of solvency or insolvency.

Council Bluffs v. Stewart, 51 Iowa, 385, 1 N. W. 628; *Fowler v. Superior*, 85 Wis. 411, 54 N. W. 800; *Chicago v. McDonald*, 176 Ill. 404, 52 N. E. 982; *Lovejoy v. Fowcroft*, 91 Me. 387, 40 Atl. 141.

Since it is the intention of the city to exercise an option to purchase at some time in the future, and since the amount paid as rentals can be deducted from the purchase money to be paid, it is a debt secured by the payments that have already been made, and the equitable interest existing thereby in the city will become forfeited upon default in paying the instalments when due.

Brown v. Corry, 175 Pa. 528, 34 Atl. 854.

The agreement is a grant to Oliver, and a contract by him to convey on payment according to the terms of the contract. What is called annual rents are annual payments to be applied as purchase money. The criterion of this is that on payment of the amount due the city has a right to demand a conveyance; the city having an interest by payment of a part of the purchase money every year, and the future payments are each year secured by the payments theretofore made.

Earles v. Wells, 94 Wis. 285, 68 N. W. 964; *Ironwood Waterworks Co. v. Trebilcock*, 99 Mich. 454, 58 N. W. 371; *Reynolds v. Waterville*, 92 Me. 292, 42 Atl. 553.

Mr. John H. Bradley also for appellee.

Monks, J., delivered the opinion of the court:

Appellee sued appellants, the city of South Bend and James Oliver, to enjoin them from carrying out a contract executed by them, on the ground that the city thereby became indebted beyond the constitutional limit. A demurrer to the answer for want of facts was sustained, and judgment rendered in favor of appellee.

It appears from the record: That the city of South Bend on October 18, 1899, was the owner and in possession of certain real estate described in the complaint, which had been purchased and was held for the purpose of erecting thereon a city hall for the use of the several departments of the city government. That on said day said city and James Oliver, coappellant, entered into a written agreement which provides that said Oliver have permission to enter upon said real estate and erect thereon a city hall for the use of said city; said structure to remain the property of said Oliver unless and until the city should exercise the option given by said contract to purchase the same. That the hall shall be suitable for the needs of the city; and according to named plans and specifications; the contract for construction to be let to the best bidder, after due notice; the cost not to exceed \$75,000; and all contracts to be approved by the city. That the building, when completed, be leased to the city for twelve years, with a right of renewal for five years longer, at a rental of \$7,200, to be paid annually as the same shall accrue from year to year. Oliver gives, and the city

reserves, an option to purchase the building at the termination of the lease, or at any time during the term, at a price equal to the original contract price thereof, with 4 per cent interest per annum, less the sum of the several amounts of rent then paid thereon with 4 per cent interest per annum on each item of said rent from the date of its payment. In case the city fail to exercise its option to purchase, Oliver has the option either to remove the building, or to purchase the ground at its statutory appraised valuation, within six months after the termination of said lease. Should he fail to exercise his option, the structure thereby becomes the property of the city. In case the exercise of any option is delayed by any order of court or by some overpowering necessity, the time so lost is not to be counted. The city is to pay taxes and insurance, but in case of fire the insurance is to be invested in repair of the old building, or in the erection of a new one. That when said contract was entered into, and since that date, said city was indebted in an amount equal to the constitutional limit. That said rent of \$7,200 to be paid annually by said city was no more than the fair rental value of said building mentioned in said contract, and described in the plans and specifications. That such expense for rent was a part of the current expenses of said city government, and was amply provided for by the annual city tax levy. That there was already in the city-hall fund, in the city treasury, nearly enough money for two years' rent, and the current revenues for the year 1899 will provide more than enough for a third year's rent. If the foregoing facts show that by said contract said city became indebted beyond the constitutional limit, the judgment must be affirmed; otherwise, it must be reversed.

It is settled in this state that if a city contracts for water, light, or other things which pertain to its ordinary and necessary expenses, and agrees to pay for the same annually or monthly as furnished, such contract does not create an indebtedness for the aggregate sum of all the annual or monthly payments, because the debt for each year or month does not come into existence until it is earned. But if the indebtedness of the city already equals or exceeds the constitutional limit, and the current revenues are not sufficient to pay such indebtedness when it comes into existence, including other expenses for which the city is liable, an indebtedness is thereby created, and the Constitution is violated. *Cason v. Lebanon*, 153 Ind. 567, 55 N. E. 768; *Laporte v. Gamewell Fire Alarm Teleg. Co.* 146 Ind. 466, 35 L. R. A. 680, 45 N. E. 588, and cases cited; *Brown v. Corry*, 175 Pa. 528, 34 Atl. 854; *Erie's Appeal*, 91 Pa. 398; 1 Dill. Mun. Corp. §§ 136, 136a. It is evident that rent for suitable offices for the officers of a city is as much an ordinary and necessary expense as the expense for water and light (*Grant v. Davenport*, 36 Iowa, 396, 403), and that, when the city agrees to pay the rent for said offices annually or monthly, the contract does not create an indebtedness for the

amount of all the annual or monthly payments. While the rent for suitable offices for city officers is an ordinary and necessary expense, the erection of a city hall or a building for the use of the city officers is not in any sense an ordinary and necessary expense, but is an extraordinary one. *Grant v. Davenport*, 36 Iowa, 396, 403. There is a clear and plain distinction between a contract for the use of rooms or a building for city purposes, and the erection by the city of a building to be used for such purposes. The one is an ordinary and necessary expense, while the other involves municipal ownership of the building or rooms, and the means of furnishing the offices, and is an extraordinary expense. *Brown v. Corry*, 175 Pa. 528, 34 Atl. 854; *Grant v. Davenport*, 36 Iowa, 396, 403. Under the contract in this case, however, the city hall is not to be erected by or for the city, but by Mr. Oliver, who is to own the same; the city being the owner of the real estate upon which it is to be erected. The only contract of the city is to pay an annual rent of \$7,200, which is admitted to be only a fair rental value for said building, and, if the city does not exercise its option to purchase said building at or before the termination of the lease, to sell and convey the real estate at the price named, provided said Oliver exercises his option to purchase the same within six months after the termination of the lease. If neither party exercises the option provided for in said contract within the time fixed, then the city-hall building becomes the property of the city. Under said contract the city is under no obligation whatever to pay anything for the erection of said building, or to purchase the same when erected. If it should attempt to exercise its option to purchase said building, but cannot do so without violating the constitutional limitation as to becoming indebted, it may be enjoined from exercising such option. No facts are alleged in the complaint showing that the current revenues of the city will not be sufficient to pay the indebtedness for rent under said contract each year when the same comes into existence, including all other expenses for which the city is liable. The allegations of the complaint do not show, therefore, that said contract creates any indebtedness in violation of the Constitution. *Cason v. Lebanon*, 153 Ind. 567, 55 N. E. 768.

It follows, therefore, that the judgment must be reversed.

Judgment reversed, with instructions to carry appellee's demurrer to the answer back, and sustain the same, to the complaint.

Thomas B. ADAMS, *Appt.*,

v.

City of SHELBYVILLE.

(.....Ind.....)

1. The legislature may create, or authorize a municipality to create, a

local taxing district for local-improvement purposes, which includes part only of the property within the municipality.

2. The legislature may declare conclusively that special assessments on account of local improvements within a taxing district shall be limited to property within that district.
3. A special assessment of property for a local improvement must be limited to the benefits which it actually receives.
4. A taxing district as a whole may be assessed on account of a local improvement therein, only to the extent of the sum of the special benefits actually received by the several parcels of contributing property.
5. The cost of a local improvement in excess of the special benefits resulting to the several parcels of property in the taxing district must be borne by the general treasury on account of the benefit to the municipality at large.
6. Property owners affected by an improvement within a taxing district are entitled to a hearing on the question of special benefits.
7. Property is not taken without due process of law by an assessment for a local improvement under Acts 1889, p. 237, authorizing by § 8 an estimate of the assessments on the basis of frontage, but providing in § 7 for a hearing of persons aggrieved before the assessment is made, as this provision impliedly authorizes and requires an adjustment of the assessments in conformity with the actual benefits.
8. A primary obligation is imposed upon a city for such deficit, if any, as there may be in the special benefits received, to meet the cost of a local street improvement, where the assessment scheme is pursued in making such improvements,—especially where the statute expressly makes the city liable to the contractor, for the contract price.
9. An ordinance for the assessment upon abutters of the cost of filling with rich dirt and sodding between sidewalk and curb is not authorized by a statute providing for grading and paving the street or the sidewalk.
10. An injunction may be granted against so much of a proposed local improvement as is not authorized by law.

(*Baker, J., dissents.*)

(April 27, 1900.)

A PPEAL by complainant from a judgment of the Circuit Court for Shelby County in favor of defendant in a suit brought to

NOTE.—For special benefits as basis for assessment, see *Asberry v. Roanoke* (Va.) 42 L. R. A. 636, and note; *Weed v. Boston* (Mass.) 42 L. R. A. 642; *Rolph v. Fargo* (N. D.) 42 L. R. A. 646; *Sears v. Boston* (Mass.) 43 L. R. A. 834; *Hutcherson v. Storrie* (Tex.) 45 L. R. A. 289; *Schroder v. Overman* (Ohio) 47 L. R. A. 156; and *Kersten v. Milwaukee* (Wis.) 48 L. R. A. 851.

enjoin defendant from undertaking certain street improvements. *Reversed.*

The facts are stated in the opinions.

Messrs. Love & Morrison and Adams & Carter, for appellant:

To levy a special assessment on a lot for a street improvement, and to sell that lot to pay such assessment, is to take from the owner of the lot his property. Such assessments have been upheld, but they are upheld on the ground that the lot is benefited by the improvement to the extent of the assessment levied, and on that ground alone.

Quill v. Indianapolis, 124 Ind. 299, 7 L. R. A. 681, 23 N. E. 788; *Heick v. Voight*, 110 Ind. 279, 11 N. E. 306; *Ross v. Stackhouse*, 114 Ind. 200, 16 N. E. 501; *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *Chamberlain v. Cleveland*, 34 Ohio St. 551; *Illinois C. R. Co. v. Decatur*, 147 U. S. 198, 37 L. ed. 134, 13 Sup. Ct. Rep. 293; *Barber Asphalt Paving Co. v. Edgerton*, 125 Ind. 455, 25 N. E. 436; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 292; *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

If, then, the right to make a special assessment upon the lots abutting on a street, for the purpose of improving the street, rests solely upon the benefit received by each lot from such improvement, no assessment can be made on any lot in excess of the benefit received by it from the improvement.

If the law authorizing such assessment does not in some way provide for ascertaining such benefits, the legislature does in an arbitrary manner strip the owner of the lot of his property, for it does not follow that a lot is actually benefited by improving a street along it.

In so far as a special assessment upon abutting lots for the purpose of improving the street upon which they abut exceeds the special benefit resulting to each lot from such improvement, in that far the owners of such lots are compelled in the most arbitrary manner to yield up their property without any compensation. Such taking of property is an act of spoliation.

Montgomery County Comrs. v. Fullen, 111 Ind. 420, 12 N. E. 298; *Parke County Coal Co. v. Campbell*, 140 Ind. 28, 39 N. E. 149, 558; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 293; *New Albany v. White*, 100 Ind. 209; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 235, 41 L. ed. 984, 17 Sup. Ct. Rep. 581; *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

The Barrett law takes from the owner his property without giving him his "day in court."

Campbell v. Dwiggins, 83 Ind. 473; *Kuntz v. Sumption*, 117 Ind. 1, 2 L. R. A. 655, 19 N. E. 474; *Swain v. Fulmer*, 135 Ind. 8, 34 N. E. 639; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 235, 41 L. ed. 984, 17 Sup. Ct. Rep. 581; *McEnaney v. Sullivan*, 125 Ind. 410, 25 N. E. 540.

The notice provided for, and by which it is sought to give to the property owner "due process of law," clearly is of the kind that 49 L. R. A.

the Supreme Court of the United States declares is not due process, for the reason that, after receiving it, the property owner cannot protect himself, but is compelled to stand by helpless, and see his property taken from him.

Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Brown v. Dwyer*, 7 Colo. 305, 3 Pac. 459.

A special assessment for local improvement is void unless the owners of the property assessed have notice and an opportunity to be heard concerning the same.

Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 292.

The council has no authority to take any part of the street and devote it to any other purpose than that for which it was intended.

Pettis v. Johnson, 56 Ind. 139; *Adams v. Ohio Falls Car Co.* 131 Ind. 379, 31 N. E. 57.

The city is to be held strictly within the limits prescribed by the statute, for the acts in question were undertaken under and by virtue of the Barrett law, and this is so declared in the resolution. On that law the improvement must stand or fall.

Kyle v. Malin, 8 Ind. 34; *Crawfordsville v. Braden*, 130 Ind. 152, 14 L. R. A. 268, 28 N. E. 849.

If the council had no authority to do the work, it should have been enjoined from doing it and putting an assessment on the appellant's lot.

Kokomo v. Mahan, 100 Ind. 245; *Cluggish v. Koons*, 15 Ind. App. 599, 43 N. E. 158; *Cass County Comrs. v. Plotner*, 149 Ind. 116, 48 N. E. 635.

The common council of a city is the creature of the legislature, and has only such powers as are given it, and such as are necessarily implied.

Lafayette v. Cox, 5 Ind. 38; *Robb v. Indianapolis*, 38 Ind. 51; *Dill. Mun. Corp.* 89.

If there is any doubt whether the council has power to do an act, the doubt must be resolved against the power. The power is limited to that which a strict construction will allow.

Lafayette v. Cox, 5 Ind. 38; *Dill. Mun. Corp.* 89.

In considering the Barrett law for the purpose of ascertaining what power is given to the council, the whole act must be considered, words must have their ordinary meaning, and the intention of the legislature is to be determined from the language used.

Terre Haute v. Mack, 139 Ind. 108, 38 N. E. 468.

In determining the validity of the Barrett law the court is to be guided by the rules of law laid down for the construction of statutes.

Constitutional provisions are superior to legislative enactments. If there is a conflict between them, the latter must yield.

Parker v. State ex rel. Powell, 133 Ind. 187, 18 L. R. A. 567, 32 N. E. 836, 33 N. E. 119; *Campbell v. Dwiggins*, 83 Ind. 480.

Special assessments have no basis upon which to rest, except the basis that a benefit is conferred upon the property assessed equal to the assessment.

Quill v. Indianapolis, 124 Ind. 299, 7 L. R. A. 681, 23 N. E. 788; *Montgomery County Comrs. v. Fullen*, 111 Ind. 420, 12 N. E. 298; *Barber Asphalt Paving Co. v. Edgerton*, 125 Ind. 455, 25 N. E. 436.

If a special assessment is made, and there is no inquiry whether a benefit is conferred upon the property assessed equal to the assessment, such an assessment is arbitrary, unjust, and invalid because it is made on a rule which excludes any inquiry as to special benefits, and the necessary operation of which is, to the extent of the assessment above the benefit, to take property without compensation.

Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 197; *Campbell v. Dwiggins*, 83 Ind. 480; *Parke County Coal Co. v. Campbell*, 140 Ind. 28, 39 N. E. 149, 558.

A valid assessment cannot be made under an invalid law or ordinance.

Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 293; *Brown v. Denver*, 7 Colo. 305, 3 Pac. 459; *Campbell v. Dwiggins*, 83 Ind. 480; *Kuntz v. Sumption*, 117 Ind. 1, 2 L. R. A. 655, 19 N. E. 474.

An assessment must be made according to some prescribed rule, and not left to the unbridled discretion of a council or trustee.

Campbell v. Dwiggins, 83 Ind. 480; *Sears v. Boston Street Comrs.* 173 Mass. 350, 53 N. E. 877.

When an act of the legislature is independent and complete in itself it cannot be aided by incorporating into it that which is not there.

Campbell v. Dwiggins, 83 Ind. 480; *Kuntz v. Sumption*, 117 Ind. 1, 2 L. R. A. 655, 19 N. E. 474.

Assessments made under this law are made on the assumption that the property assessed is benefited in a sum equal to the amount of the assessment.

Keith v. Wilson, 145 Ind. 152, 44 N. E. 13; *Barber Asphalt Paving Co. v. Edgerton*, 125 Ind. 465, 25 N. E. 436; *Terre Haute v. Mack*, 139 Ind. 109, 38 N. E. 468.

If the assessment is based upon such an assumption, it is clear that it is made under a rule which excludes any inquiry as to the special benefits received by the property assessed.

Schroder v. Overman, 61 Ohio St. 1, 47 L. R. A. 156, 55 N. E. 158; *Walsh v. Barron*, 61 Ohio St. 15, 55 N. E. 164; *Birdseye v. Clyde*, 61 Ohio St. 27, 55 N. E. 169; *Charles v. Marion*, 98 Fed. Rep. 166.

Messrs. Elliott, Elliott, & Littleton, Lisher & Chez, Wilson & Yarling, Nelson & Myers, and McConnel & Jenkins for appellee.

Hadley, Ch. J., delivered the opinion of the court:

Appellant brought this suit to restrain appellee from improving a street on which he 49 L. R. A.

owned an abutting lot. Shelbyville has less than 10,000 inhabitants, and the proceedings for the proposed improvement were instituted under the statute commonly known as the "Barrett Law" (Burns's Rev. Stat. 1894, §§ 4288-4298; Horner's Rev. Stat. 1897, §§ 6771-6780). On August 2, 1898, the common council, without any petition from the owners of the property affected, passed a resolution declaring a necessity for the improvement, the same to be executed as follows: "There shall be set and erected a curb of oolitic stone 4 inches thick, 20 inches wide, and not less than 5 feet in length, to be set 23 feet from the lot line outward, set to grade, set on a good bed of sand 4 inches thick, and to be dressed so that, when set and completed, the part of curbing that is exposed will show as dressed; the joints all to fit neat and smooth, and make close connection; and the space between the brick sidewalk on said part of said street shall be filled with good, rich dirt, and properly graded and made smooth, and when grade is made to be covered with good, live, fresh sod, to be on grade with the curbing and the brick sidewalk; . . . and that the cost and expense thereof, including advertising, labor, and material for the same, be assessed against the property on the line and collected according to the provisions of an act of the general assembly of the state of Indiana approved March 8, 1889, and amendments thereto;" and that notice should be given by publication that the common council, on August 30, 1898, at their chamber, would receive sealed proposals for the execution of the work, and would hear property owners' objections to the necessity for the construction thereof. On August 26, 1898, appellant filed his complaint, stating the foregoing facts, and alleging that the street to be improved is 100 feet wide, and the proposed widening of the sidewalks to 22 feet on each side will reduce the roadway to about 55 feet; that the making of said improvement will cost about \$1 per lineal foot, which it is proposed the abutting property owners shall pay; that it will inconvenience the plaintiff and other property owners, and make their property less valuable, because of the inconvenience in getting to and from the traveled roadway; that it will be of no benefit to the plaintiff, and damage him \$100. The sustaining of a demurrer to the complaint for want of facts is the only error assigned.

Counsel, in the introduction of their respective briefs, epigrammatically state the principal issue in this court thus: "Is the 'Barrett Law' law?" "The 'Barrett Law' is law." "The 'Barrett Law' is not law."

We will not stop now to inquire whether the demurrer to the complaint should have been overruled for a minor cause, since the appellant, as indicated by his argument, has based his appeal principally upon the question of the statute's constitutionality, and for the present the complaint will be taken as admitting that the city intends to proceed in accordance with the provisions of the statute. Appellant's contention is that the stat-

ute, in violation of the Federal and state Constitution, provides for the taking of property without just compensation, and without due process of law. Two propositions are involved: (1) Is the method of assessing the whole cost of a street improvement upon the abutting property equally by the frontage, irrespective of accruing benefits and damages, constitutional? (2) Is that the method required by the Barrett law?

Many of the courts of this country have answered the first question in the affirmative. Cooley, Tax'n, 2d ed. 1886, p. 644, says: "In many instances, where streets were to be opened or improved, sewers constructed, water pipes laid, or other improvements entered upon, the benefits of which might be expected to diffuse themselves along the line of the improvement in a degree bearing some proportion to the frontage, the legislature has deemed it right and proper to take the line of frontage as the most practicable and reasonable measure of probable benefits, and, making that the standard, to apportion the benefits accordingly. Such a measure of apportionment seems, at first blush, to be perfectly arbitrary, and likely to operate in some cases with great injustice; but it cannot be denied that, in the case of some improvements, frontage is a very reasonable measure of benefits,—much more just than value could be,—and perhaps approaching equality as nearly as any estimate of benefits made by the judgment of men. However this may be, the authorities are well united in the conclusion that frontage may lawfully be made the basis of apportionment."

In his treatise on Municipal Corporations, published in 1890, Dillon gives an extended review of the subject, and notes that the courts are very generally agreed that the authority to require property specially benefited to bear the expense of local improvements is embraced within the taxing power, and that a statute authorizing municipal authorities to make such improvements, and assess the cost in proportion to the frontage, in the absence of some special constitutional restriction, is a valid exercise of the power of taxation, and, according to the weight of authority, is considered to be a question of legislative expediency. Dill. Mun. Corp. 4th ed. §§ 752-761. And, as upholding the doctrine of the majority, the author notes (§ 760) that the Supreme Court of the United States holds that state laws imposing upon property, according to legislative discretion, the cost of local improvements, do not deprive the owner of his property without due process of law, within the meaning of the 14th Amendment. *Davidson v. New Orleans* (1877) 96 U. S. 97, 104, 24 L. ed. 616; *Mobile County v. Kimball* (1880) 102 U. S. 691, 26 L. ed. 238; *Hagar v. Reclamation Dist. No. 108* (1883) 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Wurtz v. Hoagland* (1884) 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; *Walston v. Nevin* (1888) 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192. To which may be added *Spencer v. Merchant* (1887) 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Williams v. Eggleston* (1898) 170 U. S. 304, 311, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617; *Parsons v. District of Columbia* (1898) 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521. The author, however, after considering many cases pro and con, and summing up the general principles underlying special assessments in his eighth conclusion (§ 761), affirms what he conceives to be the only true rule upon principle, as follows: "Whether it is competent for the legislature to declare that no part of the expense of a local improvement of a public nature shall be borne by a general tax, and that the whole of it shall be assessed upon the abutting property and other property in the vicinity of the improvement, thus for itself conclusively determining, not only that such property is specially benefited, but that it is thus benefited to the extent of the cost of the improvement, and then to provide for the apportionment of the amount by an estimate to be made by designated boards or officers, or by frontage or superficial area, is a question upon which the courts are not agreed. Almost all of the earlier cases asserted that the legislative discretion in the apportionment of public burdens extended this far, and such legislation is still upheld in most of the states. But since the period when express provisions have been made in many of the state Constitutions, requiring uniformity and equality of taxation, several courts of great respectability, either by force of this requirement or in the spirit of it, and perceiving that special benefits actually received by each parcel of contributing property was the only principle upon which such assessments can justly rest, and that any other rule is unequal, oppressive, and arbitrary, have denied the unlimited scope of legislative discretion and power, and asserted what must, upon principle, be regarded as the just and reasonable doctrine, that the cost of a local improvement can be assessed upon particular property only to the extent that it is specially and peculiarly benefited, and since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury."

Among the many cases cited by the author in support of his conclusion is *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634, where it is said, on page 527, Am. Dec. p. 641: "Where lands are improved by legislative action, on the ground of public utility, the cost of such improvement, it has been frequently held, may, to a certain degree, be imposed on the parties who, in consequence of owning lands in the vicinity of such improvement, receive a peculiar advantage. By the operation of such a system, it is not considered that the property of the individual, or any part of it, is taken from him for the public use, because he is compensated in the enhanced value of such property. But it is clear this principle is only applicable when the benefit is commensurate to the

burthen; when that which is received by the landowner is equal or superior in value to the sum exacted; for, if the sum exacted be in excess, then to that extent, most incontestably, private property is assumed by the public. Nor as to this excess can it be successfully maintained that such imposition is legitimate as an exercise of the power of taxation. Such an imposition has none of the essential characteristics of a tax. We are to bear in mind that this projected improvement is to be regarded as one in which the public has an interest. The owners of these waste lands have a special concern in such improvement, so far as their lands will be in a peculiar manner benefited; beyond this, their situation is the same as that of the rest of the community. The consideration for the excess of the cost of the improvement over the enhancement of the property, within the operation of this act, is the public benefit. How, then, upon any principle of taxation . . . can this portion of the expense be thrown exclusively upon certain individuals? The expenditure of this portion of the cost of the work can only be justified on the ground of benefit to the public. I am aware of no principle which will permit the expenses incurred in conferring such benefit upon the public to be laid in the form of a tax upon certain persons, who are designated, not, indeed, by name, but by their description, as the owners of certain lands."

In the recent case of *Norwood v. Baker*, 172 U. S. 289, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, filed December 12, 1898, the Supreme Court of the United States seems to have abandoned its former rulings, and to have adopted what Dillon announces as the only true rule upon principle. In that case the court said: "The particular question presented for consideration involves the validity of an ordinance of that village [Norwood], assessing upon the appellees' land abutting on each side of the new street an amount covering, not simply a sum equal to that paid for the land taken for the street, but in addition the cost and expenses connected with the condemnation proceedings." And: "The present appeal is prosecuted directly to this court, because the case involves the construction and application of the Constitution of the United States." Under a statute of Ohio, the council was authorized to assess the cost and expenses of street improvement "by the front foot of the property bounding and abutting upon the improvement." Rev. Stat. § 2264. Under this statute the village passed an ordinance providing that all costs and expenses of the condemnation and opening proceedings should be assessed "per foot front upon the property bounding and abutting on that part of Ivenho avenue as condemned and appropriated herein." The real question presented by the facts is thus stated by the court: "Does the exclusion of benefits from the estimate of compensation to be made for the property actually taken for public use authorize the public to charge upon the

abutting property the sum paid for it, together with the entire costs incurred in the condemnation proceedings, irrespective of the question whether the property was benefited by the opening of the street?" In answering the question the court says: "The power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not in fact pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received. In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation." After reviewing many authorities, and italicizing what Dillon affirms as the true rule, the court concludes: "It thus appears that the statute authorizes a special assessment upon the bounding and abutting property by the front foot for the entire cost and expense of the improvement, without taking special benefits into account. And that was the method pursued by the village of Norwood. The corporation manifestly proceeded upon the theory that the abutting property could be made to bear the whole cost of the improvement, whether such property was benefited or not to the extent of such cost." And further: "As the pleadings show, the village proceeded upon the theory, justified by the words of the statute, that the entire cost incurred in opening the street, including the value of the property appropriated, could, when the assessment was by the front foot, be

put upon the abutting property, irrespective of special benefits. The assessment was by the front foot, and for a specific sum representing such cost, and that sum could not have been reduced under the ordinance of the village, even if proof had been made that the costs and expenses assessed upon the abutting property exceeded the special benefits. The assessment was in itself an illegal one, because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was therefore the only appropriate one." Again: "The present case is one of illegal assessment under a rule or system which, as we have stated, violated the Constitution, in that the entire cost of the street improvement was imposed upon the abutting property by the front foot, without any reference to special benefits." An assessment for such improvement, to be in conformity with the opinion, is thus stated: "That, while abutting property may be specially assessed on account of the expense attending the opening of a public street in front of it, such assessment must be measured or limited by the special benefits accruing to it, that is, by benefits that are not shared by the general public; and that taxation of the abutting property for any substantial excess of such expense over special benefits will, to the extent of such excess, be a taking of private property for public use without compensation." The final judgment of the court follows: "The judgment of the circuit court must be affirmed, upon the ground that the assessment against the plaintiff's abutting property was under a rule which excluded any inquiry as to special benefits, and the necessary operation of which was, to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting property therefrom, to take private property for public use without compensation."

While the facts in the *Norwood-Baker Case* are unusual and distinguishable from the facts in the case at bar, yet it cannot be successfully denied that the general doctrine laid down is to the effect that the imposition of assessments for local improvements per front foot, irrespective of the question of accruing benefits, is in violation of the 14th Amendment to the Federal Constitution; and that the case has been so construed generally by the courts of the country, see *Loeb v. Columbia Twp.* (Jan. 9, 1899) 91 Fed. Rep. 37, involving the validity of assessments laid by a township upon abutting property for the improvement of a road; *Fay v. Springfield* (May 9, 1899) 94 Fed. Rep. 409, street-paving assessments against abutters; *Sears v. Boston Street Comrs.* (May 18, 1899) 173 Mass. 350, 53 N. E. 876, sewer assessments upon a particular class of property; *Hutcheson v. Storrie* (June 19, 1899) 92 Tex. 685, 45 L. R. A. 289, 51 S. W. 848, street-paving assessments upon abutting property; *Schroder v. Overman* (Oct. 24, 1899) 61 Ohio St. 1, 47 L. R. A. 156, 55 N. E. 158, street-pavement and sewer assessments

against abutters; *Charles v. Marion* (Dec. 11, 1899) 98 Fed. Rep. 166, street-paving assessments against abutters.

The judgment of the Federal Supreme Court defining the limits of legislative power, sanctioned by the Federal Constitution, is the supreme law of the land. It commands state courts as well as state legislatures. The duty thus imposed is agreeable, as being in accord with our sense of just principles, and as furnishing the only reasonable foundation for the exercise of the taxing power in respect to special assessments.

Streets are public highways, which all inhabitants of the municipality have an equal right to use, and by the improvement of which all are in a measure benefited. There is much justice in holding that a sum equal to the special benefits—that is, such benefits as are not shared by the citizens generally—conferred upon the abutters may be exacted for application to the costs of the improvement; for, when the corporation takes only so much as it returns in the way of enhanced values and increased personal comfort, the property owner is not injured, but when he has thus contributed his special benefits as to the remainder of the costs he stands as any other citizen. This remainder represents the price to the public for its general benefits, and when exacted from the abutters is but the taxation of a class for public benefit, and clearly a taking of property for public use without just compensation.

We conclude, therefore, that the principles applicable to assessments for local improvements are these: The legislature may create, or authorize a municipality to create, a local taxing district for local-improvement purposes, which includes part only of the property within the municipality. The legislature may declare conclusively that only the property within the taxing district shall be specially assessed on account of local improvement within that district. Each parcel of contributing property may be assessed only to the extent that it actually receives special benefits. The taxing district, as a whole, may be assessed only to the extent of the sum of the special benefits actually received by the several parcels of contributing property. The improvement, so far as its cost exceeds the special benefits resulting to the several parcels of property in the taxing district, is a benefit to the municipality at large, and such excess must be borne by the general treasury. Property owners affected by an improvement within a taxing district are entitled to a hearing on the question of special benefits.

It remains to be seen if the Barrett law denies any of these principles. Whether the answer shall be for the appellant or the appellee depends upon two considerations, namely: (1) Does the Barrett law require that the costs of street and alley improvements shall be assessed against abutting property by the front-foot rule, without regard to the question of resulting benefits? (2) Do the provisions of the Barrett law

supply to affected property owners "due process of law," within the meaning of the state and Federal Constitutions?

In arriving at the true interpretation of the statute, it is useful for us to review the legislative and judicial history of the state and county prior to the enactment of the Barrett law, in 1889. Dillon and Cooley class Indiana as one of the majority states upholding the doctrine that it is competent for the legislature to conclusively declare that the total cost of a local improvement shall be assessed equally against the frontage, and such classification was not without warrant. In 1852 the right to confer authority upon municipal officers to so provide for street and other improvements was first asserted by the legislature in a general law. Rev. Stat. 1852, p. 217. It was reasserted in 1857 (Acts 1857, p. 53), and again in 1865 (Acts 1865, Special Sess. p. 29), and again in 1867 (Acts 1867, p. 66), and again approved in 1881 (Rev. Stat. 1881, § 3163). The right to enforce such assessments was recognized by this court in 1861, *Indianapolis v. Imberry*, 17 Ind. 175, and in many subsequent decisions. The constitutionality of such legislation was never called in question until 1868, when it was assailed on the ground only that the same was in violation of the state Constitution requiring the rate of assessment and taxation to be uniform and equal. Such legislation was then and subsequently upheld as against such objection. Const. art. 10, § 1; *Goodrich v. Winchester & D. Turnp. Co.* 28 Ind. 119; *Bright v. McCullough*, 27 Ind. 223; *Palmer v. Stumph*, 29 Ind. 329; *Law v. Madison, S. & G. Turnp. Co.* 30 Ind. 77. But the constitutional question of due process of law and the taking of property for public use without compensation in the making of local improvements, within the meaning of the 14th Amendment to the Federal Constitution, seems never to have been previously considered by this court, so far as we have observed. Hence no ground exists to justify the insistence that the determination by this court, under former street-improvement laws, of the constitutional question now involved, has been carried into the enactment of the statute in controversy.

It should be noted that prior to 1889 no provision was found in any of the laws entitling property owners to a voice upon the necessity for the improvement, or to a hearing of any kind upon the acts of the assessing officers, or to be heard upon any subject touching the improvement, until after the issuance of a precept for the sale of their property for the payment of the assessment, and then only as to the regularity of the proceedings subsequent to the making of the contract for the improvement. As the law had stood for thirty-seven years, when the Barrett law came up for consideration in the assembly of 1889, municipal officers had the power, with a two-thirds vote of the council, to order an improvement, however costly and however unnecessary and oppressive, without regard to the wishes of the citizens,

and proceed to charge the abutters with the total cost by the frontage rule, irrespective of any consideration of benefits, and thus, in some instances, impose upon the citizens an absolute confiscation of property without any form of hearing in its defense, further than to require it to be done orderly and according to prescribed rule. For some reasons the people had become dissatisfied with the law as it existed upon the subject. In what respects may be best judged from the character of the changes that were made. It is evident that the discontent did not arise from the method of frontage assessments, as a rule; for that principle had been consistently maintained in every enactment since 1852, and was carried into the Barrett law. Besides, in most cases, the rule is as just and equitable as any that may be devised. In the light of thirty-seven years' experience, however, it was doubtless manifest to the lawmakers that in some instances municipal officers, by reckless and inconsiderate acts, without testing public opinion, had involved citizens in heavy and unnecessary burdens by improvements, and that it was to them equally clear that all property bordering upon a municipal highway was not affected in the same way by an improvement of the latter; that in some cases the grade may be so raised or lowered as to most seriously impair the use and value of the property; in others, that some property may be situate upon a general level, highly improved, and in a business part of the city, while others upon the same street may be remote from business, lying low, and near a watercourse and practically worthless for business or residential purposes; in others, some abutting lots may be 20 feet, and others 200 feet deep. It seems, therefore, reasonable to presume that the mischiefs resulting from the acts of reckless officials, and the common, but exceptional, cases of injustice and hardship flowing from the uniform and rigid application of the front-foot rule, were brought to the attention of the legislature, and that their avoidance was a purpose entering into the structure of the new law. *Quill v. Indianapolis*, 124 Ind. 292, 295, 7 L. R. A. 681, 23 N. E. 788. This much is certain, that for reasons deemed sufficient new and important provisions were incorporated into the new law,—provisions contained in no previous law upon the subject.

The first of these is § 2, p. 237, Acts 1889 (Burns's Rev. Stat. 1894, § 4289), and is as follows: "Whenever cities or incorporated towns subject to the provisions of this act shall deem it necessary to construct any sewer, or make any of the alley or street improvements in this act mentioned, the council or board of trustees shall declare by resolution the necessity therefor, and shall state the kind, size, location, and designate the terminal points thereof, and notice for ten days of the passage of such resolution shall be given for two weeks in some newspaper of general circulation published in such city or incorporated town, if any there be, and if there be not such paper, then in some such paper printed and published in the

county in which such city or incorporated town is located. Said notice shall state the time and place when and where the property owners along the line of said proposed improvement can make objections to the necessity for the construction thereof."

It is argued that this section affords the property owner no remedy beyond the right to advise the council with respect to the necessity for the improvement; and so it has been held by this court. *Quill v. Indianapolis*, 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788. But it does not follow that no benefit is to flow to the property owner from the observance of this provision. Municipal officers are elective, and, as a rule, in dealing with corporation affairs, will give respectful heed to the popular judgment of their constituents. This provision removes all power from the common council to impose burdens upon private property unawares the owner. It requires public notice to be given of the character and location of the proposed improvement for twenty-four days from the first publication,—a length of time sufficient to develop public opinion advisedly; and at a fixed time and place, and before making a contract, the council shall hear those along the line upon the subject of the improvement; and it may reasonably be expected that if the property owners shall be able to show that there exists no necessity for such improvement, or that it will cost more than the accruing benefits, well-meaning officers will be controlled by such showing and advice, as readily as by the positive mandate of a statute. It was not intended by this section to deprive the common council of the power of ordering the improvement irrespective of the advice of the property owners, but its purpose is to provide, in all cases, that they shall act advisedly and with deliberation.

The second and most important new provision is found in §§ 6, 7, Acts 1889 (the latter section, as amended, Acts 1891, p. 324; Acts 1899, p. 631; Burns's Rev. Stat. 1894, §§ 4293, 4294), which follow:

"When any such improvement has been made and completed according to the terms of the contract therefor made, the common council of such city, or the board of trustees of such town, shall cause a final estimate of the total cost thereof to be made by the city or town engineer, and the common council of such city, or the board of trustees of such town shall require said city or town engineer to report to the common council of such city or the board of trustees of such town the following facts touching such improvement: First. The total cost of said improvement. Second. The average cost per running front foot of the whole length of that part of the street or alley so improved. Third. The name of each property owner on that part of the street or alley so improved. Fourth. The number of front feet owned by the respective property owners on that part of said street so improved. Fifth. The amount of such cost for improvement due upon each lot or parcel of ground bordering on said street

or alley, which amount shall be ascertained and fixed by multiplying the average cost price per running front foot by the number of running front feet of the several lots or parcels of ground respectively. Sixth. The full description, together with the owner's name, of each lot or parcel of ground bordering on said street so improved. Seventh. In the case of the construction of a sewer, a description of each lot or parcel of lot benefited thereby, together with the owner's name and the fair proportion of the cost of such sewer according to the benefits conferred thereby, that should be assessed against such lot or part of a lot."

"Upon the filing of the report provided for in the last preceding section, the common council of such city, or the board of trustees of such town, shall give two weeks' notice in a newspaper printed and published in such city or incorporated town, if any there be, and if there be no such paper, then in a newspaper printed and published in the county in which such city or incorporated town is located, of the time and place when and where a hearing can be had upon such report, before a committee to be appointed to consider such reports, and such committees shall make report to the common council of said city, or the board of trustees of such town, recommending the adoption or alteration of such report, and the common council of such city or the board of trustees of such town may adopt, alter, or amend such report and the assessments therein. Any person feeling aggrieved by such report shall have the right to appear before such committees and the common council of such city or the board of trustees of such town, and make objections thereto, and shall be accorded a hearing thereon, and the common council of such city, or the board of trustees of such town, shall assess against the several lots or parcels of ground the several amounts which shall be assessed for and on account of such improvement."

It will be noted that § 6 provides that, after completion of the work, the engineer shall report certain facts to the council,—not make an assessment of the costs; that, when such report is lodged with the council, it shall give two weeks' public notice of a time and place when and where a hearing can be had upon the facts reported by the engineer, before a committee appointed by the council to consider such report, and such committee shall, after a consideration of the report, recommend to the council the adoption or alteration of the same. And any person feeling aggrieved by such report shall have the right to appear before the committee, and present objections thereto, and shall be accorded a hearing thereon, and the further right to carry his objections to the common council, where he shall also be accorded a hearing. After the hearings and objections are disposed of, the common council may adopt, alter, or amend the report and the assessments thereon, "and shall assess against the several lots or parcels of ground

the several amounts which shall be assessed for and on account of such improvement."

It is contended that the statute limits the hearing before the committee and common council to errors of the engineer in stating the facts required of him, and that the power of the council, with respect to the report, is exhausted when it has verified such facts. We are unable to approve such construction. Section 6 requires that the engineer shall report certain facts to the council; that is to say, report such facts correctly. Nothing short of a correct report is a compliance with the statute. We must view the subject as if the lawmakers assumed that the engineer would do his duty, and that when he submitted his report to the council, it accurately stated the facts required of him. Besides, will it be seriously contended that if, by inadvertence, errors crept into the report, the engineer, or even the council, at any time before final action thereon, did not have full power to correct it? *Ball v. Balfe*, 41 Ind. 221, 225. What reason, then, could there be for the legislature to deem it expedient to provide express authority in the council to correct, or cause to be corrected, errors in a report where none were reasonably supposed to exist, and where the power of correction would exist by irresistible implication? We may not attribute insincerity and dissembling to the legislators. We must believe that they meant something by these provisions beyond that granted by the old law, or why change it? The old law had been found efficient, and authorized by the Constitution.

In the search for legislative intent, "the court will look to each and every part of the statute; to the circumstances under which it was enacted; to the old law upon the subject, if any; to other statutes upon the same subject, or relative subjects, whether in force or repealed; to contemporaneous legislative history; and to the evils and mischiefs to be remedied." *Barber Asphalt Paving Co. v. Edgerton*, 125 Ind. 455, 460, 25 N. E. 437; *Reynolds v. Bowen*, 138 Ind. 434, 449, 36 N. E. 756, 37 N. E. 962; *Goodwin v. State ex rel. Foley*, 142 Ind. 117, 121, 41 N. E. 359. The common council shall give two weeks' notice of a time and place when their committee shall consider the report and hear grievances. In drainage and other assessment proceedings, it is provided that the commissioners shall inquire into certain facts, assess benefits and damages, and "make report to the court, and the court shall fix a time for hearing the report," and, after ten days' notice of the filing thereof, those affected by the report may appear and remonstrate. *Burns's Rev. Stat. 1894*, §§ 5624, 5625.

Is it even doubtful that the consideration of the report required of the committee, and the hearing they shall give thereon, relate to any other subject than the proposed assessments or allotments of the cost of the improvement? After such hearing and consideration, the committee is required to report their recommendations to the common

council, and the council, being thus advised, and upon further hearing of objections, may adopt the report as made by the engineer, distributing the total cost equally per front foot, or it may alter the report and the assessments therein; and, when the conclusion of the council is reached, it shall assess against the several lots and parcels of ground the several amounts which shall be assessed on account of such improvement. The mandate of the statute, following the hearings that the council shall assess the several amounts against the several parcels, clearly indicates the particular subject to be previously considered by the council and its committee. From the term "hearing" is necessarily implied the power to administer some adequate remedy. The council may alter the assessments; that is, as indicated by the engineer's report on the front-foot rule. "Alter" is to "make otherwise." Webster, *Int. Dict.*

From these considerations, we are unable to resist the conclusion that, upon the hearing provided in § 7, the common council have power to change assessments from the frontage rule in such cases as they may deem just. That the legislature may confer upon municipal officers the power to adjust special benefits accruing from such improvements to a fair and just basis is well settled (*Garvin v. Dausman*, 114 Ind. 429, 435, 16 N. E. 826; *Kizer v. Winchester*, 141 Ind. 694, 696, 40 N. E. 265); and the speedy and ample remedy afforded by this view of the statute is consistent with the spirit of the act and the nature of such improvement, which public convenience requires to be accomplished in the shortest practical period. As said in the *Dausman Case*, 114 Ind. 436, 16 N. E. 830: "It is essential to the public good that the necessity for street and other public improvements, and the cost of making them, and such other proceedings as are necessary to insure the prompt execution of the work, be determined and taken in a comparatively summary way." An "assessment" is the "adjusting the shares of a contribution by several towards a common beneficial object, according to the benefit received." Bouvier, *Law Dict.*; Anderson, *Law Dict.* From the power to alter is necessarily implied the power to add to or diminish. The absence of an express rule for guidance in the exercise of the power to alter does not impair it. It is sufficient if the power to change the assessment from the frontage rule exists. "It is a well-affirmed principle that, where a power is conferred by a statute, everything necessary to carry out the purpose of the power conferred and make it effectual and complete, will be implied." *Conn v. Cass County Comrs.* 151 Ind. 517, 525, 51 N. E. 1064; *Sutherland, Stat. Constr.* §§ 340, 341. Such implied power, however, will not authorize the employment of means and methods which may spring from the whims and caprices of administrative officers, according to the varying circumstances, but will only permit the use of such reasonable, uniform, and consistent modes and measures as are

calculated to accomplish the purpose in the spirit designed. How the power may be exercised in this instance must be determined from the spirit and scope of the whole act, of which said § 7 is a part, as aided by the spirit and principle running through other legislation upon the same and kindred subjects. *Id.* § 288. In an act relating to the opening and improvement of streets (Burns's Rev. Stat. 1894, § 3633; Rev. Stat. 1881, § 3170; Horner's Rev. Stat. § 3170), commissioners are commanded to make assessments on the basis of actual benefits. The same rule is required in drainage and free gravel-road proceedings (Burns's Rev. Stat. 1894, § 5658; Rev. Stat. 1881, § 4288; Horner's Rev. Stat. § 4288, Acts 1869, p. 74); and this court has consistently held for thirty years that special benefits are the only foundation for special assessments (*New Albany v. Cook*, 29 Ind. 220; *Ross v. Stackhouse*, 114 Ind. 200, 16 N. E. 501; *Quill v. Indianapolis*, 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788; *Barber Asphalt Paving Co. v. Edgerton*, 125 Ind. 455, 465, 25 N. E. 436).

The published notice calls attention of all persons affected that the report of the engineer is before the council for consideration, and that the same is subject to such alteration as the council may deem just in adjusting the several assessments to the basis of actual benefits, and all persons concerned are bound to know that the prima facie assessments against their property are liable to be increased as well as decreased. That this court, prior to 1889, supported the doctrine that the legislature had constitutional sanction to declare, as matter of law, that the special benefits to a particular district, by an improvement, were equally received by bordering property, and equal to the total cost, had little force as an argument. The answer to it is that the injustice and hardship resulting from the doctrine were potential in securing legislative action for the amelioration of the rule. We think it evident that the assembly of 1889 determined upon a modification of the old rule, so far as it required an equal distribution of the cost of an improvement, on all bordering property, without regard to the question of actual benefits. Not that the rule offended either the Federal or state Constitution as then interpreted by the Federal and state courts (for no question of that character had been raised in this state), but because it was required by the simplest principles of justice. That act of 1889 may be tested by the usual canons of construction, and if from these it appears that the assembly took cognizance of the mischiefs resulting from the old law, and provided a remedy in advance of constitutional requirement, the legislature is not to be discredited by the fact that the courts have come to restrict the constitutional limitations to the bounds set by the statute. The important inquiry is, Is the statute, as enacted in 1889 and as it now stands, antagonistic to any of the principles of the Federal Constitution as now construed by the United States Supreme Court? 49 L. R. A.

Section 3 provides: "In all contracts specified in the preceding section, the cost of any street or alley improvement shall be estimated [not assessed], according to the whole length of the street or alley or part thereof to be improved, per running foot, . . . and the city or incorporated town shall be liable to the contractor for the contract price of said improvement, and the owners of lots or parts of lots bordering on such street or alley or part thereof to be improved, . . . shall be liable to the city for their proportion of the costs in the ratio of the front line of the lots owned by them, to the whole improved line for street and alley improvements, . . . and the city or incorporated town shall have a lien upon such lots or parts of lots respectively from the time such improvement is ordered for such costs of improvement, collectable as hereinafter provided. . . . Such city or town shall be liable and pay for all that part of such street or alley improvement as shall be occupied by the street or alley crossings and may order that any part of the total cost of any of the improvements in this act mentioned shall be paid out of the general fund."

The gist of these provisions is that, in providing for the payment for an improvement, the expense of it shall be estimated—that is, calculated—by the running foot; the city or town shall be liable to the contractor for the full contract price, and to reimburse it the owners of lots shall be liable to the city or town for their legal proportion of the cost in the ratio of their several frontage to the whole frontage of the improvement, which liability shall constitute a lien upon abutting property in favor of the city or town from the time such improvement is ordered.

Three things may be noted in these provisions: (1) That the cost shall be estimated by the running foot, not so assessed; (2) that the liability shall relate to the frontage; and (3) that the liability and lien shall arise and attach at the time the improvement is ordered. There is nowhere to be found a mandate that the cost shall be assessed by the frontage rule, or that property shall ultimately be required to contribute equally per front foot. The measure of liability and lien here mentioned are only conjectured at most, since they arise before an ascertainment of the facts, by measurement, necessary to their definite determination. The provision can only mean that the liability and lien, when definitely ascertained by the report of the engineer, as required by § 6, as reviewed and adjudged by the common council, as required by § 7, shall relate back to the time of ordering the improvement.

If we read § 3 as providing a fixed rule of assessments, as contended, the effect is to render § 7 meaningless and nugatory; for it clearly follows that, if the rule of assessments is unalterably fixed by § 3, the hearing provided for in § 7 is nothing more than a cunningly devised illusion, which expressly provides that the aggrieved property owners

shall have the right to present their grievance to a tribunal that has no power to grant relief. This is mockery, pure and simple, and implies insincerity and dissimulation in the lawmakers, which we cannot indulge. On the other hand, if we read § 3 as providing a basis for assessments which shall be prima facie correct, and which shall be held to be the true and correct assessments until assailed by the property owner, and shown upon a hearing by a preponderance of proof or found to be unjust and altered and amended by the common council of its own motion, then we find §§ 3, 6, and 7 in complete harmony, each effective and in accord with the other provisions of the act. The intention is to be ascertained by considering the entire statute; and we must proceed as we would with any other composition, construing it with reference to the leading idea and purpose of the whole instrument. The general intent is the polar star by which the meaning of any part is to be determined with a view to harmonizing the entire act. Sutherland, Stat. Constr. § 239. We therefore conclude that § 3, Acts 1889 (Burns's Rev. Stat. 1894, § 4290), must be construed as providing a rule of prima facie assessments in street and alley improvements, which allotments by the city or town engineer, under § 6 of said act of 1889 (Burns's Rev. Stat. 1894, § 4293), are subject to review and alteration by the common council and board of trustees, under § 7 of said act of 1889, as amended (Acts 1891, p. 324; Acts 1899, p. 64; Burns's Rev. Stat. 1894, § 4294), upon the basis of actual special benefits received by the improvement; and that under said § 7 the common council of a city or board of trustees of an incorporated town have not only the power, but it is their imperative duty, to adjust the assessments for street and alley improvements, under said act, to conform to the actual special benefits accruing to each of the abutting property owners.

The further question is propounded: If, in adjusting assessments to actual special benefits received, it shall be found that the total cost of the improvement exceeds the total sum of special benefits accruing therefrom, what provision is made for the excess of cost? It is quite clear that the common council or board of trustees have no power to impair the obligation of contracts, and that some provision must be made for full payment of the contract price for the improvement. Section 5 of said act (Burns's Rev. Stat. 1894, § 4292) reads as follows: ". . . The common council of such city or board of trustees of such town, with the concurrence of two thirds of the members thereof, may order or cause any or all of the improvements mentioned in the first section of this act, and repairs of any kind of streets and alleys to be made in like manner, without such petition, and either charge and cause any or all of the expenses thereof to be assessed, as hereinafter provided, when petition is made, or if it is deemed just and right by the common council of such city or

the board of trustees of such town to cause such expenses, or any part thereof, to be paid out of the general revenue of the city or incorporated town." Here is a new power granted the common council and board of trustees to order, by a two-thirds vote, any improvement as fully as they could do upon a petition, as provided by § 1; and, when the body chooses to exercise this power, it may elect between three schemes in providing payment for street and alley improvements. It may either charge the whole expense against the general revenues of the city or town, or it may charge a part against the general revenues, and a part against the abutting property, or it may charge all the expense of such improvement against the abutting property, upon the presumption, which it may for the time indulge, that the aggregate special benefits accruing therefrom will be equal to the total expenses; but it must take notice, when it decides to charge the abutting property, that the expenses shall be assessed "as hereinafter provided" in §§ 6 and 7, which, as we have seen, must be done upon the basis of actual special benefits received.

Section 3 provides that "the city or incorporated town shall be liable to the contractor for the contract price of said improvement," and when a city or town enters into a contract, under the scheme of requiring the abutters to contribute to the cost to the extent of their special benefits, the corporation is bound to know that if it shall be found, upon the hearing provided in § 7, that the accruing special benefits are inadequate to pay the expenses of the improvement, the deficit must be provided for from the general revenues of the city or town. The question of deficit cannot be determined until the common council has concluded its hearing and made the assessments. At this stage, the improvement has been completed, and the contractor entitled to his pay. It is then too late to halt or retreat. No course is then open to the corporation but to go forward, and put into exercise the power conferred by § 3, and order the deficit paid from the general treasury. The contingency of a deficit arises from the law, and enters into, and becomes a part of, the order for the improvement, and a part of the contract therefor, and is but a reasonable exercise of the continuing power to pay any part of the expenses from the general revenues when the fact arises that they cannot be fully met by the special benefits. The entering into a contract, under the scheme of requiring contribution from special benefits to the extent thereof, is an election between methods of payment, and, when once chosen and entered upon, the procedure thereunder, as fixed by the law, is as imperatively commanded as if no other existed. The insistence, therefore, that the law contains no mandate that the common council or board of trustees shall, in any event, pay any part of the expenses of such improvements from the general revenues, cannot be sustained.

We are aware that this court has held

that, when the assessment scheme is pursued in making such improvements, the city or town assumes no primary liability, except for street and alley crossings; and what we here hold is that, as to a deficit only, if any, in special benefits to meet the cost of an improvement, the city or town sustains the same primary obligation imposed upon it for street and alley crossings. There is language used in *Terre Haute v. Mack*, 139 Ind. 99, 38 N. E. 468, and perhaps in other cases, in this and the appellate court, not necessary to the decision of any question presented by the record, that appears in conflict with what is here decided, but, in so far as such language may so appear, it is disapproved. The canons of construction compel the interpretation which we have given this act, and, so construed, it is not obnoxious to any provisions of the state or Federal Constitution, either under the *Norwood-Baker Case* or the earlier decisions of the Supreme Court of the United States or of this state.

It is proposed by the improvement which affects the appellant to reduce the roadway of the street from 70 to 56 feet in width, by an extension outward of the sidewalks from 15 to 22 feet. The sidewalks have heretofore, under corporation direction, been improved to a width of 15 feet from the lot lines, the first 10 feet paved with brick, and the balance to the curb graded and sodded; and it will be noted, from the facts stated on the first page of this opinion, that a part of the proposed improvement consists of filling the space between the brick sidewalk and the new curb with "good, rich dirt," to be smoothed to a grade with the brick sidewalk and new curb, and covered "with good, live, fresh sod." The point is made that, conceding the constitutionality of the Barrett law, the ordinance is void for want of power in the common council, under the statute, to assess the cost of filling with rich dirt and sodding against the abutters. The first section of the act (Burns's Rev. Stat. 1894, § 4288) provides that the common council "may have the sidewalk graded and paved, or the whole width of the street graded and paved," under the provisions of the act. It may well be doubted if the authority here conferred can be extended to grading with a particular quality of earth, designed, not for the permanency of the improvement, but to produce a luxuriant vegetable growth. We think the words "grading and paving" are employed in the statute in the sense that the surface of the ground shall be made to conform to a regular line by cutting and filling with any sort of dirt suitable to the maintenance of the grade, and which may be most cheaply obtained, and smoothly covering the same with some hard substance, with the single view to permanency and easy travel for footmen and vehicles.

It is probably true, though we do not so decide, that the common council, in their general dominion over the streets, have implied power to construct lawns, and otherwise decorate those parts of the street not necessary to public travel, at the expense of the general treasury; but when it seeks to

exercise the taxing power, and to levy upon a particular class the cost of an improvement purely ornamental, it must be able to point to some express provision of the statute conferring the right. No power to tax will arise by implication. *Doe ex dem. Lemon v. Chunn*, 1 Blackf. 337, 338; *Lafayette v. Cox*, 5 Ind. 38; *Slessman v. Crozier*, 80 Ind. 487; *Gallup v. Schmidt* (Ind.) 56 N. E. 443. The council has express authority of law to require the planting of shade trees at the expense of the abutters (Burns's Rev. Stat. 1894, § 3541, cl. 46; Horner's Rev. Stat. § 3106, cl. 46); but it cannot be said that this right carries with it the power to construct lawns or other decorations in the streets, and to enforce the cost thereof against the abutters. The power is, at least, doubtful, "and any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." Dill. Mun. Corp. 4th ed. § 89, Approved in *Craufordsville v. Braden*, 130 Ind. 149, 152, 14 L. R. A. 268, 28 N. E. 849; *Williams v. Davidson*, 43 Tex. 33; *Corvallis v. Carlile*, 10 Or. 139; *Kirkham v. Russell*, 76 Va. 956. We therefore hold that the ordinance, so far as it provided for the grading with rich dirt and sodding as a part of the proposed improvement, was void, as being *ultra vires*, and that the appellant was entitled to an injunction against so much of said proposed improvement. Equity will enjoin the exercise of an unauthorized power. *Sackett v. New Albany*, 88 Ind. 273, 45 Am. Rep. 467; *Henry County Comrs. v. Gillies*, 138 Ind. 667, 673, 38 N. E. 40; Dill. Mun. Corp. 4th ed. § 914.

If entitled to any part of the relief sought, the demurrer to the complaint should have been overruled.

Judgment reversed, with instructions to overrule the demurrer to the complaint.

Baker, J., dissenting:

I regret my inability to agree with my brethren in their construction of the Barrett law. In stating my reasons, with all due deference, I think it proper first to determine accurately the question presented for solution. The Federal Constitution is not what the citizen may read it to be, but is what the Supreme Court of the United States declares it to be. I concur in the statement that, prior to the *Norwood-Baker* decision, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, the method stated in Dill. Mun. Corp. 4th ed. § 752, was constitutional; that is, that the legislature, in its discretion, might declare as a matter of law that the whole cost of a street improvement and the special benefits to abutting property equaled each other, and that the cost should be apportioned according to frontage, and that the property owners were entitled to a hearing before a tribunal authorized to review the assessment and see that it justly conformed to the frontage basis. For brevity, I shall call this the "old" Constitution. I concur in the statement that, since the *Norwood-Baker* decision, the method stated in § 752 of Dillon is unconstitutional, and that nothing short of the meth-

od stated in § 761 of Dillon is constitutional; that is, that the legislature must provide a method by which the special benefits to contributing property shall be determined as a question of fact, and that the excess of cost above the sum of special benefits is a general benefit, to be paid for from the general treasury, and that property owners are entitled to a hearing before a tribunal authorized to review the assessment, and see that it justly conforms to the basis of benefits in fact received. For brevity, I shall call this the "new" Constitution. The text-books and reports are full of the general statement that "the only basis for special assessments is special benefits." Concerning this proposition there has never been any disagreement, so far as I have been able to learn. But from this common starting point two very dissimilar lines of thought have been followed. In one it was said: "Special benefits are the only legitimate basis for special assessments, but the legislature may declare, as a matter of law, that the property owner's special benefits are exactly equal to his special assessment by frontage." In the other it was said: "Special benefits are the only legitimate basis for special assessments, but the property owner may not be specially assessed beyond his special benefits found as a matter of fact." So, finding in reported cases the expression that special benefits are the only legitimate basis for special assessments does not of itself show which theory a court has adopted. It is hardly conceivable that a court would be following out the two theories at the same time. They seem as far apart as the poles, as essentially different as a question of law is from a question of fact. A legislative act, it seems to me, must have some consistent theory underlying it. It cannot well be two different things at once. The legislature must have intended the one or the other,—not both. And though it is within the range of possibilities that the legislature in 1889 might have framed a law which would meet the requirements of the "new" Constitution of 1898, and which would be permissible under the "old," the question is, Which theory was it that the legislature intended to conform to in the Barrett law? Is it likely that, by prescience or by chance, the legislature hit upon the requirements of the "new" Constitution that were not in the "old?" Or, on the contrary, did the legislature intend to carry out the same policy, sanctioned by the judiciary, that had then been in operation for nearly forty years, with the addition of the bond feature?

Before proceeding with the question, it may be well to notice two lines of argument advanced by counsel for appellee, to which my brethren, perhaps unconsciously, may have accorded some weight. One is that this court must presume that the legislature intended its act to conform to the Constitution, and therefore this court, by intendment, should supply to the act whatever is needed to make it constitutional. The other is that the Supreme Court of the United States will follow any line of decision that this court

may adopt. Whether or not this last statement is true is not within the province of this court to decide; and whether, if that were true, it is an argument addressed to the reason, or an appeal to what counsel may believe to be the prepossessions, of this court, is not worth while to consider. But counsel's first contention is of great importance. If the contention were correct, then this court and every court has committed a grievous wrong against an independent and co-ordinate branch of the government every time a statute has been held to be unconstitutional. But it seems to me such a process is not judicial construction. Judicial construction is not an unbridled force, operating this way in one case and that way in another, according to caprice, or what courts may think would be good legislative judgment. The function of judicial construction is, not to hold statutes constitutional, but to determine the meaning of statutes. If it is found that the legislature has acted within the scope of its powers, courts should let the act alone, whether they deem it wise or not. If it is found that the legislature has usurped power, and invaded the reserved rights of the people, it should be the duty of the courts rigorously and jealously to uphold the rights of the people even if they think the legislature ought to have the power it attempted to exercise. The first business of the courts is to ascertain judicially the meaning of the statute. Whether the statute is constitutional or unconstitutional cannot be determined until the meaning of the statute is first determined; and that meaning should be determined according to rules of law that the courts should uniformly follow. If courts recognize no rules in declaring the legislative intent, or disregard the lawful order of applying recognized rules, the people, the bar, and the inferior tribunals would have no means by which to make even a fair guess at what would finally be declared to be the law. If there is no law to control courts' interpretation of law, as well might there be no law at all. *Non licet iudicibus de legibus judicare, sed secundum ipsas.* But, if counsel were correct in the contention that the court should first examine the Constitution, and then, by construction, mold the statute to fit it, the argument, it seems to me, should operate against appellee, and not in its favor, for the Constitution that the members of the legislature of 1889 had sworn to support was the "old" Constitution. They may have had the prevision to see that a "new" one was coming, but they were not bound to frame their laws according to its fashion. Yet the impression remains with me that my brethren have first laid out the new pattern and then cut the old material to fit it.

The Barrett law is too lengthy to set out here in full. But, omitting such portions as are exhibited in the majority opinion, I shall endeavor to give the framework of the statute. The 1st section provides for the beginning of street improvement proceedings by the petition of property owners. The 2d

section authorizes the common council to declare by ordinance the necessity for street improvements, and directs notice of the passage of such an ordinance to be given by publication. "Said notices shall state the time and place when and where the property owners along the line of said proposed improvement can make objections to the necessity for the construction thereof." This section does not purport to relate to the method of assessment, or to give property owners a hearing on any subject except the necessity of the proposed improvement; and, as the power to decide is left within the unqualified discretion of the council, the objections which property owners could make on the question of the necessity of the improvement would necessarily be advisory only. Accordingly, it is decided by this court that the common council may enter an order for the construction of the improvement before giving notice of the resolution of necessity. *Barber Asphalt Paving Co. v. Edgerton*, 125 Ind. 455, 462, 25 N. E. 436. This being so, I am unable to perceive how § 2 has any application to the construction of the sections that point out the procedure after the construction of the work has been determined upon. The 3d section, omitting the part in reference to sewers, declares that "the cost of any street or alley improvement shall be estimated according to the whole length of the street or alley, or the part thereof to be improved, per running foot, . . . and the city or incorporated town shall be liable to the contractor for the contract price of said improvement, and the owners of lots or parts of lots bordering on such street or alley, or the part thereof to be improved, . . . shall be liable to the city for their proportion of the cost in the ratio of the front line of their lots owned by them to the whole improved line for street and alley improvements, . . . and the city or incorporated town shall have a lien upon such lots or parts of lots, respectively, from the time such improvement is ordered, for such costs of improvement, collectable as hereinafter provided, . . . and the owners of such unplatted lands bordering on such street or alley or part thereof to be improved shall be liable to the contractor for their proportion of the cost in the ratio of the front lines of such unplatted lands owned by them to the whole improved line; and in making the assessment against such owners for the improvement of such lots or parts of lots and unplatted lands [the cost] shall be assessed upon the ground fronting or immediately abutting on such improvement back to the distance of 150 feet from such front line, and the city or incorporated town and the contractor shall have a lien thereon for the value of such improvement. . . . Any mistake in the description of the property or in the name of the owner shall not vitiate the lien of such assessment. Such city or town shall be liable and pay for all that part of such street or alley improvement as shall be occupied by the street and alley crossings, and may order that any part of the total cost of any of the improvements in this act mentioned shall be

paid out of the general fund." The 4th section provides for an allowance to the owner of any lot who, before the contract is let, has made any improvement in front of his lot in accordance with the general plan of improvement for his street, and provides for taking security from the contractor. The 5th section: "When any such contract shall be made, or shall have been heretofore made, and shall have been in progress of fulfillment, the common council . . . shall have power to cause estimates to be made from time to time of the amount of work done by the contractor, and to cause the same to be paid out of the treasury, deducting a reasonable amount of percentage to secure the completion of the contract until the whole shall be finished, and to prescribe the time in which the whole shall be completed, and such estimates shall be a lien upon the several parcels of ground upon which they are assessed to the same extent that taxes are a lien, and shall have the same preferences over other demands, and such liens shall be in favor of the city or incorporated town and the owners of the certificates or bonds hereinafter mentioned, to secure the city or incorporated town and such owners the reimbursement for such cost of improvement hereinafter provided for. The common council of such city or the board of trustees of such town, with the concurrence of two thirds of the members thereof, may order or cause any or all of the improvements mentioned in the 1st section of this act, and repairs of any kinds of streets and alleys to be made in like manner, without such petition, and either charge and cause any or all of the expenses thereof to be assessed and collected, as hereinafter provided, when petition is made, or if it is deemed just and right by the common council of such city or the board of trustees of such town, to cause such expenses, or any part thereof, to be paid out of the general revenue of the city or incorporated town." The 6th and 7th sections are set out in the majority opinion. The 8th section authorizes the issuance of improvement bonds, in anticipation of the collection of the assessments, for the payment of which bonds the lotowners provide the money in annual instalments, and commands that, after the assessment has been confirmed by the common council, "no suit shall lie to restrain or enjoin the collection of such assessment, and the validity of such assessment shall not be questioned, and such bonds, when issued, shall transfer to the owner thereof all the right and interest of such city or incorporated town in and to such assessments and the liens thereby created, with full power to enforce the collection thereof by foreclosure or otherwise, under any of the provisions of this act." The 9th section provides for the foreclosure of assessment liens, and transfers the city's interest in the liens to the holders of the bonds. The 10th section authorizes the collection of assessments by the city treasurer by sale upon precept, and allows the lotowners the right of appeal to the circuit court of the county, but "in case the court and jury shall find, upon trial,

that the proceedings of said officers subsequent to said order directing the work to be done are regular, that a contract has been made, that the work has been done, in whole or in part, according to the contract, and that the estimate has been properly made thereon, then said court shall direct the property to be sold and conveyed by the sheriff thereof as the said treasurer is hereinafter directed to sell and convey property liable to street improvements." In regard to § 10, it is evident that, under any construction of § 7, the appeal from the precept has become nugatory; for, the assessments having been made conclusive on the hearing before the council, the property owner may not again contest what has been finally adjudicated. But § 10 is important in considering the changes made in street improvement proceedings by the Barrett law.

Now, the question being under which of the two inconsistent methods of laying assessments the legislature intended to act,—whether under the old Constitution, according to special benefits declared as a matter of law, or under the new, according to special benefits, to be determined by the assessing officers as a matter of fact,—the answer should require an examination of the whole statute in the light of the circumstances surrounding the legislators in 1889, in order to determine the entire scope and manifest intent of the act. And the first of these circumstances is the attitude of this court. For nearly forty years prior to 1889 street improvements were made in this state under laws that declared that the special benefits and the assessments by frontage for the entire cost, except for street and alley crossings, equaled each other; and this court uniformly held that such laws were in harmony with the old Constitution. In *Snyder v. Rockport Trustees* (May term, 1855) 6 Ind. 237, an act was assumed and declared to be constitutional that directed the town board, on petition of two thirds of the owners of abutting property, to assess the whole cost upon all abutting property and to apportion the cost according to the last assessed valuation of such property. In *Goodrich v. Winchester & D. Turnp. Co.* (May term, 1866) 26 Ind. 119, the constitutionality of a local assessment act, wherein the legislature had fixed the "special benefits" arbitrarily as a matter of law, was under consideration, and this court, among other things, said: "It is claimed that the assessment authorized by this statute is not a tax, not a burden or charge imposed by the legislative power of the state upon persons or property to raise money for public purposes, but the exercise of the power of eminent domain, in taking private property for public use 'without just compensation.' There is a manifest distinction between the taxing power and that of eminent domain. Both, in effect, appropriate private property to public uses. They differ only in degree. Taxation exacts money from individuals as their share of the public burdens, and the taxpayer, according to the theory of our system, receives a just com-

pensation in the benefits conferred by the government in the proper application of the tax. When, however, property is appropriated by virtue of the right of eminent domain, it is taken, not as the owner's share of a public burden, but as so much more than his share. Many of our public improvements are local in their character, and confer special benefits on those in their immediate vicinity. By a long line of decisions of this court, these benefits may be set off against damages sustained by the appropriation of private property for public use in the construction of such works. In the case in judgment the legislature has determined—and this matter is within its power—that this is a proper subject for taxation, and that the burden imposed is the just share of each person embraced within the provisions of the act." In *Palmer v. Stumph* (May term, 1868) 29 Ind. 329, it was said: "By this act the rate is the same upon everyone within reach of the assessment; that is, the exact benefit each may receive from the improvement of the street. The legislature have adopted this method of reaching that result. It is certainly reasonable to suppose that, as a rule, property along the line of a street improved will be equally benefited; that, as a rule, the property fronting upon a street, foot by foot, will be of equal value, and should therefore be equally assessed." In *Ray v. Jeffersonville* (May term, 1883) 90 Ind. 567, an assessment under the street improvement law of 1881 was attacked on the ground that the act was in violation of § 21, art. 1, of our Constitution, which provides that "no man's property shall be taken by law without just compensation;" and the court held the act valid as against that objection. This court, through Mitchell, Ch. J., in *Ross v. Stackhouse* (Nov. term, 1887) 114 Ind. 200, 16 N. E. 501, declared: "Special assessments for street and other similar improvements are upheld upon the theory that each lot or tract of land assessed is benefited in a special and peculiar manner in a sum equal to the amount estimated or assessed against it." Through the same judge, the court in *Garvin v. Daussman* (May 8, 1888) 114 Ind. 429, 16 N. E. 826, in speaking of the kind of notice and hearing that was thought to satisfy all constitutional requirements, said: "In the imposition of poll or occupation taxes, where a certain sum is assessed against each individual exercising a given avocation, or according to his age, without regard to actual benefits, the necessity of notice and a hearing is reduced to a minimum. To a measurable extent, the same principle is involved when the cost of an improvement is, as by law in proper cases it may be, apportioned by mere mathematical calculation, according to a certain rate per front foot. . . . The principle which underlies and upholds special assessments, such as that involved in the present case, is that the lands assessed are enhanced in value to an amount equal to the cost of the improvement, which is to be apportioned among those specially benefited in the manner prescribed by law. . . . It is essential to the public good

that the necessity for street and other public improvements, and the cost of making them, and such other proceedings as are necessary to insure the prompt execution of the work, be determined and taken in a comparatively summary way. . . . If, therefore, the law provides for giving notice, and for a method whereby the property owner may ultimately challenge the correctness of the assessment made against his property, in respect to whether it was made in good faith, without intervening mistake or error, and according to the method and under the safeguards provided by the law—the constitutional provision is deemed to be satisfied."

Taking the foregoing as a fair illustration of the judicial history of the question down to 1889, I cannot agree in the statement that the constitutionality of the front-foot method had been considered only in reference to the provision requiring uniformity and equality in taxation, and never in reference to "just compensation" and "due process of law;" and I am unable to reconcile such a contention with the admission that Dillon and Cooley were not without warrant in classing Indiana "as one of the majority states upholding the doctrine that it is competent for the legislature conclusively to declare that the total cost of a local improvement shall be assessed equally against the frontage." The legislature of 1889 not only knew this judicial history, but also were aware that it was occasioned by a uniform and consistent course of legislation since 1852. Prior to 1889 the street improvement laws had been changed many times, and yet it is agreed that the underlying plan remained the same. In 1889 certain changes were made; and my brethren, if I understand them, state that the legislature intended to abandon the whole theory of local assessments under the "old" Constitution, and to adopt the theory of the "new." And this on account of the people's dissatisfaction with the law. But it is said that "it is evident that the discontent did not arise from the method of frontage assessments as a rule, for that principle had been consistently maintained in every enactment since 1852, and was carried into the Barrett law." The last declaration of this court on the subject of street improvements prior to the meeting of the legislature in January, 1889, was made in *Garvin v. Dausman* (May, 1888) 114 Ind. 429, 16 N. E. 826. In that case, as in some earlier ones, the constitutionality of the arbitrary front-foot method was upheld, not only in respect to "uniform and equal taxation," but also in respect to "just compensation" and "due process of law;" and the court then advised the legislature that "the determination of the common council . . . may be made conclusive."

. . . It is essential to the public good that the necessity for street and other public improvements, and the cost of making them, and such other proceedings as are necessary to insure the prompt execution of the work, be determined and taken in a comparatively summary way. In making up the Barrett law, the legislature did not strike out into

new fields; but they took, as the foundation to work upon, the old street improvement statutes of this state, which are confessedly based upon the arbitrary front-foot method; and adopted from other states certain elements that stood as component parts of the arbitrary front-foot method. Compare Bates's Anno. Stat. (Ohio) 1899, §§ 2293a, 1-9, and §§ 2293b-2293d. Also N. Y. Laws 1870, chap. 619; N. Y. Laws 1881, chap. 689; N. Y. Laws 1884, chap. 510; N. Y. Laws 1885, chaps. 396, 406; N. Y. Laws 1893, chap. 550; N. Y. Laws 1895, chap. 816; and *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682; *Jones v. Tonawanda*, 158 N. Y. 438, 53 N. E. 280; *Lyon v. Tonawanda*, 98 Fed. Rep. 361. The new features that were not in our former statutes are the provisions for the resolution of necessity, for the issuance of bonds and the foreclosure of the liens represented thereby, for the laying of the assessments by the city engineer, and for the substitution of the common council for the circuit court as the tribunal whose judgment, after a "hearing," makes the assessments conclusive. As these features are well adapted to fit into the scheme of laying street assessments by the arbitrary front-foot method, and as such was their place in the legislative plans of Ohio and New York, and perhaps other states, it strikes me as a somewhat violent assumption to say that the legislature of 1889 must have intended, by the introduction of these provisions, to grant the property owners rights beyond those given by the "old" Constitution that was then in force, and to afford them the protection guaranteed by the "new" Constitution of 1898. The proper assumption would be that the legislature did not intend to depart from a long-settled policy, or to have the basis of assessment, which was brought forward from our former statutes, viewed in any other light than that of its settled construction. The new provisions, except § 6, do not purport to fix any rule for laying the assessments. Section 6 expressly makes frontage the basis for street assessments. So it is found that in the only new section which speaks of the method of assessment the same plan is apparent that inheres in the old matter which was re-enacted. And in no other way could § 6 have been harmonized with the former laws which were used as the foundation of the new. Yet on the word "hearing" in § 7 is hung a construction which, as it seems to me, conflicts, not only with the former laws, but also with the concurrently new matter in § 6. My brethren seem to have overlooked the consideration that in enacting the Barrett law the legislature may have found that the then existing statutes, which permitted the property owners separately and one at a time to contest in the circuit court the correctness of their assessments, did not afford a satisfactory basis for the issuance of bonds, and that the substitution thereof of a "hearing" before the common council, at which all objections could be disposed of together, furnished "a comparatively summary way" of rendering the

assessments conclusive, as suggested in *Garvin v. Daussman*, 114 Ind. 429, 16 N. E. 826.

It seems to me that my brethren have acted upon the plan of first adopting a construction of § 7, and then construing the rest of the act (so far as it is set forth by them) in a way to conform thereto. I think this is not a proper method of interpretation; and I cannot, under the rules of construction as I understand them, find the meaning in § 7 that has been given to it. The language of the section furnishes no foundation for the construction adopted. It makes no allusion to special benefits. It fails to command the city to refrain from assessing upon the abutting lot an amount in excess of the special benefits actually received by it, and to refrain from assessing upon the property in the taxing district an amount in excess of the sum total of the special benefits actually received by the several parcels of contributing property. It fails to command the city to pay from the general treasury the excess of cost above the total special benefits,—the part that benefits only the municipality at large. Benefits and damages are the varying degrees above and below zero on the compensation scale. If a lotowner's special benefits were below zero, from what source, and by what method, is he to make even? The section fails to provide. These omitted matters might have been fully and explicitly supplied by the legislature by tacking them onto the word "hearing," but it did not do so. My brethren say that "from the term 'hearing' is necessarily implied the power to administer some adequate remedy." That remedy, they say, must be a determination of special benefits actually received, for otherwise the legislators are accused of insincerity, dissimulation, and mockery. The argument seems to me a plain begging of the question. The question is, Did the legislature intend to provide the "hearing" required by the "old" Constitution, then in force, or the "hearing" required by the "new" Constitution of 1898? The argument seems to assume that in 1889 no "hearing" was a "hearing" unless it was for the purpose of determining benefits actually received as a matter of fact. Although I agree in the statement that well-disposed taxing officers would remedy their omissions and mistakes, if they noticed or were informed of them, without any "hearing," yet I say that the legislature never had the power to frame a law that shut off the property owner on the presumption that the assessing officers would make no omissions or mistakes. In all valid taxation, three things have ever been required: First. A law directing the assessing officers how to proceed. The authority to tax is exclusively a legislative power. "This is manifest from the slightest consideration of what taxation is. It is the making of rules and regulations under which the necessary revenues for all the needs of government are to be apportioned between the people and collected from them." *Cooley, Tax'n*, 2d ed. 41. Second. An assessment by the proper administrative officials, which must be made in substantial conformity to the method prescribed by the

law; for the expression of one method is the exclusion of all others. Third. An opportunity for the property owner to have a "hearing" before some tribunal with judicial powers on the question whether or not the assessing officers have substantially complied with the method prescribed by the law. So the word "hearing" does not necessarily imply a hearing on special benefits as a matter of fact; for, on the question of the correctness of special assessments for special benefits declared as a matter of law, the property owner was entitled to a "hearing," and it would have been oppression and confiscation to have denied it to him. The city is the actor in prosecuting the proceedings that result in a judgment making the assessments conclusive upon the lands of abutting proprietors. The engineer files his report, assessing each piece of contributing property a certain sum as he has computed it according to the commands of § 6. The hearing provided for in § 7 is, according to the language of the act, a hearing upon the report of the engineer and the assessments therein. It is axiomatic that in all hearings the tribunal must determine the case upon the charge filed against the defendant. This is true, not only in all cases before regularly ordained courts, but also in all special proceedings before special tribunals. In proceedings before city commissioners for the opening and vacation of streets (*Rev. Stat. 1881, §§ 3166 et seq.*; *Horner's Rev. Stat. 1897, §§ 3166 et seq.*; *Burns's Rev. Stat. 1894, §§ 3629 et seq.*), before circuit courts and before boards of county commissioners for the establishment of public drains (*Rev. Stat. 1881, chap. 49*; *Horner's Rev. Stat. 1897, chap. 49*; *Burns's Rev. Stat. 1894, chap. 49*), before boards of county commissioners in the various proceedings relating to free gravel roads (*Rev. Stat. 1881, chap. 70*; *Horner's Rev. Stat. 1897, chap. 70*; *Burns's Rev. Stat. 1894, chap. 76*), the landowners are afforded a hearing on the question of special benefits, not because they are offered a hearing, but because the charge upon which the hearing is had is that their particular lands are severally specially benefited. In all these cases, the question for the tribunal to determine on the hearing is whether the engineer (or viewers, or corresponding officials, who formulate the charge against the property owners) has fully, impartially, and correctly performed the duties laid upon him by the statute. If he has, judgment confirming his action is rendered; if he has not, the tribunal alters or amends, or requires him to alter or amend, his charge to conform to what it should have been in the first place if he had complied with his duties under the statute, and then renders judgment on the charge. This principle has been fully recognized in the street improvement cases of *Garvin v. Daussman*, 114 Ind. 429, 16 N. E. 826, and *Terre Haute v. Mack*, 139 Ind. 99, 38 N. E. 468. In *Hutcheson v. Storrie* (June 19, 1899) 92 Tex. 685, 45 L. R. A. 289, 51 S. W. 852, the supreme court of Texas had before it a law that is exactly the same in es-

entials as the Barrett law. After the engineer files his report of the total cost, etc., and of the assessment upon each lot by frontage, the city council gives notice by publication of a hearing, when the property owners may "object to any such acts and proceedings, and show wherein they have been or may be wronged or injured thereby, and ask for a revision or correction of the same." The city council cannot make the final assessments until all objections have been heard and determined. It will be observed that the Texan property owners were given an opportunity to "show wherein they have been or may be wronged or injured" by the front-foot assessment. This is certainly as broad as the right to "make objection" to the report and the assessments therein. And the court said: "The foregoing provision of the charter authorizes the property owner to call upon the city council to revise and correct errors committed in the proceeding had in assessing the cost of improvement against his property, but it does not empower the council to do anything that it or its officers could not have done in the first instance. The words 'revision' and 'correction' mean that the council may be called upon to review that which had been done, and to make the proceedings conform to the law. *Vinsant v. Knox*, 27 Ark. 272. The city council, and the officers acting under the authority of the charter of the city of Houston, having no power, in the first instance, to consider the question of benefits in fixing the amount to be charged against Mrs. Hutcheson's property, a revision and correction of the acts done could not give relief against the wrong complained of. . . . The claim that, upon petition of Mrs. Hutcheson, the council could have afforded relief from the unlawful exaction, is wholly unsupported by the terms of the law, and is in direct conflict with many of its provisions. The wrong did not consist in a failure to follow the directions of the law, but in obeying its unconstitutional requirements." So, on the hearing mentioned in § 7 of the Barrett law, the inquiry must be confined to the question whether or not the assessment reported by the engineer has been made as it ought to have been made in the first instance,—that is, in conformity to the terms of the law prescribing his duties,—unless that hearing, of all the hearings in the world, is to be made an exception to the universal rule that a tribunal must determine a case on the charge filed against the defendant, and is not at liberty to discard that charge, and reach out and draw in some other from undefined sources and by undefined methods. On the "hearing" the common council "may adopt, alter, or amend such report, and the assessments therein." It is true that "alter" means "to make otherwise." But it does not follow that the report and the assessments therein cannot be made otherwise than the engineer made them, except by abandoning the method of testing the assessments by the standard of special benefits declared as a matter of law, and following the method of testing the assessments by the standard of

special benefits actually received determined as a matter of fact. If the engineer made any mistakes in following out the front-foot method prescribed for him, his report, and the assessments therein, would be made otherwise by correcting the errors. But "alter" is used in connection with other words. The council "may amend" the report and the assessments therein. "Amendment" is usually understood in law to mean the supplying of deficiencies. If the engineer made any omissions of property or other material matter, his report, and the assessments therein, would be amended by supplying the deficiencies. The council "may adopt" the report and the assessments therein. If the engineer, as the assessing officer, has made no mistakes or omissions in laying the assessments in his report, surely the council, as a reviewing tribunal, should be permitted to confirm the assessments. In taking the actual language of the clause, something more than the word "alter" should be considered. For example, it makes a difference whether the auxiliary verb "may" or "shall" is connected with "alter." Standing alone, "alter" can be given the broadest definition to be found in the dictionaries; and, if the auxiliary verb and the object are to be assumed, and not taken from the actual language of the clause itself, it is possible, of course, to say that the common council "shall alter the basis of the assessments in the engineer's report." But the actual language is that the council may adopt, alter, or amend the engineer's report and the assessments therein. The method on which the engineer's report and the assessments therein are based has been continuously asserted throughout the preceding sections. The canons of interpretation require that general words be limited to the sense of the context. "Not only are words and provisions modified to harmonize with the leading and controlling purpose or intention of an act, but also by comparison of one subordinate part with another: that is to say, the sense of particular words or phrases may be greatly influenced by the context, or their association with other words and clauses." Sutherland, *Stat. Constr.* § 262. "General words or clauses may be restricted to effectuate the intention, or to harmonize them with other expressed provisions. Where general language, construed in a broad sense, would lead to absurdity, it may be restrained. The particular inquiry is, not what is the abstract force of the words, or what they may comprehend, but in what sense they were intended to be used as they are found in the act." *Id.* § 246.

To insert into the 7th section the elements that the legislature failed to include is, I think, not only violative of the plain language of that section, but is destructive of other parts of the act. The primary rule of construction is to take the language of the legislature in question according to the plain and ordinary meaning of the words, without adding to or taking therefrom, and, if the language so taken does not create an ambiguity, to accept it as declaratory of the legislative intent. But, if there were an am-

biguity, then the next rule of construction should require the court so to resolve the ambiguity as to give effect and purpose and meaning to the other parts of the act. If the ambiguity (supposed, for the sake of argument) were resolved in favor of the idea that the council, on the hearing, is required to determine the assessments on the basis of special benefits actually received, then the 6th section is deleted from the act, and the legislature is convicted of the folly of having provided elaborately and explicitly for a method of assessing upon each front foot throughout the improvement an equal sum (a method that necessarily excludes the consideration of special benefits actually received), and then declaring that on the hearing the council, not may, but shall, disregard and throw aside all that has been done relating to assessments, and begin *de novo*, and make the assessments by the method of determining the special benefits actually received. My brethren seek to save some purpose and meaning in § 6 by holding, as I understand them, that the engineer does not make the assessments, but simply reports certain facts for the enlightenment of the council when that body enters upon the making of the assessments according to special benefits actually received. If this were true, § 6 would nevertheless accuse the legislature of dealing in futilities. How would the council, when that body purposes to enter upon the making of the assessments according to special benefits actually received, be enlightened by being informed of the total cost of the improvement? The average cost per front foot? The name of each property owner? The number of front feet owned by each? The amount due upon each lot, ascertained and fixed by multiplying the cost per front foot by the number of front feet of each lot? The legal description of each lot? How would these items afford the council any information on those matters on account of which my brethren say that special benefits actually received should be considered, namely, that it is "clear that all property bordering upon a municipal highway is not affected in the same way by an improvement of the latter; that in some cases the grade may be so raised or lowered as to impair most seriously the use and value of the property; in others, that some property may be situate upon a general level, highly improved, and in a business part of the city, while others upon the same street may be remote from business, lying low, and near a watercourse, and practically worthless for business or residential purposes; in others, some abutting lots may be 20 feet and others 200 feet deep?" But it is not true that the engineer simply reports certain facts and makes no assessments. He is required to ascertain and fix the amount due upon each lot by multiplying the average cost per front foot by the number of front feet of each lot. This is an assessment, as will hereinafter more fully be shown. It is sufficient for the present to point out that the legislature has in express words defined the engineer's ascertainment and fixing of the amounts due

upon the several lots as "assessments." The legislature says that the matter in review before the council as a tribunal is the engineer's report and the assessments therein. And the matters other than the assessments, in the engineer's report, are material only on the theory that the property owners are afforded a "hearing" to challenge the correctness of the assessments, as "hearing" was defined in *Garvin v. Daussman*, 114 Ind. 429, 16 N. E. 826. It is true that, if a property owner's assessment were made on the basis of special benefits actually received, it could be figured out that the assessment amounted to so much per front foot,—\$4.98 in one case and \$1.30 in another. But it would have been just as reasonable for the legislature to require the engineer to report the number of persons in each property owner's family; for, in the same way, it could be figured out that the assessment amounted to so much per head.

To insert into the 7th section the elements that the legislature failed to include would also destroy the 5th section of the act. That section empowers the council to pay the contractor from time to time during the progress of the work. Such payments are made out of the treasury, and are declared to be liens upon the abutting property. The city incurs no personal liability to the contractor, but acts merely as an instrumentality in collecting money for the contractor from the property owners. *Quill v. Indianapolis*, 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788; *Spidell v. Johnson*, 128 Ind. 235, 25 N. E. 889. The plain meaning of the section is that, if the city shall advance money from the treasury to the contractor, the city shall have the absolute right to reimbursement from the property owners by means of the liens that, by this 5th section, are put upon the abutting property. If the city, under § 5, should advance to the contractor 90 per centum, say, of the cost, and if, under § 7, as my brethren construe it, the city must limit the assessment against each parcel to an amount not exceeding the special benefits actually received by it, 50 per centum, say, of the cost, then the plain meaning of § 5 is utterly destroyed, and the city would be left with a loss of 40 per centum, say, of the cost, although the city had begun and carried forward the improvement under a resolution declaring that all of the cost, except for street and alley crossings, should be borne by the abutting property. If city officials had understood this necessary result of the construction contended for in this and other cases pending in this court, they might not have been so ready to deprive themselves of so much cash or debt-incurring margin to use for other purposes.

To insert into the 7th section the elements the legislature failed to include would also destroy the 3d section of the act. This section provides the fund for paying the contractor. As soon as the work is determined upon, the council makes a contract with the best bidder. The contractor gives a bond for the prompt and faithful performance of the work. The contract is, of course, binding

upon him, and he must execute it, or be liable on his bond. He enters into this binding contract on the faith of a positive legislative declaration: "The city or incorporated town shall be liable to the contractor for the contract price of said improvement, and the owners of lots or parts of lots bordering on such street or alley or the part thereof to be improved shall be liable to the city for their proportion of the costs in the ratio of the front line of their lots owned by them to the whole improved line for street or alley improvements, and the city or incorporated town shall have a lien upon such lots or parts of lots, respectively, from the time such improvement is ordered, for such cost of improvement, . . . [which] shall be assessed upon the ground fronting or immediately abutting on such improvement back to the distance of 150 feet from such front line, and the city or incorporated town and the contractor shall have a lien thereon for the value of such improvement." As already stated, the city is not personally liable to the contractor. If the city has advanced money, it has the lien by which to secure reimbursement. If the contractor receives his contract price in improvement certificates or bonds, he has the lien by which to collect the contract price of his labor and materials. This section also says that the city "shall be liable and pay for all that part of such street or alley improvement as shall be occupied by the street and alley crossings." The plain meaning of § 3 is that, unless the city voluntarily assumes in advance to pay some definite percentage of the total cost, the city shall pay for street and alley crossings, and the property owners shall pay for the rest of the improvement; and that, if the city assumes a certain percentage, the residue of the total cost, except for street and alley crossings, which must be paid for by the city, is to be borne by the property owners. By the implied power that my brethren find in § 7, this meaning is destroyed. If the assessments are to be measured by the actual benefits which the property owners receive from the improvement, it is evident that the improvement as a whole must be considered. The question would be, How much special benefit does each lot actually receive from this improvement? And each owner's contribution towards the cost as a whole would be determined accordingly. And the excess of cost, as one sum, would have to be paid by the city. It seems indisputable that the total cost would thus be divided between the city and the property owners on a contingency that bears no relation to the number of feet in the street and alley crossings. Yet § 3 clearly separates the improvement itself and the liability therefor into two distinct parts.

Further, in regard to § 3, my brethren say that it should be noted that the provision is "that the cost shall be estimated by the running foot, not assessed." They quote the definition that an assessment is the "adjusting of the shares of a contribution towards a common beneficial object according to the benefit received." Here, again, my brethren seem to revert to the idea that the plan re-

quired by the "new" Constitution is the only one in which special benefits are the sole basis for special assessments. But, as already shown, special benefits were the common starting point of the two divergent lines of thought. So, if the definition selected by my brethren were the one the legislators had in mind, it would not disclose which method they intended to pursue. But it seems clear to me, from an examination of the whole act, that the definition the legislators intended to express was that an assessment is "an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within a district." Anderson, Law Dict. In § 3, the part of the sentence that commands how the estimate shall be made, and what the liability of the lotowners shall be, ends with a semicolon, and the sentence proceeds: "and in making the assessment against such owners for the improvement of such lots or parts of lots and unplatted lands [the cost] shall be assessed upon the ground fronting or immediately abutting on such improvement back to the distance of 150 feet from such front line, and the city or incorporated town and the contractor shall have a lien thereon for the value of such improvement." Again, in § 3: "Such assessments, with the interest accruing thereon, shall be a lien upon the property so assessed, and shall remain a lien until fully paid." And in § 10: "In case any of the owners of lots or parcels of ground on which such assessments have been made shall fail or refuse for the space of twenty days after the date of the estimate to pay the amount thereof due by such person to such contractor, such contractor shall file his affidavit in the clerk's office of said city, stating that the whole or some part of said assessment remains unpaid." etc. And again, in § 10: "And in case the court and jury shall find, upon trial, the proceedings of said officers subsequent to said order directing the work to be done are regular, that a contract has been made, that the work has been done, in whole or in part, according to the contract, and that the estimate has been properly made thereon, then said court shall direct said property to be sold," etc. It therefore seems clear that the legislature understood an "official estimate" to be an "assessment." And the legislature did not confine itself to the use of the word "estimate;" for, in the part of § 3 that my brethren have omitted, it appears in plain words that the lots shall be "so assessed."

Again, it is said that § 3 contains no mandate that the property "shall ultimately be required to contribute equally per front foot." I do not see how language could be made clearer: "The owners of lots . . . shall be liable . . . in the ratio of the front line of their lots owned by them to the whole improved line." This liability is secured by a lien. It is the fund on which the contractor relies for payment. And it is the only fund, if the city is up to its debt limit, or becomes so after the contract is made, and before the work is completed. My brethren say that § 3 requires "that the lia-

bility shall relate to the frontage." But I take it that they do not mean to concede that the liability shall be according to the frontage. They only mean that the liability for special benefits in fact received, after it is determined at the conclusion of the work, is susceptible of being figured into a relation with the frontage,—a phase of the subject that has already been noticed sufficiently. But it is said that "the measure of liability and lien here mentioned are only conjectured, at most, since they arise before an ascertainment of the facts, by measurement, necessary to their definite determination." The order for the improvement, which enters into the contract, and the contract itself, disclose the dimensions, location, and character of the work, and the price per front foot, in terms, or in terms reducible to the front foot. So far as the contractor is concerned, the moment the contract is let he can determine the amount of liability of each property owner and of the city for street and alley crossings as well as when the work is finished. It is true that in the assessment made by the engineer, at the conclusion of the work, the "total cost" may include other items, such as advertising, etc.; but in these matters the contractor is not interested, for the contract is the limit of his claim and lien. *Huntington v. Force*, 152 Ind. 368, 53 N. E. 443. But, if there were any uncertainty in the amount finally to be allowed the contractor, no uncertainty would thereby be introduced into the liability; for the lien by the front foot could be fixed in advance for whatever amount the contractor's due proved to be.

In endeavoring to leave some purpose in § 3 my brethren, if I comprehend their meaning, hold that the section does not fix any basis for assessments, but only provides for a prima facie calculation of liability. This seems to me a purpose that is contrary to the entire scope and manifest intent of the act. But I admit that it would be some purpose, if all the lotowners, except the "aggrieved" mentioned in § 7, might, by not objecting and not asking to be heard, accept the prima facie calculation as a correct statement of their liability. Such a construction, however, would at once run counter to the objection that the statute did not provide for a "uniform and equal" rate of assessment. Suppose that the prima facie calculation was \$1,000 against each, A and B, who own equal frontage; that A is "aggrieved," and B is not; that A proves to the satisfaction of the council that his special benefits actually received are \$500; that A offers to prove that B's special benefits actually received are \$1,500; that the council agrees with A as to the truth of the matter, but holds that, since B has made no objections, nor appeared to be heard, B has the right to accept the prima facie amount as the true amount. Then B receives \$500 in actual benefits that he does not pay for, and A is compelled to pay (1) his special benefits actually received, (2) his proportion of the city's contribution on account of general benefits, and (3) his proportion of the

special benefits accruing to B and all others similarly situated. Now, to avoid this difficulty, it is further held that all persons whose lands are included in the engineer's report are bound to take notice that the council will so increase or decrease the prima facie calculations as to make them equal the special benefits actually received. And in holding that the prima facie calculations are not even prima facie the true amounts, but that the amounts must be adjusted on the radically different basis of actual benefits, my brethren come around to the original position of discarding all the steps provided for in the sections preceding the seventh, and of requiring the council to determine the assessments *de novo* on the basis of actual benefits; thus depriving § 3 of any intelligent purpose. It seems to me incredible that the legislature intended that its positive and explicit mandates expressed in the prior sections should be overborne by an implication read into § 7. And I think it equally faulty to suppose that the legislature intended that the contractor should bind himself, under penalty, to perform work, for the payment of which § 3 gives him a lien upon the abutting property by the front foot, and then that the common council, at the procurement of the property owners, should abrogate the contract, should destroy the improvement certificates or bonds, should approve and accept the work, and deprive the contractor of his pay. To quote from *Hutcheson v. Storrie*, 92 Tex. 685, 45 L. R. A. 289, 51 S. W. 848: "In support of this conclusion, we call attention to the potent fact that the city had entered into a contract with Storrie for the performance of the work at a stipulated price, and with the agreement that he should be paid in improvement certificates, which would hold a lien upon the property, before the amount of the assessment was ascertained. If the engineer, for instance, committed an error in estimating the cost of the work in front of Mrs. Hutcheson's property, then a revision and correction of that act by the council could be had, and the wrong could be corrected, because the contract itself furnishes the data, and the correction would accord with the contract. If, however, the council had changed the basis of the assessment against Mrs. Hutcheson's property from the costs of the work to that of benefits received by the property, whereby the amount assessed would be lessened, the contract would have been annulled. A construction should not be placed upon the language that would empower the city to destroy the contract without the consent of Storrie." If the pavement contractors had understood this necessary result of the construction contended for in this and other cases pending in this court, they might not have been so ready to take contracts under an act which deprives them of the absolute right to definite liens on the lots of the property owners, and remits them to the uncertainty of collection from the municipalities. In *Cason v. Lebanon* (Ind.) 55 N. E. 768, it was held that a contractor, in contracting to do street-im-

provement work under the Barrett law, must take notice of the city's indebtedness; that, if the contractor could not collect from the city for its part of the liability, the whole contract was not destroyed; that the consideration to be paid by the abutting property owners was sufficient to support the contract; and that the property owners had no ground of complaint unless the contractors put in higher bids than they would have if the city's part of the expense was collectable. This strikes me as justifiable doctrine, if the improvement itself and the liability therefor are considered as divided into two distinct parts, which may be known to and examined by both the contractor and the property owners when the contract is let, and before the work is begun. But, under the construction of the Barrett law that is now adopted, the contract, at the time it is made, is severable neither as to the work nor as to the liability therefor. After the work as an entirety is done, a severance of the total liability is made; but until then no one could tell what was the extent of the city's liability, or what the property owners'. If, at the time the contract is entered into, the city be indebted to the limit, it is likely that the contractor's bid would be higher, on account of the uncertainty of getting his pay. Yet, no matter how high his bid, the chance of even getting his money back would depend upon a contingency, after his labor and materials were expended, entirely within the power and discretion of the adverse parties to the contract. And if, at the time the contract is entered into, the city have a debt-incurring margin to the amount of the contract, the council, without the consent of the contractor, could exhaust that margin in waterworks, electric lights, etc., and then find that the actual special benefits to the property owners were not half the amount of the contractor's expenditures. Street improvements are public improvements. Special benefits are benefits that are not common to the citizens in general. How much the contractor may collect as special benefits, and how much as general benefits, is left for his adversary in the contract to say.

By my brethren's reading of § 7 (that is, that the council, on the hearing upon the engineer's report and the assessments therein, shall disregard the method of assessment pursued down to that point, and upon which the contract is based, and shall substitute a *de novo* inquiry into the special benefits actually received), the legislature is accused and found guilty of ignorance of the meaning or even the existence of the word "benefits." Yet on the statute book, as already pointed out, there were many instances in which assessments for improvements were carefully provided for on the basis or by the method of ascertaining the special benefits, as a matter of fact, and limiting the assessments to that amount, and apportioning the cost in ratio to such benefits; and in this very statute (the Barrett law) assessments for the construction of sewers are directed to be limited and apportioned according to benefits. Hereinabove only the material parts of 49 L. R. A.

the act relating to street improvements have been referred to. In reference to the assessment lien given in § 3, the language concerning sewer construction is that "the cost of any such sewer shall be apportioned among the lands, lots, and parts of lots, benefited thereby, and according to such benefits, . . . and the owners . . . of the lots or parts of lots benefited by the construction of such sewer shall be liable, for the construction of such sewer, for the benefit of such lots or parts of lots thereby." In reference to the duties of the engineer in making his report to the council, the first six items from the 6th section relate to street improvements. The seventh item in that section relates to sewer construction: "Seventh. In the case of the construction of a sewer, a description of each lot or parcel of lot benefited thereby, together with the owner's name, and the fair proportion of the cost of such sewer, according to the benefits conferred thereby, that should be assessed against such lot or part of a lot." If a sewer is constructed, and a landowner objects to his assessment, the hearing on the engineer's report, provided for in § 7, gives him his "day in court" on the question of benefits, because the charge on which the hearing is had is that his lands should be assessed a certain sum, according to the benefits conferred. Sutherland says that attention should be given, not only to the language used, but also to "the words or expressions which obviously are by design omitted." Section 239. See also § 241. It seems strange to suppose that the legislature did not know the vital difference between the engineer's assessment in street-improvement cases and in sewer cases; between the Men declared in § 3 for street improvements and the lien declared in the same section for sewer construction; between a method of legislatively assuming and fixing the special benefits at the cost per front foot, as a matter of statute law, and a method of providing for a determination of the actual benefits, as a matter of fact. And the legislature's nicety in making these distinctions cannot be overborne, excepting by reading into § 7 an implication that renders meaningless many parts of the act, and ignores others. All of the matter in the Barrett law in reference to sewer construction was a new feature in street improvement statutes in this state. I believe my brethren state the rule of construction correctly: "The intention is to be ascertained by considering the entire statute; and we must proceed as we would with any other composition, construing it with reference to the leading idea and purpose of the whole instrument. The general intent is the polar star by which the meaning of any part is to be determined with a view to harmonizing the entire act." But I do not understand the purpose in stating the rule, if it is not to be followed. I find that material parts of §§ 3, 5, 6, 8, 9, and 10, and the whole of the interrelated sewer law, are omitted from consideration.

It is axiomatic that the constitutional provision authorizing the levy and collection

of taxes is not self-executing. It is fundamental that the provision cannot be made operative by the executive department, nor by the judicial department, but only by the legislative department. It is elementary that the power must be carried into execution by appropriate legislation, and that no taxing bodies or officers can make a valid assessment unless they follow with substantial strictness the precise method prescribed by the statute. If the constitutional provision be read into the statute, it is not perceived how the situation is changed. If the provision is not self-executing as it stands in the Constitution, it is not self-executing when read into the statute. If it cannot rightfully be put into operation by the judicial department as it stands in the Constitution, it cannot rightfully be put into operation by the judicial department when read into the statute. If it can only be carried into execution by appropriate legislation as it stands in the Constitution, it can only be carried into execution by appropriate legislation when read into the statute. The appropriate legislation necessary to put into execution the constitutional provision for taxation, by the method of limiting assessments to actual benefits in street-improvement cases, cannot be supplied by the judicial department, it seems to me, without going outside its proper limits. The constitutional provision that "no man's property shall be taken by law without just compensation" is likewise not self-executing. It is a negative provision,—an inhibition. If the constitutional provision be read into the statute, what is accomplished? If it is only a negative provision, an inhibition, as it stands in the Constitution, it is only a negative provision, an inhibition, when read into the statute. If affirmative legislation is needed to enable a city to act under the provision as it stands in the Constitution, affirmative legislation is needed to enable a city to act under the provision when read into the statute. In the place of the established principles for ascertaining judicially the legislative intent, substitute the following formula: Take a statute in which the only method prescribed for fixing assessments is by frontage, regardless of actual benefits, read into this statute the constitutional inhibition of the laying of assessments by that method, delete from the statute all that conflicts with the inhibition, and amend the statute by adding thereto all the affirmative legislation that is needed to prescribe a method of apportioning and limiting assessments according to special benefits actually received. In other words, take a piece of paper, and erase what is on it, so that it becomes a blank. Then write upon it the necessary directions by which a constitutional provision that is not self-executing can be executed. "The certainty and stability of the law are among its chief excellencies. By following this legal injunction, the common law has become a symmetrical system. The same authoritative rule applied to statutory construction gives a wholesome precision to dubious generalities, and 49 L. R. A.

otherwise removes doubts which arise upon obscure provisions, and has a salutary tendency to give confidence to those who must act upon statutes, but cannot settle their meaning." Sutherland, Stat. Constr. § 313. "The aid of contemporaneous construction is invoked where the language of a statute is of doubtful import, and cannot be made plain by the help of any other part of the same statute, nor by the assistance of any act *in pari materia* which may be read with it, nor of the course of the common law up to the time of its enactment. Under such circumstances the court may consider what was the construction put upon the act when it first came into operation. Where this has been given by enactment, it is conclusive. A contemporaneous construction is that which it receives soon after its enactment. This, after the lapse of time, without change of that construction by legislation or judicial decision, has been declared to be generally the best construction. It gives the sense of the community as to the terms made use of by the legislature. If there is ambiguity in the language, the understanding of the application of it when the statute first goes into operation, sanctioned by long acquiescence on the part of the legislature and judicial tribunals, is the strongest evidence that it has been rightly explained in practice. A construction under such circumstances becomes established law." Id. § 307. "The uniform legislative interpretation of doubtful constitutional provisions, running through many years, and a similar construction of statutes, has great weight. The contemporary and subsequent action of the legislature in reference to the subject-matter has been accepted as controlling evidence of the intention of a particular act." Id. § 311. "It is to be observed that in the comparison of different statutes passed at the same session, or nearly at the same time, this circumstance has weight; for it is usually referred to as indicating the prevalence of the same legislative purpose, as rendering it unlikely that any marked contrariety was intended." Id. § 283. "The practical construction given to a doubtful statute by the public officers of the state, and acted upon by the people thereof, is to be considered; it is, perhaps, decisive in case of doubt." Id. § 309.

In the light of these canons of construction, it is important to examine the interpretation given to the Barrett law by the legislative, administrative, and judicial departments of the state during the ten years that elapsed from 1880 to the adoption of the new Constitution. But my brethren pass by all of these considerations. In speaking of the judicial history of the state prior to 1889, they say: "That this court prior to 1889 supported the doctrine that the legislature had constitutional sanction to declare, as matter of law, that the special benefits to a particular district by an improvement were equally received by bordering property, and equal to the total cost, had little force as an argument. The answer to it is that the injustice and hardship resulting from the doc-

trine was potential in securing legislative action for the amelioration of the rule." The inquiry being the intent of the legislature, the so-called answer is a begging of the question. The judicial history prior to 1889 is useful in showing a long-continued judicial approval of a long-continued legislative policy, and in affording the basis for the presumption that no marked contrariety was intended in the Barrett law. But the judicial history since 1889 is more important because the Barrett law itself is involved. This judicial history is found to be a continued approval of a continuation of the long-settled legislative policy. Of this, my brethren say: "There is language used in *Terre Haute v. Mack*, 139 Ind. 99, 38 N. E. 468, and perhaps in other cases in this and the appellate court, not necessary to the decision of any question presented by the record, that appears in conflict with what is here decided; but, in so far as such language may so appear, it is disapproved." In the first place, I think that an examination of the cases will show that the language disapproved was necessary to the decision of the questions presented by the records. But, whether the language is disapproved because it is supposed to be *dictum*, or because it is thought the cases were wrongly decided, the disapproval cannot take those cases out of the judicial history of the state. As contemporaneous expositions of the legislative intent, acquiesced in by the legislature, their force is not dependent upon the correctness of the decisions from the court's present point of view. In *Quill v. Indianapolis* (May term, 1890) 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788, this statement was made: "Assessments for street improvements are upheld on the ground that the adjacent property upon which the cost of the improvement is assessed is enhanced in value to an equal amount to the sum assessed against it, and that the owners have received peculiar benefits, which the citizens do not share in common." In *Barber Asphalt Paving Co. v. Edgerton* (May term, 1890) 125 Ind. 455, 25 N. E. 436, after quoting the extract hereinbefore given from *Garvin v. Daussman*, the court said: "We have no reason to doubt the soundness of the doctrine enunciated in this case, and under this rule §§ 6 and 7 of this act [the Barrett law] afford the owners of property abutting upon a street to be improved a remedy which the legislature, in its wisdom, deemed sufficient for their protection." In *Terre Haute v. Mack* (May term, 1894) 139 Ind. 99, 38 N. E. 468, a street improvement was made under the provisions of the Barrett law. The assessments were levied against the abutting property by the front-foot rule, except on a lot situated at the corner of another street. In the case of this lot, the amount to be assessed against it as a whole was determined by the frontage rule, the same as in the case of other lots abutting on the improved street. By the Barrett law the first 50 feet back from the front line is primarily liable for the assessment, and the remainder back to 150 feet is only secondarily liable. The first 50 feet

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of this lot was owned in three separate parcels. Mrs. Hudson owned the entire frontage. Her parcel extended back 19 feet. Froeb and Morgan owned the next parcel, extending across the lot, having a width of 18.6 feet, and fronting on the side street. Mrs. Mack owned the third parcel within the 50 feet, extending across the lot, having a width of 12.4 feet, and fronting on the side street. The engineer, in making his report, apportioned the assessment upon this lot among the three parcels in the ratio of actual benefits. The council, on the "hearing on such report and the assessments therein," approved and confirmed the apportionment by that method. On these facts, the assessment against Mrs. Mack's property was declared to be void, and the following principles were established: That the engineer's report is the only legal basis on which any assessment can be made against any land whatever; that no assessment can be made, except on an abutting lot; that such assessment can only be by the front foot; that the engineer cannot lay, nor can the common council adjudge, an assessment on any other rule than frontage, because no other basis or method is prescribed; that the revision goes only to the correction of errors, as indicated in *Garvin v. Daussman*. Among other things, the court said: "We have nothing to do with the policy, expediency, or justice of the statute. . . . It is a well-recognized rule in the interpretation of statutes that the whole act and all its parts must be construed together, so as to give effect to all the language employed, and inconsistent expressions are to be harmonized to reach the real intent of the legislature. The statute ought to be so construed as to make it a consistent whole. Sutherland, Stat. Constr. §§ 239-246. It appears from the complaint and answer that the engineer reported an estimate in favor of the contractors against the property owners benefited thereby, to wit: Mary V. Hudson, on a strip or lot of ground on said Fifth street, 137.96 feet along said street and 19 feet wide, \$297.06; Froeb & Morgan, a strip or lot 137.96 feet long, parallel with said street, 18.6 feet wide, adjoining the strip first described, \$27.10; and Amanda D. Mack, a strip or lot 137.93 feet long, parallel with said street, adjoining the last-described strip, and 12.4 feet wide,—said strips or lots being lots 1 and 2, and a part of lot 3 of said Blake's subdivision. Such an estimate as this, the engineer had no right to make. He was required by the statute, as we have seen, to report the amount of such cost for improvement upon the ground bordering on the improved street, which amount he was required to ascertain and fix by multiplying the average cost price by the number of front feet; also, the name of the owner of the lot so bordering on said street. The name of the owner of such lot was Mary V. Hudson, and, her lot being the only one that bordered on the improved street, the amount due upon it he was required to ascertain and fix by multiplying the average cost price per running foot by the number of running front

feet of her lot. And this he was required to report to the common council, and such report the amended 7th section required the common council to approve and confirm, or, in case it was incorrect, to cause it to be amended, and to make the assessment according to such report. Therefore, if the statute had been followed by the city engineer and common council, the whole amount of cost of the improvement for which the whole 150 feet back from the line of Mrs. Hudson's lot bordering on the improved street could in any event be made liable would have been assessed against Mrs. Hudson's lot No. 1. Without the proviso in § 3, no person whose lot or ground does not border and abut on the improved part of the street could be made liable for any part of the cost of the improvement in any event. *Ray v. Jeffersonville*, 90 Ind. 567. But the proviso makes such land liable only in the event that the lots or parcels preceding it towards the front or border have proven insufficient to pay the cost of the improvement. And the amount for which such ground is in any event made liable is not fixed by any assessment or ascertainment either by the engineer or common council, but it is fixed and ascertained by the balance remaining unpaid of the whole amount assessed on the front-foot lot or parcel after the exhaustion of the parcels that precede it to the front. That cannot be known and ascertained until such preceding parcels have been sold. Therefore the act of the engineer in fixing and apportioning any amount against the appellee's lot was without authority of law and void, and the act of the common council in assessing said amount against appellee's lot was void, and she was entitled to have it declared so." The engineer having made, and the council having confirmed, an assessment according to special benefits actually received, and their power to do so having been challenged, I cannot see why the language used, and a full consideration of the scope and intent of the Barrett law, were not necessary to a decision of the question presented by the record.

This case was considered from the point of view of Mrs. Mack. Look at it a moment from Mrs. Hudson's standpoint. She owned a parcel of land having 138 feet frontage and 19 feet depth. The assessment for 138 feet frontage was \$730.21. If her parcel, after being improved, would not sell for enough to pay the assessment, and back-lying parcels had to be sold to make up the deficiency, —and such cases have occurred under the Barrett law,—where do the special benefits come in? Though the legislature should declare, as a matter of law, if it had the power, that the special benefits equaled the cost, it would be difficult for anyone to point out wherein any special benefits, as a matter of fact, were derived from the proceeding. In *Keith v. Wilson* (May term, 1896) 145 Ind. 149, 44 N. E. 13, it was stated: "The law assumes that the property will be benefited to an amount equal to the cost of the improvements thus made." In *Cason v. Lebanon* (Ind.) 55 N. E. 768, it was claimed that a railroad company was bound by a con-

tract with the city to improve the street, and that therefore an ordinance requiring the property owners to pay for the whole improvement, except street and alley crossings, was invalid. This court declared that "said contract did not deprive the city of the power to improve said street in the manner alleged in the complaint, at the expense of the abutting property owners, as provided by law." Though the statute was not particularly discussed in that case, it is sufficiently clear that the court considered it settled that the law provided for the construction of street improvements, except street and alley crossings, "at the expense of the abutting property owners." In *Sands v. Hatfield*, 7 Ind. App. 357, 34 N. E. 654, it was decided that, if the engineer omitted from his report any abutting property, the common council, on this fact being shown by objectors at the "hearing," should correct the report, and alter the assessments to what they would have been if the engineer had performed his duties properly in the first instance. The appellate court, on October 24, 1899, in *Indianapolis & V. R. Co. v. Capitol Paving & Constr. Co.* 54 N. E. 1076, said: "Conceding that appellant's right of way is 'land,' within the meaning of the charter, the question remains whether the right of way lying wholly within Kentucky avenue is within the designation of land abutting or bordering on the same avenue. We think the statement of the question furnishes its own solution. The city can assess only such lands as its charter designates, and, as the charter has designated lots or lands abutting or bordering on the street, none other can be assessed. We are not authorized to give the words used in the statute other than their well-defined and commonly accepted meaning. Conceding, without deciding or assuming, that the company's right of way is benefited by the improvement, the question is still unsolved, because the basis of the assessment is not property that will be benefited, but property that abuts or borders on the street. In authorizing the construction of such improvements, the legislature has assumed that they will benefit that property which abuts or borders on the part of the street improved. The right to impose such a tax is based upon a presumed equivalent. It has not been assumed that any property other than that designated will be benefited. What property the local officers may believe will be benefited is not the question. If a property owner is an abutting owner, he must bear his share of the burden, because the legislature has so directed." So it appears that the judicial department of this state has always hitherto entertained the same belief in regard to the scope and intent of the Barrett law that it did in regard to the street-improvement laws prior to 1889. The legislature has never indicated any dissent from this judicial interpretation, but, on the contrary, has shown its understanding and approval thereof.

The legislative department of this state made the method of assessment prescribed in the Barrett law conform to the constitu-

tional requirements concerning taxation and compensation as that department has always understood them. That understanding was, in the language of Dillon (quoted in the dissenting opinion in *Norwood v. Baker*), that "whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present [then] weight of authority, considered to be a question of legislative expediency." The legislative department of this state has always understood that the only basis for special assessments was special benefits, but that it was a matter of legislative discretion to declare absolutely by law that the special benefits were always and invariably equal to the cost of the improvement; that if, in sewer and highway and drainage acts, the equality of cost and benefit were not absolutely declared by law, but were left open to the determination of the truth by the assessing officers, whose assessment of actual benefits was reviewable before some tribunal duly clothed with power and procedure to that end, it was a matter of legislative grace, and not a matter of constitutional compulsion; and that, if the legislature chose to exercise its discretion by declaring that the cost of street improvements should be assessed upon the abutting property by frontage, the citizen could no more complain than in any other case in which the legislature had determined a question of legislative expediency. The Barrett law was enacted in 1889, and it was amended in 1891. It applies to all towns and cities not specially classified. In 1891 the legislature passed an act concerning the government and powers of cities of 100,000 population (Indianapolis). Acts 1891, p. 137. On pages 175-181 are the provisions relating to street improvements. The method prescribed is to assess the cost upon the abutting property by frontage; and no provision is made in the act for a "hearing" before the council or board of public works, but the property owners have only the hearing described in *Garvin v. Dausseman*. And although at each subsequent session acts regarding street improvements have been passed, and the charter of Indianapolis has been amended, the legislature has seen no occasion for changing the foregoing method for paying for street improvements. In 1893 (Acts 1893, p. 56) the charter of Indianapolis was so amended that the cost of paving street and alley crossings, which had before been borne by the city, was assessed against the property owners, but the charter was left unchanged so far as a hearing is concerned. At the same session, on March 3, 1893 (Id. p. 65), an act was approved relating to the government and powers of cities of 50,000 population (Evansville). On pages 104-110 are the provisions relating to street improvements. These provisions are the same

as those in the charter of Indianapolis. On the same day, March 3, 1893, (Id. p. 202), an act was approved relating to the government and powers of cities of 35,000 population (Ft. Wayne). On pages 243-249 are the provisions relating to street improvements. These provisions are substantially the same as those in the charter of Indianapolis and Evansville, except that the Barrett law is followed, in providing for a hearing upon the assessment before the board of public works. The case of *Terre Haute v. Mack*, 139 Ind. 99, 38 N. E. 468, was decided on October 16, 1894. At the next session of the legislature after this decision, on March 11, 1895 (Acts 1895, p. 239), an act was approved that amended the charter of cities of 35,000 inhabitants so that the total cost of the improvement should be assessed by the front-foot rule upon the abutting property back to a line equidistant from the edge of the improved street and the next street parallel to it, but that, if a lot belonged to different persons, the assessment thereon should be apportioned among the several parcels according to the benefits received from the improvement by reason of being upon, near, or having access to it. Though other acts relating to street improvements were passed at this and each subsequent session, the act last above referred to remains the only instance in which the legislature has undertaken to prescribe the method of having the assessing officers assess and a tribunal determine special benefits, as a matter of fact, in street improvement cases. And, though this act is a very limited and imperfect application of the principle, it clearly illustrates two things: First, that the legislature understood the difference between "frontage" and "actual benefits;" second, that the legislature acted, as it always has, upon the assumption, sustained by the then weight of authority, that it was purely a question of legislative expediency whether or not the legislature should declare, as a matter of law, that each front foot was specially benefited to the extent of its *pro rata* share of the total cost. On the same day, March 11, 1895, an act was approved that amended the charter of cities of 50,000 inhabitants. Acts 1895, p. 258. Regarding street improvements the charter was so amended as to require the board of public works, after making out the final assessment roll, to give notice of a day "on which said board will receive and hear remonstrances from persons with regard to their respective assessments. On the day named in such notice said board shall proceed to hear and determine such remonstrances, and may change, modify, or confirm the same. Said assessment roll shall contain the names of the property holders and a description of the property assessed for such improvement, and shall contain the *pro rata* assessment against each piece of property. After hearing such remonstrances said department shall deliver such assessment roll as modified or confirmed to the department of finance." That the legislature intended in this, as in every other instance in which it was thought worth while to pro-

vide a hearing before a special tribunal, that the hearing should be upon the question whether or not the assessing officers had faithfully performed their duties according to statute, and had correctly reported the assessments as determined by the method prescribed for them to act upon,—that the review should be for the purpose of determining the correctness of the view,—is explicitly shown in another provision of this same act. Regarding sidewalk improvements, the charter was also amended so as to provide for a hearing after the assessment list has been prepared. "Upon the completion of said sidewalk said department shall cause to be prepared an assessment list, and shall notify such owner in the same manner as in this section above provided. Said notice shall fix a time and place when the owner may remonstrate against such assessment. On said day such owner may appear and remonstrate, and the board shall take final action and shall assess such owner and such real estate for the cost of such improvement." On March 15, 1895, an act came into effect by which the charter of cities of 100,000 inhabitants was again amended. Acts 1895, p. 384. Some minor changes were made in respect to collection of instalments of assessments, etc., but the charter was not amended in the matters involved in the amendments of the charter of Ft. Wayne or of Evansville. At the next session, on February 23, 1897 (Acts 1897, p. 56), an act was approved whereby the charter of Indianapolis was further amended in reference to street improvements. It is a matter of common knowledge that the practice was generally adopted by city treasurers of notifying property owners by mail of the amounts of their assessments after they came into the hands of the treasurers for collection, and to state in the notice that it was given voluntarily, and not as a duty required. This amendment made the giving of such notice by mail obligatory upon the treasurer of Indianapolis, and further required him to publish a notice to all persons who had failed to avail themselves of the privilege of paying in instalments that, unless payment was made within thirty days, proceedings for the collection of assessments would be instituted. On February 26, 1897, the charter of Indianapolis was further amended. Acts 1897, p. 79. Some details about the cost of street and alley intersections, the issue of bonds, and the collection of instalments were changed; but the proceedings for fixing the final assessments by the board of public works were left as they were prescribed in the original act of 1891. At the last session of the legislature, on March 3, 1899, an act was approved that related to the government and powers of cities of 23,000 population (Terre Haute). Acts 1899, p. 270. In its essential features, it is the same as the charters of Evansville and Ft. Wayne. On pages 314-322 are the provisions concerning street improvements. The assessments for that purpose are to be made by the front-foot rule. But the assessments for sewer construction, according to the directions of every one of

these acts, are to be laid upon the lands found to be benefited, and are to be apportioned according to, and not exceeding, the special benefits actually received. On March 4, 1899, an act was approved that again amended the charter of Indianapolis in reference to street improvements. Acts 1899, p. 399. The amendment provides for an appraisal of the abutting property, exclusive of improvements, and forbids the ordering of any improvement which, when completed, is to cost more than 25 per cent of the aggregate appraised value. This still leaves any parcel of abutting property liable to an assessment by frontage that might exceed the value of that parcel. And the hearing before the council or board of public works as to the correctness of the assessments, on which the present construction of the Barrett law is built up, has remained unprovided for to the end. Is it conceivable that the legislature foresaw the new Constitution, and entertained the deliberate design of making some of these acts constitutional and others unconstitutional? Assuredly not. This whole series of acts, from the Barrett law of 1889 to the last amendment of the charter of Indianapolis, in 1899, evidences a continuous and consistent legislative policy. That policy was to put street improvements upon a different basis from sewers and ditches and roads, and other like special proceedings. These street improvement statutes are the ones my brethren should have examined if they were seeking acts *in pari materia* by which to determine the scope and intent of the Barrett law. The sewer and ditch and gravel-road laws are only *in pari materia* with the sewer law interwoven in the act of 1889, which my brethren pass by without notice. The legislature never doubted that it had the power to do as it did. It assumed that it was purely a question of legislative expediency to require the whole cost of street improvements to be assessed upon the property by the running foot. The administrative department of the state, as represented in the various towns and cities, has uniformly acted under the law on the same assumption. It is a matter of common knowledge that the people, the lawyers, the contractors, the municipal officers, the legislature, and the courts have all been in accord in the understanding that under the Barrett law the city paid for street and alley crossings, and the abutters paid the rest of the total cost of street improvements according to a uniform rate per front foot, until the exigency arose, after the *Norwood-Baker* decision was studied, of hunting for some other meaning. If the continuous and consistent interpretation of the Barrett law, during all the years since its passage, by all the departments of the state, were looked to, and if the canons of construction as laid down in the books were followed, that construction should be accepted as decisive.

Thus far I have been stating the reasons why I am unable to join my brethren in finding in § 7 the "implied power" that authorizes the council to change the basis of the assessments. But it seems to me there is a

vital difference between a power and a duty,—between the right to do a thing and the obligation to do it. In this case, the record shows, it is admitted that the council has already decided that it will not accord the property owners a hearing on the question of the amount of special benefits actually conferred by the improvement. Where is the command in the statute that forbids the council from basing the assessments upon the report of the engineer after it has been amended, if necessary, to conform to what the statute commanded the engineer to do in the first instance? If the legislature delegated to the council a discretion in the matter, the property owners could not base a suit for mandatory injunction upon what they deemed a mistaken exercise of that discretion. The statute says that the council “may adopt, alter, or amend the engineer’s report and the assessments therein;” not, “shall change the basis of assessments.” The statute permits the council to pay all or any part of the total cost of the improvement out of the treasury. This is purely and simply a matter of option. If the council paid the total cost, there would be no assessments. If the council determined to pay a certain portion of the total cost, the residue of the total would have to be assessed against the abutting property in the method provided by the statute. In this case, the record shows, it is admitted that the council has already ordained that the total cost shall be borne by the abutters. Now, if the improvement is to cost \$10,000, and it should be found on the supposed hearing that the aggregate of special benefits actually received by the several parcels of abutting property was only \$8,000 (though the complaint avers and the demurrer admits that the abutting property is not specially benefited at all, as a matter of fact), what good would it do to have the total cost apportioned among the abutters in the ratio of the special benefits, as among themselves? Each abutter would find his property assessed with 125 per cent of his special benefits. So it becomes necessary to find, both in the law and in appellee’s ordinance under the law, not only the right, but the duty, to pay the \$2,000 excess out of the general treasury, although it is agreed that the city ordered the improvement with the intention and in the belief that it had the power to ordain “that the cost and expense thereof, including advertising, labor, and material for the same, be assessed against the property on the line.” And in the opinion filed by my brethren, though I notice that considerable attention is given to making out the “implied power,” I fail to find anything but a fiat that transforms the “implied power” into an “imperative duty.” The views I entertain are supported by authority. In *Hutchison v. Storrie*, 92 Tex. 685, 45 L. R. A. 289, 51 S. W. 848, and in *Lyon v. Tona-wanda*, 98 Fed. Rep. 361, statutes were involved that are essentially the same as the Barrett law; and in *Charles v. Marion*, 100 Fed. Rep. 538, the Barrett law was considered. I may also cite the last page of my

brethren’s opinion, wherein the rules regarding “implied powers” are properly indicated.

Not only am I constrained to believe that the Barrett law as enacted is unconstitutional, but I am also of the opinion that the Barrett law as now construed by my brethren is unconstitutional. And I will suggest some of the reasons for thinking so: The taxing power is committed to the legislative department, and cannot be conferred upon the judicial. All assessments must be made by administrative officers, whose sole authority is to follow with substantial strictness the method pointed out by law. The property owner is entitled to a “day in court” to challenge the assessment. The court cannot make the assessment, but can only hear the challenge of the assessment already made, and then enter judgment confirming or correcting the assessment. If the engineer does not make the assessment as an administrative officer, and if the council does not merely review the assessment as a court, but if, on the contrary, no assessment is made until the council makes it on the hearing, the result is either that the assessment is made by a judicial tribunal, or that the hearing is for the purpose of enabling an administrative body to determine what assessment to make, with no opportunity for the property owner thereafter to challenge its correctness. A common council may at one time exercise legislative, at another administrative, and at another judicial, functions, but it cannot have two or three characters at the same time. If the prescribed mode of fixing assessments by frontage is deleted from the statute as enacted, there is not a word left limiting the council to any method or prescribing any rule of procedure whatever. There would likely be as many methods as there are towns and cities in the state. Uncertainty would probably prevail until, in suits involving the Barrett law as now construed, this court formulated a definite and uniform procedure. I cannot concur in the statement that “the absence of an express rule for guidance in the exercise of the power does not impair it. It is sufficient if the power to change the assessment from the frontage rule exists.” Regulations and methods in all tax matters must be prescribed by law. *State Bd. of Tax Comrs. v. Holliday*, 150 Ind. 216, 42 L. R. A. 826, 49 N. E. 14. In the syllabus of *Barnes v. Dyer*, 50 Vt. 469, it is said: “A statute empowering the authorities of a city to construct sidewalks, and make local assessments on the property fronting the same ‘for so much of the expense thereof as they shall deem just and equitable,’ is unconstitutional, in that there is no fixed, certain, and legal standard for assessment.” In *State, New Brunswick Rubber Co., Prosecutors, v. New Brunswick Street and Sewer Comrs.* 38 N. J. L. 190, 20 Am. Rep. 380, the following appears: “It is not sufficient that the legislative act merely declares that the cost, or a part of the cost, of the improvement shall be assessed upon the lots drained by the sewers to be built. It must, as well establish some rule,—some definite scheme,—within constitutional

limits, for the apportionment of the tax upon the lands on which such special burthen is imposed. An act of the legislature directing a tax for a local improvement to be imposed upon particular lands, to be legal or effectual, must consist of something more than a mere authorization to assess a sum of money, the cost of a local improvement upon the designated property. The act must determine the mode of distributing the burthen, the property out of which the tax is to be made must be designated, and some certain standard of assessments established. It cannot properly be left by the legislature to the discretion of others to fix the method,"—courts, for example. A property owner is entitled to a law that operates according to constitutional principles without his intervention. According to the Barrett law as now construed, a property owner does not have a tax that is assessed on the basis of his actual special benefits, without affirmative action on his part at the hearing to see that it is put on that basis. Further, a lawful assessment must show on its face the principle according to which it is laid. *State, New Brunswick Rubber Co. v. New Brunswick Streets and Sewers Comrs. supra.* This would appear under the Barrett law as enacted, but not as construed. It seems to me that the property owner is subjected to a tax "without due process of law." The abutters alone are named in the engineer's report. My brethren hold that all such persons are bound by the published notice to know that assessments will be made at the hearing which shall correspond with special benefits actually received. They do not hold, as I understand them, that persons who are not abutters must take notice that their back-lying property will be assessed for actual benefits. The Barrett law as enacted made such persons secondarily liable. This was so, as was pointed out in *Terre Haute v. Muak*, 139 Ind. 99, 38 N. E. 468, not because they were included in the assessment either as made by the engineer or as confirmed by the council, for they were not, but because the statute made them sureties, so to speak. Now, under the Barrett law as enacted, the legislature created a uniform taxing district, over all of which the contractor had his lien. But, under the Barrett law as construed, an irregular district is created, without any valid reason inhering in the subject-matter of the act to warrant the irregularity, and the lien of the contractor is to that extent diminished. If A owns a parcel having 50 feet frontage and 150 feet depth, and B owns a parcel having 50 feet frontage and 20 feet depth, and C owns a parcel having 50 feet width and 130 feet depth, and lying back of B's parcel, it seems to me that if A is liable for actual special benefits on his 7,500 square feet, and B is liable on his 1,000 square feet, and C is not liable at all on his 6,500 square feet, not only is the taxing district irregular without reason, but

the parties are not subjected to a "uniform and equal rate of assessment." The notice provided for in § 7 is not sufficient to give the council jurisdiction over any subject except "objections," nor any person except one "aggrieved." In *Kuntz v. Sumption*, 117 Ind. 1, 7, 2 L. R. A. 658, 19 N. E. 476, the court said of the board of equalization statute: "It does provide notice sufficient for two classes of judgment, but for no others. It provides for notice sufficient as to all general changes in the levy, and sufficient as to all who have complaints to make, and over these matters jurisdiction arises when the notice is given as the statute directs. But there is no provision for notice to the individual taxpayer whose list is to be added to or whose valuation is to be increased. . . . This notice, it is obvious, cannot require every taxpayer in the county to be in attendance at the meeting of the board to see that no additions are made to his list." The contract is made between the contractor and the council for the city. Under the Barrett law as enacted, the liability of the city was limited to the cost of street and alley crossings, and under § 7 the council had no discretion and no duty but to see that the balance of the cost was properly apportioned among the property owners according to frontage. The council for the city has control of the expenditure of the general fund; but, under the Barrett law as enacted, no conflict of interest arose among the council and the property owners and the contractor. Under the Barrett law as construed, however, a three-cornered conflict of interest at once arises, and the council is made the exclusive and final judge in its own case. In *Huntington County Comrs. v. Heaston*, 144 Ind. 583, 41 N. E. 457, 43 N. E. 651, it was held that a board of county commissioners, in allowing or disallowing claims against the county, acted merely in the capacity of an auditing committee. The court said: "If it was a suit against the county for the recovery of money, in the sense urged by counsel, then the claimant was the plaintiff and the county the defendant, and the commissioners were in the discharge of a double duty—acting as a court, and also as the representative of the defendant,—or otherwise the county could not be said to be in court. Such a construction as contended for apparently leads to an absurdity. It would follow that the court and the party defendant were virtually the same. It is an axiom of the law that no man can be a judge in his own case." A proper method of giving the people "due process of law" is illustrated in our statute in reference to the opening of streets. In that statute it is recognized that the general treasury will be subjected to an indefinite liability, and the city is not made the exclusive and final judge in its own case. On the whole, it seems to me that my brethren, in steering away from the rock of Scylla, have plunged into the whirlpool of Charybdis.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Auburn F. PEARL

v.

WEST END STREET RAILWAY COMPANY.

(.....Mass.....)

1. A plaintiff in an action for negligent injuries acts at his peril in following the suggestion of defendant's physician, who has been sent to examine him, to try standing on the injured leg after he and his physician have stated that he cannot bear his weight upon it.
2. A physician acting for defendant in making a physical examination of plaintiff in an action for negligent injuries is an independent contractor, and not a servant or agent, so as to charge defendant with liability for his acts.

(May 17, 1900.)

NOTE.—Obeying or disobeying physician as affecting remedy of injured person against one who injured him.

- I. Scope of note.
- II. Effect of obeying improper directions.
- III. Effect of disobeying directions.

I. Scope of note.

This note is limited to the effect of obeying or disobeying a physician, on the remedy of the injured person against the person injuring him, where the injury is by a third person, and not by the physician himself, through the improper performance of his duties. Malpractice cases have been excluded, with the exception of a few having a special bearing upon the question of the effect of obeying or disobeying a physician's directions, with reference to personal injuries, and which lay down rules which would seem to apply equally to either class of cases.

II. Effect of obeying improper directions.

PEARL v. WEST END STREET R. CO., so far as it holds that an injured person following an improper suggestion made by a physician in the employ of the one who injured him, or by a physician other than his own, acts at his peril, and cannot hold the author of the original injury for an increase or aggravation of the injury thereby caused, seems to be a pioneer case.

The holding in that case, however, that a physician employed by the person causing an injury is an independent contractor, and not an agent or servant of the person employing him, for whose negligent acts the employer would be liable, finds support in *South Florida R. Co. v. Price*, 32 Fla. 46, 18 So. 638, in which it was held that a railroad company employing a physician and surgeon to furnish medical or surgical aid to sick or injured employees performs its entire duty in that respect, if it owes any, when it employs a person of ordinary competency and skill in the profession, and is not liable to an employee whose arm was broken in a collision, though he faithfully carried out all of the physician's orders relating to the care of the arm, where it was set in such an unskilled and negligent manner as to render it ill shaped, and of no use to him in the performance of manual labor.

49 L. R. A.

REPORT by the Superior Court for Middlesex County after verdict for defendant, for the opinion of the Supreme Judicial Court of an action brought to recover damages for injuries alleged to have been caused to plaintiff by negligence of a physician sent by defendant to examine plaintiff as to the extent of personal injuries for which he had brought suit against defendant. *Judgment on the verdict.*

The facts are stated in the opinion.

Mr. Conrad Reno, for plaintiff:

There was sufficient evidence to warrant the jury in finding that Dr. Hubbard was negligent in his manner of conducting his examination of the plaintiff.

Harriott v. Plimpton, 166 Mass. 585, 44 N. E. 992; *Wilnot v. Howard*, 39 Vt. 447, 94 Am. Dec. 338; *Hathorn v. Richmond*, 48 Vt. 557; *Chamberlin v. Morgan*, 68 Pa. 168:

The opposite rule would appear to prevail when the improper directions followed by an injured person are those of his own physician, or a physician under whose charge he is placed for the purpose of being cured.

Thus, a party injured by the negligence of another is bound to use ordinary care to effect his restoration or cure, and he is not responsible for a mistake, and, when he acts in good faith under the direction of the physician, the mistake of the latter in the treatment will not shield the wrongdoer. *Caven v. Troy*, 15 App. Div. 163, 44 N. Y. Supp. 244.

And a person injured in consequence of a defective highway, who employs a surgeon of ordinary professional knowledge and skill, and follows his necessary directions, is entitled to recover the full amount of his damages from the town, though the surgeon treated the injury unskillfully, and by such unskillful treatment prevented him from recovering as soon as he would have recovered under skillful treatment. *Stover v. Bluehill*, 51 Me. 439.

And the amount of compensation of one whose foot was caught in a hole in a sidewalk, whereby her leg was broken, should not be reduced by reason of any wrong treatment the physician may have given or administered, if she followed his directions in her conduct and use of her limb, even though such conduct or use was not proper, and aggravated the injury. *Goshen v. England*, 119 Ind. 368, 5 L. R. A. 258, 21 N. E. 977.

And where an employee of a railroad company, while engaged in his employment, stumbles over a cinder pile negligently left by the company, and is thrown to the ground, and his foot is caught and crushed by the drive-wheel of an engine, and he allows his foot to be amputated on the advice of a competent and efficient physician, the amputation is the negligence of the railroad company for which it is liable, whether or not the surgeon makes a mistake in advising it. *St. Louis & S. F. R. Co. v. Doyle* (Tex. Civ. App.) 25 S. W. 461.

So, one whose arm is broken by the negligence of another, who employs physicians, surgeons, and nurses of ordinary skill in their profession, using ordinary care in their selection, and follows their direction, is not the insurer that they will be guilty of no negligence or error of judgment; and where, through some unskillful or negligent act on their part, the parts of his arm become separated, resulting

Gates v. Fleischer, 67 Wis. 504, 30 N. W. 674; *Wright v. Hardy*, 22 Wis. 348.

An experiment upon an injured person always involves danger, and no physician or surgeon should make such an experiment as Dr. Hubbard made in this case, especially as he was not in the employ of the plaintiff, but in the employ of the defendant.

Slater v. Baker, 2 Wils. 359; *Chamberlin v. Morgan*, 68 Pa. 168.

The facts would have warranted the jury in finding that the plaintiff was injured by Dr. Hubbard's negligence.

Brooks v. Rochester R. Co. 156 N. Y. 244, 50 N. E. 945; *DuBoise v. Decker*, 130 N. Y. 325, 14 L. R. A. 429, 29 N. E. 313; *Harriott v. Plimpton*, 166 Mass. 585, 44 N. E. 992; *Hathorn v. Richmond*, 48 Vt. 557; *Gates v. Fleischer*, 67 Wis. 504, 30 N. W. 674.

The evidence warranted the jury in find-

ing that the plaintiff was in the exercise of due care during Dr. Hubbard's examination, and that he did not assume the risk of injury arising from Dr. Hubbard's negligence.

If the plaintiff had refused to try the experiment of standing on his left leg, when Dr. Hubbard insisted upon it, the defendant would have proved such refusal in the action arising out of the car accident, and would have argued that the plaintiff had refused to submit to a reasonable test of his physical condition. The plaintiff acted under this compulsion, and in reliance upon the supposed superior knowledge of Dr. Hubbard.

McKee v. Tourtellotte, 167 Mass. 69, 48 L. R. A. 542, 44 N. E. 1071; *Burgess v. Davis Sulphur Ore Co.* 165 Mass. 71, 42 N. E. 501.

Dr. Hubbard was employed by the defendant for its own benefit and information to ex-

in a false joint, the party responsible for the breaking of the arm will be held to answer for the false joint, as the injury resulting from the mistake of the physicians, surgeons, and nurses is to be regarded as part of the immediate and direct damages resulting from the breaking of the arm. *Pullman Palace Car Co. v. Bluhm*, 109 Ill. 20, 50 Am. Rep. 601.

If a reputable physician was employed to care for an injured arm, who treated it as long as he deemed proper, and his directions were followed, the injured person cannot be charged with negligence because the result was not what was expected. *Strudgeon v. Sand Beach*, 107 Mich. 496, 65 N. W. 616.

Where a person, injured by the negligence of another acting in good faith, consulted a competent physician, who advised him to take exercise, which advice he followed, it shields him against the charge that he recklessly, wilfully, or carelessly exposed his health or retarded his recovery; and evidence of such advice is competent in an action for the injury, not to cast upon the defendant any damage which his negligence did not occasion, but to show that the plaintiff acted in good faith and used proper care, to mitigate the damage which such negligence did occasion. *Lyons v. Erie R. Co.* 57 N. Y. 489.

So, in *McGarrahan v. New York, N. H. & H. R. Co.* 171 Mass. 211, 50 N. E. 610, it was held that improper treatment of a patient by a physician does not relieve from liability the person causing the injury, where the patient used ordinary care in procuring the physician, his duty being fully discharged in the use of such ordinary care in procuring a reputable physician, and the same care in following his instructions.

And in *Sauter v. New York C. & H. R. R. Co.* 66 N. Y. 50, 23 Am. Rep. 18, holding a defendant liable for a negligent injury to another which would have caused death, where the injured person employed a competent surgeon, who, in performing an operation, made a mistake sufficient of itself to cause death, it was said, following *Lyons v. Erie R. Co.* 57 N. Y. 489, *supra*, that if one who is injured by the negligence of another acts in good faith under the advice of a competent physician, even if it is erroneous, he may recover, and that the error is no shield to the wrongdoer.

From the above cases the rule appears to be that one who acts upon an improper suggestion made by a physician not in his employ does so at his own risk, and cannot recover against one who injured him for any enhancement of the injury thereby caused; and, though the physi-

cian may have been employed by the person causing the injury, he is an independent contractor, and not an agent or servant for whose act in making the improper suggestion the employer would be liable. But if the physician is one employed by or for the injured person to treat his injuries, the person injuring him is responsible in damages for the whole injury, though the injury was enhanced by obeying mistaken directions of the physician, where reasonable care was exercised in the selection of a physician of ordinary skill.

III. Effect of disobeying directions.

Where an injured person disobeys the directions of his physician, and thereby enhances or aggravates the injury, the rule seems to be universal that such disobedience will prevent a recovery to the extent that the damages were thereby enhanced or increased; and some of the cases have laid it down without apparent qualification.

Thus, if a person injured by the negligence of another employs, to care for his injuries, a reputable physician, but negligently fails to follow directions as to treatment of his injuries, and thereby his damages are aggravated, that aggravation should be considered, and should reduce his claim. *Strudgeon v. Sand Beach*, 107 Mich. 496, 65 N. W. 616.

And one who suffers an injury from catching her foot in a hole in a sidewalk, breaking her limb, cannot recover damages from the city for any increased pain or deformity caused by her own negligence or carelessness in the use of the limb after the injury, or by failure to follow directions of her physician with reference to its use. *Goshen v. England*, 119 Ind. 368, 5 L. R. A. 253, 21 N. E. 977.

And while one who unlawfully sells intoxicating liquors to a person, who becomes quarrelsome and makes a disturbance, and is shot in the leg and injured in the progress thereof, and who afterwards disobeys the orders of his physician and uses the leg, after which it has to be amputated and his death results, would be liable to the deceased's wife, under the civil damage act, if the death could be regarded as the natural and proximate cause of the intoxication, if the death was the consequence of disobeying the physician's orders a new agency will intervene, and the liquor seller cannot be held responsible. *Schmidt v. Mitchell*, 84 Ill. 195, 25 Am. Rep. 446.

And it is a material question for the jury, in an action by the wife under the civil damage act, against the person supplying the liquor,

amine the plaintiff, who was then suffering from the effects of a fall from the defendant's car.

Dr. Hubbard was acting strictly within the scope of his employment by the defendant, and when he told the plaintiff to stand upon his left leg he was doing an act which was clearly within the scope of his employment. The defendant, therefore, is liable for such negligence of Dr. Hubbard.

Shattuck v. Bill, 142 Mass. 56, 7 N. E. 39; *Zinn v. Rice*, 161 Mass. 571, 37 N. E. 747; *Richardson v. Carbon Hill Coal Co.* 6 Wash. 52, 20 L. R. A. 338, 32 Pac. 1012; *Texas & P. Coal Co. v. Connaughten*, 20 Tex. Civ. App. 642, 50 S. W. 173; *Hitchcock v. Burgett*, 38 Mich. 501; *Brackett v. Lubke*, 4 Allen, 138, 81 Am. Dec. 694; *Story, Agency*, §§ 308, 452; *Southern Exp. Co. v. Platten*, 93 Fed. Rep. 936, 36 C. C. A. 46.

A person who employs an attorney-at-law

to determine from the evidence whether the wound received was the cause of the death, or whether the death was the result of the misconduct on the part of the person injured in using his leg in disregard of the advice by the physician; and the exclusion of evidence as to such advice by the physician, and such disregard thereof, would be error. *Ibid.*

Likewise, the same or similar rules applicable to this subject have been laid down in a number of actions against physicians for malpractice with reference to personal injuries.

Thus, in *Becker v. Janinski*, 27 Abb. N. C. 45, 15 N. Y. Supp. 875, it was said that a patient must obey the orders, and follow the directions, of his physician.

And in *McCandless v. McWha*, 22 Pa. 261, and in *Haire v. Reese*, 7 Phila. 138, it was held to be the duty of a patient to conform to the necessary prescription and treatment of his physician, if they be such as a physician or surgeon of ordinary skill and care would adopt or sanction; and if he will not, or under the pressure of pain cannot, do so, the physician is not responsible for injury resulting therefrom.

And in *Jones v. Angell*, 95 Ind. 376, it was held to be the duty of a patient to submit to the treatment prescribed by his physician, and to follow the necessary or reasonable directions given by him, and that a refusal to adopt the remedies, or comply with the directions, of the physician, defeating the endeavors of the physician or aggravating the case, prevents a recovery for the consequences due to himself; and that calling the attention of the jury, in an action for the injuries, to the question of the plaintiff's neglect or refusal to obey his physician, is not improper, where there is evidence establishing, or strongly tending to establish, the fact alluded to.

So, in *Geiselman v. Scott*, 25 Ohio St. 86, it was held that a patient who is directed by his physician to observe absolute rest as a part of the treatment of an injured foot, such direction being one which would be adopted by a surgeon or physician of ordinary skill, who negligently fails to observe such direction, or purposely disobeys the same, cannot recover if such neglect or disobedience proximately contributes to the injury of which he complains, although it appears that the physician's negligence or want of skill also contributes to the injury.

And in *Potter v. Warner*, 91 Pa. 362, 36 Am. Rep. 668, it was held that if the parents of a boy run over and injured by a cattle car were in charge of and nursed him, and did not obey 49 L. R. A.

to do certain legal work for him is liable for the torts of his attorney committed upon a third person, while the attorney is acting within the scope of his employment.

Zinn v. Rice, 161 Mass. 571, 37 N. E. 747; *Shattuck v. Bill*, 142 Mass. 56, 7 N. E. 39.

A like principle has been applied to physicians who have been employed to do certain medical work for the benefit of their employer, and, while acting within the scope of their employment, injure a third person by some act of negligence.

Texas & P. Coal Co. v. Connaughten, 20 Tex. Civ. App. 642, 50 S. W. 173; *Richardson v. Carbon Hill Coal Co.* 6 Wash. 52, 20 L. R. A. 338, 32 Pac. 1012.

The doctrine of *ultra vires* does not apply. A corporation is liable for the negligence of its employees to the same extent that natural persons are liable.

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the directions of the physician in regard to the treatment and care of their son during the time, but disregarded the same, and thereby contributed to the injuries of which he complained, he cannot recover; and it is not necessary that the negligence of each party be equal, to defeat a recovery.

And in *Swanson v. French*, 92 Iowa, 695, 61 N. W. 407, it was held that an instruction that if a plaintiff disobeyed the orders of his physician by removing the splints from his leg, and by using it before receiving permission of the physician, and while it is not sufficiently recovered, and procured crutches, and went about against the orders of the physician, and became intoxicated and used his leg while in that condition, and by reason of such use contributed in any degree directly to the injury of his leg complained of by him, he could not recover, announces a correct rule of law, and is not objectionable as shifting the burden of proof of contributory negligence to the defendant.

And in *Whitesell v. Hill* (Iowa) 66 N. W. 894, an instruction placing the duty of following a physician's directions upon a person injured, with reference to the treatment of the injury, and relating to the care he should use, and directing the jury to disallow any claims of the plaintiff which resulted from his failure to obey such directions or instructions, was held to be justified by a claim on the part of the plaintiff that a bandage was negligently placed on his arm after the reduction of the fracture, causing him excessive pain, which was attempted to be met by evidence that directions were given to the plaintiff, which, if followed, would have relieved the pain and saved the trouble complained of.

Other cases, however, show that the rule is a qualified one, both with reference to the nature of the directions disobeyed, and to the competency or capacity to obey of the person injured, the rule probably being that the remedy would not be affected by disobeying a palpably erroneous direction, or by the disobedience of a person who was insane, or otherwise incompetent to understand or act upon the direction.

Thus, it cannot be said, as a matter of law, that a patient may not, without imputation of negligence, which will prevent a recovery against one who negligently caused him an injury, trust to natural results without the complication of scientific experiments. *Sullivan v. Tioga R. Co.* 112 N. Y. 643, 20 N. E. 569.

And the question whether the refusal of a man, who had been injured by the negligence

Mass. 177, 22 L. R. A. 364, 35 N. E. 776; *Donnelly v. Boston Catholic Cemetery Assn.* 146 Mass. 163, 15 N. E. 505.

Messrs. M. F. Dickinson, Jr., and Walter Bates Farr, for defendant:

The defendant cannot be held liable in this action because the defendant failed in no duty which it owed to the plaintiff.

It is only when the employer and the employed stand in the relation of master and servant that the employer is liable for the negligence of a person employed, and then only if the acts complained of were done in the course of the servant's employment.

Hilliard v. Richardson, 3 Gray, 349, 63 Am. Dec. 743; *Linton v. Smith*, 8 Gray, 147.

Dr. Hubbard was employed by the defendant simply to make a physical examination of the plaintiff.

The employment of Dr. Hubbard was an

independent employment, and he was an independent contractor.

Under such circumstances the employer is not liable for the negligence or unskillfulness of the person employed.

Harrison v. Collins, 86 Pa. 153, 27 Am. Rep. 699; *Barry v. St. Louis*, 17 Mo. 122; *Sprout v. Hommingway*, 14 Pick. 1, 25 Am. Dec. 350; *Wood v. Cobb*, 13 Allen, 58; *Harding v. Boston*, 163 Mass. 14, 39 N. E. 411; *Stretton v. Holmes*, 19 Ont. Rep. 286.

A corporation is not liable for the negligence and unskillfulness of a physician employed by it to attend and treat third persons, where it had not failed to exercise due care in selecting a competent person.

Union P. R. Co. v. Artist, 19 U. S. App. 612, 23 L. R. A. 581, 60 Fed. Rep. 367, 9 C. C. A. 14; *Pierce v. Union P. R. Co.* 32 U. S. App. 48, 66 Fed. Rep. 45, 13 C. C. A. 323;

of another, to submit his leg to amputation in accordance with the advice of his physician, constitutes negligence on his part which will bar a recovery against the person causing the injury, is one for the jury, where the physician gave no assurance that the operation would change the apprehended result, but merely stated that it would have improved chances, and it appeared that in similar cases amputation had been omitted and the limb saved. *Ibid.*

So, the information which a surgeon may give to a patient concerning the nature of his malady is a circumstance which should be considered by the jury in determining the question whether the patient, in disobeying the instructions of the surgeon, was guilty of contributory negligence. *Geiselman v. Scott*, 25 Ohio St. 86.

And one who receives a physical injury at the hands of another cannot be expected to know in every instant the most prudent thing for him to do, and should not be held negligent because his sufferings are such that they impel him to a course unfavorable to his recovery, where there is but a mere scintilla of evidence that he knew that such course was unfavorable; and one who was injured by the negligent act of a railroad company will not be debarred from recovering the full amount of his damages by the testimony of his physician that he was an active, strong man, that it was impossible to control him, that he did not observe the strict quietude that he should have done, that his pain made him restless and uneasy, and that he thought exercise relieved his pain, which was a characteristic of the injury, where the witness does not say the injured person was told of the importance of keeping quiet, or that he knew that moving about would retard his recovery. *Gulf, C. & S. F. R. Co. v. McMannewitz*, 70 Tex. 73, 8 S. W. 66.

So, in *McCandless v. McWha*, 22 Pa. 261, it was said by Lewis, J., that a patient is bound to submit to such treatment as his surgeon prescribes, provided the treatment be such as a surgeon of ordinary skill would adopt or sanction; but if it be painful, injurious, and unskillful, he is not bound to imperil his health, and perhaps his life, by submission to it. And before a physician can shift the responsibility from himself to the patient, on the ground that the latter did not submit to the course recommended, it must be shown that the prescriptions were proper and adapted to the end in view, and it is incumbent on the surgeon to satisfy the jury on that point.

And the same rule was laid down in *Du Bois* 49 L. R. A.

v. Decker, 130 N. Y. 325, 14 L. R. A. 429, 20 N. E. 813. But these were malpractice cases.

And in *Chamberlain v. Morgan*, 68 Pa. 168, which was an action for malpractice against a physician, it was held that evidence by a consulting physician that on examination of a girl whose arm was injured, in the presence of, and at the request of, her father, he proposed to put her under the influence of an anæsthetic, and attempt to reduce the fracture, and that the injury could then have been reduced, and that the father replied in her presence that so long as she was improving so fast he would not have it disturbed, is not admissible in an action brought by the girl, where the consulting physician had only been asked to examine the daughter's arm and give his opinion about it, as that did not oblige the father to adopt his advice.

So, as most insane persons are under compulsory medical treatment, they cannot be assumed to occupy the same moral and fiduciary relations to their medical attendants as do sane persons, and they are not bound to co-operate with their medical attendants in procuring a cure of their own persons as sane patients are. And their neglect or unwillingness to do so cannot be imputed to them as contributory negligence. But as insanity at law is a term of variable significance, covering different shades of mental unsoundness, there might be phases of it in which a patient would be capable of such negligence as would amount to contributory wrong on his part. *People ex rel. Norton v. New York Hospital*, 3 Abb. N. C. 229.

But the rule with reference to the degree of care required of a person injured by the negligence of another in the employment of a physician and surgeon, and in procuring and submitting to proper medical treatment, is not changed or affected by the fact that the person injured was himself a physician and surgeon. *Boynton v. Somersworth*, 58 N. H. 321.

Subsequent negligence, however, after the injury of one whose foot is caught in a hole in a sidewalk whereby her limb is broken, in the use of the limb, and in failing to follow the directions of her physician, does not bar a recovery against the city, but it can only be held liable for such damage as its negligence produced; and before a reduction of damages for the pain actually suffered and the deformity actually existing can be had, it must appear that the pain and deformity were increased by the negligence or failure to obey the instructions of the physician by the plaintiff. *Goheen v. England*, 119 Ind. 368, 5 L. R. A. 253, 21 N. E. 977.

A recovery is not barred by a mere failure to follow the physician's directions, but no dam-

Secord v. St. Paul, M. & M. R. Co. 5 McCrary, 515, 18 Fed. Rep. 221.

Even in the case of a public hospital corporation, whose business it was to furnish medical treatment for patients, it has been held that the physicians and surgeons thus employed were not the servants of such corporation.

McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529; *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675.

It makes no difference that Dr. Hubbard was employed to make an examination for purposes of information rather than for treatment.

Harriott v. Plimpton, 166 Mass. 585, 44 N. E. 992.

The plaintiff was not bound to obey Dr. Hubbard's directions, and if it were dangerous he knew it better than Dr. Hubbard could know. The maxim *Volenti non fit injuria*, therefore applies, and the plaintiff cannot complain of an injury which he caused himself, and to which he consented.

Latter v. Braddell, 50 L. J. C. P. N. S. 166; *Gilbert v. Guild*, 144 Mass. 601, 12 N. E. 368; *Goddard v. McIntosh*, 161 Mass. 253, 37 N. E. 169; *Davis v. Forbes*, 171 Mass. 548, 47 L. R. A. 170, 51 N. E. 20.

Holmes, Ch. J., delivered the opinion of the court:

This is an action seeking to charge the defendant with the alleged results of a doctor's examination of the plaintiff. The plaintiff had had an accident, and had sued the defendant, whereupon the defendant forthwith sent a doctor to examine him. The plaintiff's trouble was in his left leg, and the doctor, after directing him to stand upon his right leg, told him to stand upon his left leg. The plaintiff said that he could not, and his own doctor also said that he could not bear his weight upon that leg. The examining doctor then told the plaintiff to "try standing on his left leg." The plaintiff tried it, fell, and attributes subsequent hysterical trouble to this cause. At the trial the judge directed a verdict for the defendant, and the case is here on exceptions.

It would be a strong thing to say that the

ages should be allowed for an injurious effect resulting from such failure. *Keyes v. Cedar Falls*, 107 Iowa, 509, 78 N. W. 227.

And evidence in an action therefor proving the receipt of the injury, and that it occurred by reason of the negligence of the defendant and without the plaintiff's fault, and that she employed skilful physicians and surgeons to treat it, and that a deformity was caused thereby, establishes a cause of action for the pain suffered and the deformity existing; and if the defendant, to relieve itself from such liability, asserts that the pain and deformity were not the result of the injury, but were caused by the negligence of the plaintiff in the treatment of the limb after the injury and in failing to follow directions of her physician, the burden rests with him to establish the truth of such assertion. *Goshen v. England*, 119 Ind. 368, 5 L. R. A. 253, 21 N. E. 977.

And a person receiving a personal injury through the negligence of another is entitled 49 L. R. A.

evidence warranted finding anyone responsible for the accident except the plaintiff himself. The doctor's request that he should try standing on his left leg was not medical advice or direction upon a matter as to which the plaintiff had put himself in the doctor's hands. On the contrary, it came from one who avowedly was in an adverse interest, and who had no authority of any kind. Furthermore, it recognized in its very words that perhaps the plaintiff was right in thinking that he could not stand in that way. It only called on him for an experiment in a region of admitted doubt. How far the experiment should go necessarily was left to the plaintiff himself when he should make it. If he carried it too far, the doctor was not to blame. See *Latter v. Braddell*, 50 L. J. C. P. N. S. 166, a much stronger case than the present.

But, further, the doctor was not an agent or servant of the defendant in making his examination. He was an independent contractor. There is no more distinct calling than that of the doctor, and none in which the employee is more distinctly free from the control or direction of his employer. See *Linton v. Smith*, 8 Gray, 147; *Milligan v. Wedge*, 12 Ad. & El. 737, 741, 742. In this case the doctor was informing himself, according to the suggestions of his own judgment in order to advise and perhaps to testify for the defendant. We must assume, in the absence of other evidence than his profession and his purpose, that what he should do and how he should do it was left wholly to him. See *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 424, 34 Am. Rep. 675; *Secord v. St. Paul, M. & M. R. Co.* 5 McCrary, 515, 18 Fed. Rep. 221, 225.

An argument is addressed to us drawn from the liability of litigant for his attorney. *Shattuck v. Bill*, 142 Mass. 56, 7 N. E. 30. But no argument can be trusted that relies on that analogy. Perhaps the liability for an attorney rests on the fact that the very essence of his employment was to represent the person of a party to a suit. *Attornatus fere in omnibus personam domini representat*. Bracton, 342a. It must be remembered that this right of representation in a lawsuit was conceived with difficulty.

to recover of the person causing the injury full compensation for all the mental and physical injury that he sustained by reason of the negligence and carelessness of such person: and the jury, in an action therefor, is not justified in inferring that if the injured person did not regard the advice of his physician the injury was thereby aggravated so that he would not be entitled to recover. *Lawrence v. Housatonic R. Co.* 29 Conn. 390.

These cases seem to establish the rule, with reference to disobeying the directions of the physician in charge, that if the injuries are thereby enhanced or increased the person injured cannot recover of the person injuring him for the increased injury. But the right to recover for the injury as it originally existed would not be affected, and the rule would not apply to disobedience of a direction which was erroneous to the knowledge of the patient, or of a person who was incompetent to understand or obey.

F. H. B.

and only gradually granted, and, as first allowed, seems to have been worked out through some sort of fictitious identification.

Whether for that reason or another, attorneys sometimes have been spoken of as servants (*Anonymous*, 1 Mod. 209, 210), and their acts within the scope of their employment always have been said to be the acts of their clients (*Parsons v. Loyd*, 3 Wils. 341, 345; *Barker v. Braham*, 2 W. Bl. 866, 868, 869, 3 Wils. 368, 374; *Bates v. Pilling*, 6 Barn. & C. 38, 41; *Nicholberry v. Lee*, 3 Hill, 523; *McIlvoy v. Wright*, 137 Mass. 207).

In short, the liability of client for attorney is the result of a special series of events, and cannot be allowed to found a general rule.

We are of opinion that on one or the other of the foregoing grounds the direction was right.

In the view which we take, the exceptions to the exclusion of evidence become unimportant. The questions excluded went to the general skill of the doctor's examination. This was immaterial, as the ground of the claim was a specific fact, definitely stated.

Judgment on the verdict.

WYOMING SUPREME COURT.

Ex parte John MISKIMINS.

(.....Wyo.....)

1. The supreme court, having jurisdiction to issue writs of habeas corpus, may issue a writ to release from imprisonment one entitled to relief, although a writ has been previously refused or dismissed by a lower court, if the statute does not provide for appeal, and plainly contemplates repeated applications for the writ.
2. When any constitutional right or immunity of accused is violated in a proceeding for contempt in refusing to give testimony, a judgment of conviction is void.
3. A court loses jurisdiction of an accused person by wrongfully interpreting his constitutional rights or immunities against him, or by refusing him a constitutional right, so that its judgment against him is void.
4. Want of jurisdiction to punish a witness for contempt for refusing to answer questions tending to incriminate himself, because punishment will violate his constitutional rights, will entitle a witness to release on habeas corpus in case of imprisonment, although the conviction might be reviewed by writ of error.
5. A witness may be compelled to answer a question against his claim of privilege on the ground that his answer might tend to incriminate him, if the court decides that there is no tangible or substantial probability that any direct answer to the question would implicate him.
6. One charged with compounding a felony by refusing to testify against accused cannot, although the information against him has been dismissed, be compelled to give evidence to prove the commission of the felony, since that would be one link in establishing his guilt of compounding it.
7. A constitutional provision that no one shall be compelled to give incriminating evidence against himself will protect against the extortion of the evidence, although, if given, it could not be used in any prosecution against the witness.

NOTE.—For habeas corpus to review void sentence, see *note* to *Blon's Appeal* (Conn.) 11 L. R. A. 694; and *Stoutenburgh v. Frazier* (D. C.) 48 L. R. A. 220.

For habeas corpus to review commitment for contempt in refusing to give up books and papers, see *Ex parte Clarke* (Cal.) 46 L. R. A. 835.

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8. The question of the good faith of a witness in claiming privilege against giving self-incriminating testimony does not depend upon his attitude towards the prosecution, but upon his belief as to the effect of his answer.

9. That the privilege of a witness to refuse to give self-incriminating testimony is subject to abuse cannot be considered by the courts in determining the validity of a conviction for contempt for refusing to answer, further than to guard against such abuses as far as consistent with the maintenance of the right itself.

(*Knight, J., dissents.*)

(September 18, 1899.)

APPPLICATION for a writ of habeas corpus to obtain the release of petitioner from the custody of the sheriff of Laramie County to which he had been committed for contempt in refusing to answer questions propounded to him as a witness. *Petitioner discharged.*

Statement by **Coom, J.:**

This is a writ of habeas corpus. The prosecuting attorney of Laramie county, upon information furnished him by the plaintiff, made complaint before a justice of the peace against one Oliver C. Hough, charging him with having obtained the sum of \$1,130 from plaintiff by false pretenses. He and one James Raff, also charged with the same offense, had left this state, and gone to the state of Colorado; and the plaintiff made the necessary affidavit to obtain a requisition, and they were arrested, and brought back to this state for trial. Upon the preliminary examination the plaintiff was placed upon the witness stand by the prosecution, and asked the following questions:

Q. Did you purchase, or attempt to purchase, from the defendants, James Raff and Oliver C. Hough, or either of them, a bunch of cattle, or any interest in any cattle, between the 1st day of July, A. D. 1899, and the 15th day of July, A. D. 1899, or about that time? If so, state the particulars of the purchase, or attempted purchase.

Q. If any such purchase, or attempt to purchase, was made, state where the defendants, or either of them, stated at the time

said cattle were situated, or under whose charge.

Q. If any such purchase, or attempt to purchase, was made, state fully all the facts and circumstances leading up to the said transaction, and all the facts of the transaction itself.

Q. You may state fully what, if any, admissions the defendants James Raff and Oliver C. Hough, alias Clifford W. Lang, or either of them, made to you in regard to this transaction; stating the date, time, and place, and who was present, if anybody, and all the facts and circumstances of such admissions, if any were made.

Q. State fully and particularly what money, if any, was paid, either by you or your direction, to the defendants, or either of them, as purchase price, or on the purchase price, for the cattle, or the interest of the defendants, or either of them, in the cattle, and all the facts in relation to such payment.

Q. If any purchase, or attempted purchase, was made, state whether or not you obtained any cattle, by your purchase, or attempted purchase; and, if your answer is in the negative, state fully all you know of the reasons why you did not obtain any cattle, or any interest in any cattle, by your purchase, or attempted purchase.

He declined to answer all of them, upon the ground that the answers to them would tend to criminate him. In the meantime the prosecuting attorney had had some difficulty in getting the plaintiff, the prosecuting witness, before the justice to testify in the case, and had filed a complaint against him, charging him with compounding the felony with which the defendants were charged. The justice decided that the plaintiff must answer the questions, and upon his continued refusal adjudged him to be in contempt, and committed him to jail until he should consent to answer. The plaintiff then sued out a writ of habeas corpus before Hon. Richard H. Scott, the district judge of the first district. Judge Scott, upon the hearing, adjudged that the plaintiff was properly imprisoned for his failure to answer, and remanded him to jail. The plaintiff then presented another petition for the writ of habeas corpus to one of the judges of this court, who issued it, and made it returnable before the supreme court.

Messrs. R. W. Breckons and W. R. Stoll, for petitioner:

A person summoned as a witness before any inquisitional body, judicial or legislative, is absolutely privileged from answering a question put to him, if he will state upon his oath, in answer to such question, that he refuses to answer the same for the reason that his answer thereto, if given, will subject him to an indictment for a crime; and if such an answer be not deemed sufficient by the inquisitional body, and the witness be imprisoned for contempt for refusing further to answer, he will be entitled to his discharge on habeas corpus.

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1 Thompson, Trials, § 286; *Chamberlain v. Willson*, 12 Vt. 491, 36 Am. Dec. 356; *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; *Ex parte Irvine*, 74 Fed. Rep. 954; *Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; *People ex rel. Taylor v. Forbes*, 143 N. Y. 219, 38 N. E. 303; *People ex rel. Taylor v. Scaman*, 8 Misc. 152, 29 N. Y. Supp. 329; *People v. Mather*, 4 Wend. 239, 21 Am. Dec. 122; *Adams v. Lloyd*, 3 Hurlst. & N. 351; *State v. Edwards*, 2 Nott & M'C. 13, 10 Am. Dec. 557; *Pool v. Peritt*, 1 Speers L. 128; *Sanderson's Case*, 3 Cranch, C. C. 638, Fed. Cas. No. 12,297; *United States v. Burr*, Brunner, Col. Cas. 493, Fed. Cas. No. 14,692; *Noale v. Coningham*, 1 Cranch, C. C. 76, Fed. Cas. No. 10,067; *Re Graham*, 8 Ben. 419, Fed. Cas. No. 5,659; *United States v. Moses*, 1 Cranch, C. C. 170, Fed. Cas. No. 15,824; *United States v. Lynn*, 2 Cranch, C. C. 309, Fed. Cas. No. 15,649; *Ex parte Clarke*, 103 Cal. 352, 37 Pac. 230; *Southern Railway News Co. v. Russell*, 91 Ga. 808, 18 S. E. 40; *Stevens v. State*, 50 Kan. 712, 32 Pac. 350; *Minters v. People*, 139 Ill. 363, 29 N. E. 45; *Com. v. Tridor*, 143 Mass. 180, 9 N. E. 510; *Lombard v. Mayberry*, 24 Neb. 674, 40 N. W. 271; *South Bend v. Hardy*, 98 Ind. 577, 49 Am. Rep. 792; *Lister v. Boker*, 6 Blackf. 439; *Ex parte Senior*, 37 Fla. 1, 32 L. R. A. 133, 19 So. 652; *Printz v. Cheney*, 11 Iowa. 469; *Re Tappan*, 9 How. Pr. 394; *Bellinger v. People*, 8 Wend. 595; *Simmons v. Holster*, 13 Minn. 249, Gil. 232; *Pleasant v. State*, 15 Ark. 624; *Southard v. Reasford*, 6 Cow. 254; *Janvriu v. Scanmon*, 29 N. H. 280; *Lea v. Henderson*, 1 Coldw. 146.

When the court can see from the situation in which the witness is placed, or the circumstances by which he is surrounded, that the questions are of such a nature that possible answers could be given to them which might tend to criminate the witness, either by showing him guilty of the particular crime charged, or of some other crime, or which might form a link in the chain of evidence which might be made the foundation of a criminal charge, the court will not compel the witness to answer the questions, provided he states on oath that answers to the same will tend to criminate him.

In all cases where the privilege is claimed, the mere claim of the privilege itself necessarily draws with it the legal conclusion, first, that the witness is actually guilty of a crime; or, second, that by disclosing the actual facts of the transaction he will disclose some fact or circumstance which would tend to form a link of incriminating evidence to be thrown around him; or third, the witness may be entirely innocent, yet he may be so situated with relation to guilty parties, and the facts and circumstances which surround him may be such, that any answer that he might make would form or tend to form a link in the chain of incriminating circumstances which might be taken as the basis of a criminal prosecution, or as the basis of a criminal complaint.

The questions in and of themselves show

the relator so situated with relation to time, place, and circumstances that answers which he might make to the questions would clearly tend to criminate him.

It is a presumption of law that, if a witness answers, he will answer truthfully and fully. The law cannot presume anything else, and if the witness answers at all as to a transaction the court will compel him to answer fully.

Chamberlain v. Willson, 12 Vt. 491, 36 Am. Dec. 356; *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; *Broicu v. Walker*, 161 U. S. 591, 40 L. ed. 819, 3 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; *Ex parte Senior*, 37 Fla. 1, 32 L. R. A. 133, 19 So. 652.

It is not the province of the court to say that, simply because an answer to a particular question might not tend to criminate the witness in the particular offense that is then being tried, therefore the witness cannot claim his privilege.

The compounding of a felony embraces two elements: first, the felony itself; and, second, the compounding. There can be no conviction of compounding a felony without first establishing the existence of the felony. A witness already charged with compounding a felony, or a witness whose answers might disclose the compounding of a felony, certainly cannot be called upon to prove the felony, because by doing so he is compelled to prove a part of the cause against himself.

United States v. Lynn, 2 Cranch, C. C. 309, Fed. Cas. No. 15,649; *Ex parte Irvine*, 74 Fed. Rep. 954.

The fact that when a witness is called to testify he claims his constitutional privilege, that it appears that he has made an affidavit, or that he has testified in some other proceeding on the same matter, can in no manner whatever impair the efficacy of the constitutional privilege; nor can the fact that the county attorney has promised that he will not bring any criminal action against the witness, or that he dismissed a criminal action against the witness that has already been begun, cut any figure whatever in the case.

Bellinger v. People, 8 Wend. 595; *Cullen v. Com.* 24 Gratt. 624; *Temple v. Com.* 75 Va. 802; *Muller v. State*, 11 Lea. 18; *Emery v. State*, 101 Wis. 627, 78 N. W. 145.

The jurisdiction of a committing court is considered only as to such contempt as involves some idea of delinquency or wrongdoing on the part of the party committed, and cannot extend to calling an act a contempt which is indifferent or innocent,—such, for instance, as claiming a constitutional privilege.

Re Dill, 32 Kan. 608, 49 Am. Rep. 505, 5 Pac. 39; *Ex parte Hollis*, 59 Cal. 405; *Holman v. Austin*, 34 Tex. 668; *Church, Habeas Corpus*, §§ 318 et seq.; *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; *Ex parte Irvine*, 74 Fed. Rep. 954; *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211; *People v. Dewey*, 23 Misc. 267, 50 N. Y. Supp. 1013; *Re Patswald*, 5 Okla. 789, 50 49 L. R. A.

Pac. 139; *People ex rel. Burchinell v. Arapahoe County Dist. Ct.* 22 Colo. 422, 45 Pac. 402; *State ex rel. Connolly v. Brown*, 47 Minn. 472, 50 N. W. 920; *Ex parte Webb* (Nev.) 51 Pac. 1027; *Ex parte Smith*, 135 Mo. 223, 33 L. R. A. 606, 36 S. W. 628; *Ex parte Rosenblatt*, 19 Nev. 439, 14 Pac. 298; *Re Havlik*, 45 Neb. 747, 64 N. W. 234; *McClatchy v. Sacramento County Super. Ct.* 119 Cal. 413, 39 L. R. A. 691, 51 Pac. 696; *Re Tom Yum*, 64 Fed. Rep. 485; *Re Morton*, 10 Mich. 208; *Re MacKnight*, 11 Mont. 126, 27 Pac. 336; *Ex parte Gardner*, 22 Nev. 280, 39 Pac. 570; *Keenan v. People*, 58 Ill. App. 241; *People ex rel. Hackley v. Kelly*, 24 N. Y. 74; *Ex parte Degener*, 30 Tex. App. 566, 17 S. W. 1111; *Brown, Jurisdiction of Courts*, § 98.

It certainly cannot be contended that in such an important matter as a citizen's constitutional rights the supreme court of this state can pass no judgment upon the question by virtue of the fact that either a justice of the peace or a district court has passed upon it.

Wyo. Rev. Stat. §§ 1264, 1296; Wyo. Const. art. 1, § 11, art. 5, §§ 2, 3; 9 Enc. Pl. & Pr. p. 1070; 9 Am. & Eng. Enc. Law, pp. 237, 239; *Ex parte Kaine*, 3 Blatchf. 1, Fed. Cas. No. 7,597; *Re Snell*, 31 Minn. 110, 16 N. W. 692; *People ex rel. Laurence v. Brady*, 50 N. Y. 182; *People ex rel. McIntyre v. Hurlburt*, 67 How. Pr. 362; *Ex parte Lawrence*, 5 Binn. 304; *Ex parte Campbell*, 20 Ala. 89; *Ex parte Pattison*, 50 Miss. 161; *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717; *Holman v. Austin*, 34 Tex. 668; *Re Perkins*, 2 Cal. 424; *Re Ring*, 28 Cal. 248; *Re Dill*, 32 Kan. 608, 49 Am. Rep. 505, 5 Pac. 39; *Maria v. Kirby*, 12 B. Mon. 542.

It does not matter whether a habeas corpus proceeding grows out of a civil action, or how it originates, it is always an original proceeding; and a statute which gives an appeal from a final order affecting a substantial right, made in a special proceeding, does not relate to a habeas corpus proceeding, but only to a civil proceeding for the enforcement and protection of private rights, or the redress or prevention of private wrongs.

Re Fencelon, 37 Wis. 231.

When a statute permits an appeal to be taken in a habeas corpus proceeding, from the determination of a court, no appeal will lie where the determination was not by a court, but by a judge.

Carper v. Fitzgerald, 121 U. S. 87, 30 L. ed. 882, 7 Sup. Ct. Rep. 825; *Broadwell v. Com.* 98 Ky. 15, 32 S. W. 141; *Re Perkins*, 2 Cal. 424; *Re Ring*, 28 Cal. 248; *Hammond v. People ex rel. Vacaro*, 32 Ill. 446, 83 Am. Dec. 286; *Ex parte Thompson*, 93 Ill. 89; *Lambert v. Barrett*, 157 U. S. 697, 39 L. ed. 865, 15 Sup. Ct. Rep. 722; *State v. Brownell*, 80 Wis. 563, 50 N. W. 415; *Ex parte Juneman*, 28 Tex. App. 486, 13 S. W. 783.

No proceeding in error (whether by writ of error or appeal makes no difference) ever lies in the absence of a statute permitting or requiring this method to be pursued to review the judgment of a court or the order of a judge on the hearing of a writ of habeas

corpus respecting the right of the petitioner to be discharged from imprisonment.

Wyo. Const. § 5, §§ 1-3; Wyo. Rev. Stat. p. 4, § 1264; *Annapolis v. Howard*, 80 Md. 244, 30 Atl. 910; *Re Perkins*, 2 Cal. 424; *Re King*, 28 Cal. 248; *Hammond v. People ex rel. Vacaro*, 32 Ill. 446, 83 Am. Dec. 286; *Ex parte Thompson*, 93 Ill. 89; *Napier v. People*, 9 Ill. App. 523; *State ex rel. Arkansas Industrial Co. v. Neel* (Ark.) 3 S. W. 631; *Ex parte Yerger*, 8 Wall. 85, 19 L. ed. 332; *Ex parte Strong* (Tex. Crim. App.) 30 S. W. 666; *Thomas v. State*, 40 Tex. 6; *Ex Parte Ainsworth*, 27 Tex. 731; *Ex parte Senior*, 37 Fla. 1, 32 L. R. A. 133, 19 So. 652; *Caro v. Maxwell*, 20 Fla. 17; *Re Smith*, 52 Kan. 13, 33 Pac. 957; *Re Olyne*, 52 Kan. 441, 35 Pac. 23; *People ex rel. Reeve v. Gilbert*, 57 Ill. App. 505; *Ex parte Mitchell*, 1 La. Ann. 413.

Corn, J., delivered the opinion of the court:

A number of questions arise in this case, none of which have been passed upon by this court. Some of them are of serious importance, and, owing to the difference in the habeas corpus statutes in the various states and some conflict in the decisions, of considerable difficulty. Therefore, while the circumstances of the case have urged an immediate decision, we have deemed it better to take sufficient time to give the propositions a careful consideration, and endeavor to reach a conclusion which could be relied on as a safe precedent in so serious a matter as the imprisonment of a citizen as a penalty for exercising what he claims to be a constitutional right.

Counsel for the defendant contend that, the district judge having adjudicated the question of the legality of plaintiff's imprisonment upon the same facts, this court ought not to again consider it; that the plaintiff might have come to this court by petition in error, and should be required to avail himself of that remedy. All the authorities agree that there is no appeal from a hearing upon habeas corpus, unless the right is conferred by statute. In many habeas corpus cases, as, for instance, where the custody of children is involved, it is, without doubt, an appropriate method of obtaining the opinion of the court of last resort. In cases like the present, where the petitioner is imprisoned, and other proceedings are awaiting the decision of the questions, the necessary delays incident to a review by petition in error make it subject to serious objections, and, if there is no other remedy, entirely inappropriate and inadequate. We do not deem it necessary to decide, in this case, however, whether proceedings in error are authorized by our statutes; for we think that our habeas corpus act, when considered in connection with the constitutional provisions bearing upon the question, clearly contemplates that the writ shall issue, and a hearing be had, when, upon the showing of the petitioner, he would be entitled to relief, notwithstanding the fact that the writ may have been refused, or may have

been issued and afterwards dismissed, upon a hearing by another judge.

It is said that "by the great preponderance of authority the principle of *res judicata*, where not otherwise provided by statute, has no application to habeas corpus cases, and a decision on one writ is no bar to the issuance of and proceedings on a subsequent habeas corpus." 9 Enc. Pl. & Pr. 1070. In *Ex parte Lawrence*, 5 Binn. 304, where the case had already been heard upon a habeas corpus upon the same evidence by the common pleas, who remanded the prisoner, the supreme court of Pennsylvania refused to issue a second writ, but say in their decision: "We do not think that the act of assembly obliges this court to grant a habeas corpus, where the case has been already heard upon the same evidence by another court; and we do not think it expedient in this case, because it has already been heard upon the same evidence, and the party is not without remedy, as he may resort to a *hominem replegiando*. The court are not, however, to be understood as saying that they have not authority to issue a habeas corpus in such a case, if they should think it expedient." And this was not a case where the applicant was imprisoned, but involved the question of the right to his freedom of one held as a slave. In a case before Mr. Justice Nelson, at chambers, it was objected that the decision of the circuit court of the United States upon the return of a former writ of habeas corpus, remanding the prisoner, was conclusive, and a bar to any subsequent inquiry into the same matters by virtue of this writ; but, after reviewing the authorities, the justice said: "The decision, therefore, of the circuit court, upon a previous writ of habeas corpus obtained on behalf of the prisoner, refusing to discharge him, will not relieve me from inquiring into the legality of the imprisonment under the order of the commissioner upon the present application. *Ex parte Kaine*, 3 Blatchf. 5, Fed. Cas. No. 7,597. And upon a hearing the prisoner was discharged. In *People ex rel. Lawrence v. Brady*, 56 N. Y. 182, the relator was arrested upon a warrant of the governor of the state of New York, upon the requisition of the governor of Michigan. A writ of habeas corpus was issued out of the supreme court and upon a demurrer to the return before the court of oyer and terminer there was judgment against the relator, and the writ was dismissed. Afterwards another writ of habeas corpus was issued out of the circuit court of the United States, and there was judgment against the relator, dismissing the writ and remanding the relator. Afterwards another writ of habeas corpus was issued, and returned before Mr. Justice Brady of the supreme court, and there was again judgment, dismissing the writ and remanding the relator to the custody of the sheriff. The proceedings before Judge Brady were affirmed by the supreme court on certiorari, and the writ of certiorari dismissed. The court of appeals, on error to the supreme

court, discharged the relator; and the court says: "We are of opinion that the previous adjudications in proceedings on habeas corpus are no answer to a new writ, issued on the application of the relator. The case is not within the principle of *Mercein v. People ex rel. Barry*, 25 Wend. 64, 35 Am. Dec. 653, where the controversy related to the right to the custody of an infant child. In this case the relator is restrained of his liberty; and a decision under one writ, refusing to discharge him, did not bar the issuing of a second writ by another court or officer,"—referring to *Ex parte Kaine*, 3 Blatchf. 1, Fed. Cas. No. 7,597, and the English cases of *Ex parte Parlington*, 13 Mees. & W. 679, and *Re v. Suddis*, 1 East, 306. *People ex rel. Lawrence v. Brady*, 56 N. Y. 182. And the point was again decided in the same way in *People ex rel. McIntyre v. Hurlburt*, 67 How. Pr. 362. It may be here remarked that in the case of *Re Graham*, 7 Wash. 237, 34 Pac. 931, relied upon by counsel for the respondent, where the supreme court of that state denied an application because the matter had once been heard upon habeas corpus before a judge of the superior court, they in terms decide only a question of practice. While admitting their jurisdiction, and conceding that the practice is different in some states, they hold that the Constitution does not require them to take jurisdiction under such circumstances, and they remit the applicant to his right of appeal, which seems to be provided for in that state. And it is to be observed, further, that, even upon the questions decided, the decision was by a divided court; two out of the five judges dissenting. Brown, Jurisdiction of Courts, § 111, the latest text-book to which we have access on the subject, says: "A denial of the petition is not a bar to a second writ; but in some states the petitioner must show whether the question has been passed upon by any of the courts. The doctrine of *res judicata* has no application to this proceeding, except where the statute provides for an appeal, which is the case in some states." And in the note he cites Hawes, Jur. § 181. "A decision under one writ of habeas corpus, refusing to discharge a person restrained of his liberty, is no bar to a second writ by another court or officer. *Re Perkins*, 2 Cal. 424; *Ex parte Ellis*, 11 Cal. 223-225; *Re Ring*, 28 Cal. 251; *Yates v. People*, 6 Johns. 416; *Re Snell*, 31 Minn. 110, 16 N. W. 692; *Bell v. State use of Miller*, 4 Gill, 303, 45 Am. Dec. 130; *Ex parte Kaine*, 3 Blatchf. 2, 5, Fed. Cas. No. 7,597; *Bonnett ex rel. Newmeyer v. Bonnett*, 61 Iowa, 200, 47 Am. Rep. 810, 16 N. W. 91; *Ex parte Foster*, 5 Tex. App. 643, 32 Am. Rep. 577; *Ex parte Robinson*, 6 McLean, 356, Fed. Cas. No. 11,935; *Ex parte Campbell*, 20 Ala. 93; *Ex parte Lawrence*, 5 Binn. 304; *People ex rel. Lawrence v. Brady*, 56 N. Y. 185. A decision on habeas corpus is not appealable, or subject to review. The doctrine of *res judicata* has no application to such a case; but it seems that a discharge under a writ of habeas corpus by a court of competent

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jurisdiction, being in favor of personal liberty, is final and conclusive, and a rearrest under the same charge is unlawful. *McFarland v. Johnson*, 27 Tex. 105; *Re Ring*, 28 Cal. 251; *Lea v. White*, 4 Sneed, 73, 67 Am. Dec. 599; *People ex rel. Eldridge v. Fancher*, 1 Hun, 28; *Re Curley*, 34 Iowa, 185; *Hammond v. People ex rel. Vacaro*, 32 Ill. 446, 83 Am. Dec. 286; *Re Blair*, 4 Wis. 526; *Perry v. McLendon*, 62 Ga. 601; *Ex parte Pattison*, 56 Miss. 162; *Weddington v. Sloan*, 15 B. Mon. 152."

Unquestionably the matter may be regulated by statute, provided the statutory regulations do not infringe upon the constitutional right to the writ. But the clear intention of our statute is to preserve the right to repeated applications. By subdivision 4, § 1264, Rev. Stat. it is provided that the petition for the writ must state "that the legality of the imprisonment has not already been adjudged upon a prior proceeding of the same character to the best knowledge and belief of the applicant, or, if so previously adjudged upon, setting forth as fully as practicable the facts of such previous hearing, with a copy of all the papers connected therewith, or a satisfactory reason for the absence of such copy or copies." If a former adjudication is to bar a second writ, the latter part of the subdivision, providing for setting out the facts of such former hearing, is useless and absurd, and in reason it must be presumed that the subdivision would end with the requirement that the petition should state that there had been no such former adjudication. The same considerations apply to subdivision 5 of the same section: "It must also state whether application for the writ has been made to and refused by any court or judge, and, if such application has been made, a copy of the petition in that case, with the reasons for the refusal thereto appended, must be produced, or satisfactory reasons given for the failure to do so." The requirement that the facts of such previous hearing, or the reasons for such refusal, must be set out, necessarily implies the power and the duty of the court or judge to whom the second application is made to consider and pass upon the facts of such previous hearing or the reasons for such refusal. These sections are also especially persuasive of this view, in connection with the fact that no other method of review is provided for in the act itself; and this conclusion is further fortified by the fact that the act provides in what cases the writ may be refused, and those in which a former adjudication has been had is not one of them, but it is permitted to be refused only when the application is made to a more remote court or judge, and no sufficient reason stated for not making the application to the more convenient court or judge, or when, upon the showing of the petitioner, the plaintiff would not be entitled to any relief. The statute does not authorize the refusal of the writ in any other cases. The habeas corpus act, in the arrangement of our statutes, is not included in the division of the Code of Civil

Procedure entitled "Special Proceedings;" nor is it incorporated in the Code at all, as is done in some of the states. The act, which was adopted under the territorial government, attempted to confer jurisdiction of the writ also upon the probate judges. They were not, ordinarily, persons learned, or alleged to be learned, in the law; and a construction of the act which would make their judgments final in so vital a matter, involving the constitutional rights and the personal liberty of the citizen, or, at the best, to make a review of their judgments dependent upon the doubtful application of the provisions of the Civil Code to the subject, would expose the lawmaking power of the territory to the charge of enacting rash and ill-considered legislation. By § 3, art. 5, of the Constitution, this court has original jurisdiction in habeas corpus, and each of the judges is given power to issue the writ, and make it returnable before himself, or the supreme court, or any district court of the state, or any judge thereof. In view of all these considerations,—the evident purpose of the Constitution that the writ shall be conveniently obtained, shown in conferring original jurisdiction upon all the courts and judges of the state; the provisions of the statute itself; the office of the writ, to furnish to the citizen summary relief where he is unlawfully deprived of his liberty; the failure of the habeas corpus act to provide for any proceedings in error, and the entire inadequacy of such proceedings in many cases; and the prevailing opinion and practice of the courts of the country where the matter is not otherwise regulated by statute,—we think the power and duty of this court and its judges to consider such second applications, and, in proper cases, to issue and have a hearing upon the writ, cannot be seriously questioned.

Moreover, if there should be an exercise of the jurisdiction in any case, it should be in one like this, where the petitioner is imprisoned in execution of a sentence claimed to be illegal because of a denial of a constitutional privilege. Brown on Jurisdiction of Courts, above quoted, further says: "The Constitution of the United States provides . . . that no person shall be subject for the same offense to be put twice in jeopardy of life or limb, nor be compelled to give evidence against himself. Each state Constitution has similar provisions; and, if not, the United States Constitution would be binding on the courts, and a trial by a different method than that prescribed by it would be a nullity, and the judgment void. The refusal of the court to grant each of the rights above enumerated, or all of them, seems to go to the jurisdiction; and, if the court has jurisdiction to try the action, it seems to lose jurisdiction, once acquired, by a disobedience of the mandates of the Constitution; or, rather, the trial ceases to be a legal trial by a deviation from this course. Therefore, when any constitutional right or immunity of a person is violated, the judgment of the court is void. The Supreme Court of the United States, in a recent case, says: 'It 49 L. R. A.

is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights than an unconstitutional conviction under a valid law.' [*Re Nielsen*, 131 U. S. 183, 33 L. ed. 120, 9 Sup. Ct. Rep. 674.] Under this rule, if a court errs in assuming jurisdiction where it does not possess it, or in interpreting a constitutional immunity or right secured thereby against a prisoner, or in refusing him a constitutional right, the jurisdiction over him ceases, and its acts are, not simply erroneous, but void. Therefore it may be laid down as a rule of law that the error of a court in construing any constitutional immunity or right in a criminal case against the accused is as fatal to the judgment as assuming jurisdiction originally where the court had none. Error in either case destroys the power to render any valid judgment, and, if rendered, it is not simply erroneous, but void." Brown, Jurisdiction of Courts, § 97. This statement of the law seems to be applicable equally to a witness imprisoned in denial of his claim of a constitutional right, for he is the defendant in the contempt proceedings. There was formerly much controversy whether, and to what extent, the judgment of a court imprisoning a person for contempt could be collaterally attacked by means of the writ of habeas corpus.

The writ is not in the nature of, nor is it to be used as a substitute for, proceedings in error. A finding or decision of the inferior court, no matter how erroneous, if it does not affect its jurisdiction, is not subject to attack in this collateral proceeding. The office of the writ is to determine the legality of the particular imprisonment, and the facts to be considered in determining that question are jurisdictional facts. If, upon a consideration of such facts, it appears that the court exceeded its jurisdiction in making the order, the petitioner will be discharged upon habeas corpus; and it is not material that the questions might have been brought to this court by petition in error. In *Re Boulter* this court issued the writ, and carefully considered all the points presented, although, as the court says, "they might all have been raised in proceedings in error, without resorting to habeas corpus." 5 Wyo. 329, 40 Pac. 520. The distinction is tersely stated in *Re Nielsen*, 131 U. S. 184, 33 L. ed. 120, 9 Sup. Ct. Rep. 674: "The distinction between the case of a mere error in law and of one in which the judgment is void is pointed out in *Ex parte Siebold*, 100 U. S. 371, 375, 25 L. ed. 717, 718, and is illustrated by the case of *Ex parte Parks*, 93 U. S. 18, 23 L. ed. 787, as compared with the *Cases of Lange*, 18 Wall. 163, 21 L. ed. 872, and *Snow*, 120 U. S. 274, 30 L. ed. 558, 7 Sup. Ct. Rep. 556. In the *Case of Parks* there was an alleged misconstruction of a statute. We held that to be a mere error in law, the court having jurisdiction of the case. In the *Cases of Lange* and *Snow* there was a denial of a constitutional right." Our habeas corpus act (Rev. Stat. § 1299) provides: "It is not permissible to question

the correctness of the action of a grand jury in finding a bill of indictment, or a petit jury in the trial of a cause, nor a court or judge when acting within their legitimate province, and in a lawful manner." There are similar provisions in the legislation of most of the states. It being a common-law writ, the right to which is secured to us by our Constitution, except when, in case of rebellion or invasion, the public safety may require its suspension, it is not to be supposed that the purpose of the statute was to attempt to detach from its force or curtail its operation, but it is intended as a mere declaration of the common law. It being a constitutional right, the statute would be ineffective, except to declare the law or regulate the method of its enforcement. It was never questioned that the jurisdiction of the committing court over the subject-matter and the person of the applicant might be inquired into in this way; but, under many of the earlier rulings, the power of the court to go beyond this, and inquire into the jurisdiction and power of such court to render the particular judgment, was denied, when the court was shown to have general jurisdiction of the subject-matter and of the person of the petitioner. But the later decisions seem to take a different view. In *Church, Habeas Corpus*, § 362, it is said: "The decisions of the courts are not uniform or harmonious on this point, but the later decisions of very high authority go to show that jurisdiction of the person and of the subject-matter are not alone conclusive, but that the jurisdiction of the court to render the particular judgment in question is a proper subject of inquiry." In *Brown on Jurisdiction of Courts*, before referred to, under the heading "The Three Essential Elements Necessary to Render Conviction Valid," it is said: "These are that the court must have jurisdiction over the subject-matter, the person of the defendant, and authority to render the particular judgment. If either of these elements are lacking, the judgment is fatally defective." Section 110. And it is said in *People ex rel. Tweed v. Liscomb*: "If a process good in form, issued upon a judgment of a court having jurisdiction, either general or limited, must in all cases be assumed to be valid until the judgment be reversed upon error, the remedy by writ of habeas corpus will be of little value." 60 N. Y. 570, 19 Am. Rep. 211.

Many of the earlier decisions have refused to discharge upon habeas corpus, under the rule that only questions of jurisdiction could be considered, and that, when the committing court had jurisdiction of the subject-matter and of the person, the judgment was conclusive. Others, while professing to adhere to the same rule, have gone beyond it, and, though the jurisdiction of the committing court over the subject-matter and of the person was admitted, have gone into the question of the power of the committing court, under the facts of the case, to render the particular judgment. Thus it is said in a California case: "Of course, where a court

has jurisdiction of the subject-matter and the parties, its judgment is not reversible on such process. Being conclusive, courts will not go behind it, to ascertain whether any errors of law were committed in the proceedings in which it was rendered." After stating the principle thus, the court, however, immediately proceeds to say: "But the judgment is not conclusive upon the question of the authority of the court that rendered it. That, as well as any other matter which would render the proceedings void, is always open to inquiry. It were a legal absurdity to say that a judgment of conviction, valid in form, precluded all inquiry into authority to render it. In *Ex parte Kearny*, 55 Cal. 212, this court went behind the judgment of the police court of San Francisco, to determine whether the act of which the petitioner in that case was convicted was a criminal offense known to the law, and, having reached the conclusion that it was not, we held the judgment of conviction absolutely void. As was said in that case: 'Whenever a court undertakes to imprison for an offense to which no criminality is attached, it acts beyond its jurisdiction.' Nearly a hundred years ago, the author of Bacon's Abridgment thus expressed the same doctrine: 'If the commitment be against law, as being made by one who had no jurisdiction of the case, or for a matter for which by law no man ought to be punished, the courts are to discharge.'" *Ex parte Hollis*, 59 Cal. 407. And in that case, it being a commitment for contempt, the court held that the jurisdiction of the court to punish and imprison for such an offense was reviewable by the supreme court on habeas corpus, or on certiorari, and on appeal. It is aptly said in *Ex parte Degener*, 30 Tex. App. 566, 17 S. W. 1113: "But jurisdiction is of two kinds: first, the power to hear and determine the particular matter, and to render some judgment thereon; and secondly, the power to render the particular judgment which was rendered. The idea of the early courts seems to have been that jurisdiction of courts consists entirely of the former of these powers." In *Re Nielsen*, 131 U. S. 184, 33 L. ed. 120, 9 Sup. Ct. Rep. 674, it is said: "A party is entitled to a habeas corpus, not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner." In a Washington case the prisoner was committed for a failure to pay certain costs, adjudged against him as the prosecuting witness in a criminal prosecution. The supreme court, on original application for habeas corpus, decided that the prisoner was detained for a cause not recognized by the law as ground for the judgment of imprisonment, and therefore not within the possible jurisdiction of any court. In a former case they had held that the courts were precluded from inquiring further when it appeared that the petitioner was committed by a court of general jurisdiction, in pursuance of its final judgment, for a crime triable by such court. Referring to

their decision in that case, they say: "As applied to that case, enough was said; but in this one the qualification that the cause was triable by the court must be extended to cover the condition that the court's judgment was one which, under the law, it had jurisdiction to render." And they further say that the petitioner was not estopped to maintain the habeas corpus proceeding by the fact that he might have appealed from the judgment against him. *Re Permatick*, 3 Wash. 674, 29 Pac. 351. And we think this is the tenor of authority at this time.

The acts constituting the alleged contempt are to be examined, to ascertain whether, in law, they constitute a contempt, and, if they do not, the court was without jurisdiction to imprison, and the petitioner is entitled to be discharged on habeas corpus. In Michigan, under constitutional provisions similar to our own, there was a statute providing that no court or officer, on the return of any habeas corpus or certiorari, should have power to inquire into the justice or propriety of any commitment for a contempt, made by any court or officer according to law, and charged in such commitment as therein provided. In a habeas corpus proceeding the supreme court of that state held that they had authority to inquire into the justice or propriety of proceedings in contempt only so far as to ascertain whether the court or officer had jurisdiction and was proceeding according to law. But they say: "The question of jurisdiction necessarily involves an inquiry whether the conduct alleged was in fact a contempt of the court, and committed under circumstances which authorize the court to proceed to punishment therefor." *Re Wood*, 82 Mich. 81, 45 N. W. 1115. In a Texas case, where the witness was committed for refusing to answer, it is said: "The legality of the commitment, however, depends upon the power or jurisdiction of the court to ask the question. If the question be 'improper,'—if the court interrogate a witness about a matter over which it has no jurisdiction, and about which it has no right to inquire,—the refusal of the witness to answer the interrogatory is no contempt of court, and any order or decision which punishes the refusal to answer as a contempt is void." *Holman v. Austin*, 34 Tex. 668. In *Ex parte Irvine* the petitioners were called as witnesses for the prosecution upon the trial of twelve defendants upon an indictment for a conspiracy to commit an offense against the United States. The petitioners refused to answer certain questions propounded to them, upon the ground that it might tend to incriminate them. The court decided that the answers to the questions could not possibly incriminate them, and, upon their continued refusal, committed them to jail for contempt. Writs of habeas corpus were sued out before the circuit court of the United States, and, in considering the question how far the court might look beyond the commitment and its recitals, into the evidence and circumstances upon which the committing court acted, the court says: 49 L. R. A.

"The duty of this court to examine into and consider the facts upon which the trial court acted in committing the petitioners cannot be doubted. If the petitioners, in their refusal to answer the questions, were within the protection of the 5th Amendment to the Constitution, the power of the court to commit them for their refusal was exceeded, and the invalidity of the commitment may be declared in this collateral inquiry." 74 Fed. Rep. 954. In an Iowa case the petitioner was subpoenaed to come before a justice of the peace to make an affidavit under the provisions of a certain statute. He refused to appear or testify, and was committed by the justice for contempt. On habeas corpus a majority of the court held that he was properly committed, Justice Beck dissenting; but upon the proposition under consideration the court seem to have been substantially in harmony. The majority opinion states it thus: "We cannot, in a habeas corpus proceeding, review the order of imprisonment for contempt, and reverse, unless the act constituting the alleged contempt was such that we can pronounce, as a matter of law, that it was not a contempt. If, for instance, the justice had no authority to subpoena this plaintiff, and was acting without jurisdiction in doing so, then what he did was done merely as an individual, and whatever contempt there was, if it could be called such, not being for judicial authority, would not be such as the law recognizes and punishes." In the dissenting opinion it is thus stated: "Tribunals may decide all questions touching their jurisdiction, but their decisions supporting their jurisdiction are not conclusive; and judgments rendered without jurisdiction may be assailed either directly or collaterally. The decision of a court that an act is a contempt is a decision as to its jurisdiction, and may be questioned in any collateral proceeding. It may, of course, be assailed upon habeas corpus, which is the very proceeding provided by the law whereby the legality of the imprisonment of a citizen may be determined." And the majority of the court, in announcing their decision at the close of their opinion, fully recognize the principle. They say: "Having reached the conclusion that the justice was not without jurisdiction in issuing the subpoena, and that there was a contempt in fact, we think that this disposes of the case." *State ex rel. Whitcomb v. Seaton*, 61 Iowa, 563, 16 N. W. 736. In a later case under the same statute, the petitioners refused to obey a subpoena, or to testify, and were committed for contempt. By an unanimous court it was decided that the evidence sought was not of a character contemplated by the statute, that the justice was without authority to issue the subpoena, and that the petitioners were illegally committed; and they were discharged. *Dudley v. McCord*, 65 Iowa, 671, 22 N. W. 920.

The doctrine thus stated—that in commitments for contempt, and in other cases of alleged illegal imprisonment, the court, on ha-

beas corpus, may inquire into the power of the committing court to make the order, by investigating the question whether the facts constitute a contempt, or, in any case, whether the facts confer jurisdiction upon the court to make the particular order, and, if they do not, to discharge—is, as we believe, sustained by the great mass of the later cases, either in express terms or, tacitly, by acting upon it. We cite a few of the great number bearing upon the question: *Re Dill*, 32 Kan. 668, 49 Am. Rep. 505, 5 Pac. 39; *People ex rel. Hackley v. Kelly*, 24 N. Y. 75; *Ingle v. State*, 8 Blackf. 574; *Ex parte Senior*, 37 Fla. 1, 32 L. R. A. 133, 19 So. 652; *Ex parte Gould*, 99 Cal. 360, 21 L. R. A. 751, 33 Pac. 1112; *Ex parte Rowland*, 104 U. S. 604, 26 L. ed. 861; *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872; *Ex parte Kellogg*, 64 Cal. 343, 30 Pac. 1030; *Ex parte Sontag*, 64 Cal. 526, 2 Pac. 402; *Robb v. McDonald*, 29 Iowa, 330, 4 Am. Rep. 211; *Ex parte Siebold*, 100 U. S. 375, 25 L. ed. 718; *Ex parte Miranda*, 73 Cal. 371, 14 Pac. 888; *Ex parte Kearny*, 55 Cal. 214; *Ex parte Fisk*, 113 U. S. 718, 28 L. ed. 1119, 5 Sup. Ct. Rep. 724; *Re Rolfs*, 30 Kan. 758, 1 Pac. 523; *Ex parte Parks*, 93 U. S. 18, 23 L. ed. 787; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Cooper v. People ex rel. Wyatt*, 13 Colo. 353, 6 L. R. A. 430, 22 Pac. 790; *Ex parte Ellis*, 37 Tex. Crim. Rep. 542, 40 S. W. 275; *Ex parte Tinsley*, 37 Tex. Crim. Rep. 527, 40 S. W. 306; *Ex parte Park*, 37 Tex. Crim. Rep. 590, 40 S. W. 300; *People ex rel. Taylor v. Forbes*, 143 N. Y. 219, 38 N. E. 303; *Ex parte Webb* (Nev.) 51 Pac. 1027; *Re Patswald*, 5 Okla. 789, 50 Pac. 139; *People ex rel. Mal-lory v. Benjamin*, 9 How. Pr. 421; *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; *Ex parte O'Brien*, 127 Mo. 477, 30 S. W. 159; *Dinsmoor v. Bressler*, 164 Ill. 223, 45 N. E. 1086.

When and under what circumstances a witness shall be protected in refusing to answer, upon the ground that his answers may tend to criminate him, has been very often considered, but is necessarily dependent in a great measure upon the facts of each case. The provision of our Constitution is that "no person shall be compelled to testify against himself in any criminal case." § 11, art. 1. It has been held in some cases that the privilege does not apply, except to the defendant in a criminal case, that the term "criminal case" can only mean a prosecution for a criminal offense, and that the prosecution must be against him. This view, after a thorough consideration, was rejected in the leading case of *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; and we do not understand that it is contended for in this case. "The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime."

Neither is it necessary, in order to claim the privilege, that the answer, unconnected with other testimony, should be sufficient to

convict him of crime. As said by Chief Justice Marshall, in *Burr's Trial*, 1 Burr, Tr. 244, Fed. Cas. No. 14,692e: "This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable, case that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact, of itself, might be unavailing; but all other facts, without it, would be insufficient. While that remains concealed within his own bosom, he is safe; but, draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description. What testimony may be possessed, or is obtainable, against any individual, the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws." It has been held that, where a prosecution for the offense is barred by the statute of limitations, the privilege does not exist. There are also statutes of the United States and many of the states providing that evidence thus elicited shall not be used against the witness in any prosecution against him, or that he shall not be prosecuted for any matter concerning which he may testify. There is no statute of limitations as to crimes in this state, and we have no statute attempting to confer immunity upon a witness in any case; so that we have only the constitutional provision itself to consider, as applied to the facts of the case before us.

It is contended by counsel for respondent, first, that it does not sufficiently appear that an answer to the question would tend to criminate the petitioner; that, quoting from Wharton, *Crim. Ev.* 9th ed. 466, "there is no answer which a witness could give which might not become part of a supposable concatenation of incidents from which criminality of some kind might not be inferred;" that the witness in this case was simply called upon, by the questions, to state the facts constituting the offense with which the defendant stood charged, and for which he had been arrested at the instance of the witness himself; and that the witness cannot be permitted to be the exclusive judge whether the answer will criminate him, and thus protect a defendant from merited punishment. It is apparent that these considerations are of the utmost weight, as affecting the proper and efficient administration of the criminal law, and it is of primary importance that the rule by which the court is to determine whether the privilege of the witness shall be allowed

shall be correctly ascertained. Quoting again from the section of Wharton above referred to: "To protect a witness from answering, it must appear, from the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend that, should he answer, he would be exposed to a criminal prosecution." In *Burr's Trial*, Judge Marshall, in stating the rule, said: "When a question is propounded, it belongs to the court to consider, and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be. The court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privilege which the law allows, and which he claims. . . . In such a case, the witness must himself judge what his answer will be; and if he say, on oath, that he cannot answer without accusing himself, he cannot be compelled to answer." 1 Burr, Tr. 244, 245, Fed. Cas. No. 14,692e.

It is urged in this case that the witness had already made statements inquired about by the question propounded, and that to rehearse them as formerly stated, which he must do to make a true answer, could not by any possibility incriminate him. But, independently of the considerations to be adverted to more fully hereafter in this opinion that subsequent acts of the witness, such as compounding the felony, might have intervened, changing his attitude in the premises, we think none of the authorities claim any power in the court to determine what the answer shall be. That, from the nature of the case, and of necessity, is in the breast of the witness. The rule above referred to, by which the court must be governed in allowing or denying the privilege, is variously stated, but, we think, with substantial harmony. In *Richman v. State*, 2 G. Greene, 534, a case relied on by counsel for respondent, the court says: "When it is evident to the mind of the court that the answer cannot accuse the witness, the court should require him to respond to the interrogatory. . . . Therefore, we think, the better and safer rule to be that of compelling a witness to answer when it is apparent to the court that such answer would not interfere with his legal privilege." And Judge Marshall, in *Burr's Trial*, 1 Burr, Tr. 244, 255, Fed. Cas. No. 14,692e, summarizes the rule thus: "It is the province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony which would be sufficient to convict him of any crime, he is not bound to answer it, so as to furnish matter for that conviction. In such a case, the witness must himself judge

what his answer will be; and if he say, on oath, that he cannot answer without accusing himself, he cannot be compelled to answer." The rule is more strongly stated by some of the other cases; as, for example, in *Re Tappan*, 9 How. Pr. 305, the court says: "The witness alone knows the facts, beyond those to be contained in the answer, which may tend to his conviction. The court is not to compel him to tell what those facts are. If, therefore, he says that the answer may tend to convict him, and on that account refuses to answer, and the court can imagine any state of facts under which the answer might lead to such a result, the witness may insist on the protection of the law, and refuse to answer." But we think, upon reason and authority, the more conservative statement of the rule should be adopted, as in *Simmons v. Holster*, 13 Minn. 249, Gil. 236: "When it reasonably appears that the answer will have a tendency to expose the witness to a penal liability, or to any kind of punishment, or to a criminal charge, 'the authorities,' says Greenleaf, 'are exceedingly clear that the witness is not bound to answer.' 1 Greenl. Ev. § 451." We think the opinion of Judge Taft in *Ex parte Irvine*, 74 Fed. Rep. 954, 960, states the rule very clearly: "The great weight of authority, as well as a due regard for the right of the community to have the wheels of justice unlogged, as far as may be consistent with the liberty of the individual, leads us to reject the doctrine that a witness may avoid answering any question by the mere statement that the answer would criminate him, however unreasonable such statement may be. The true rule is that it is for the judge before whom the question arises to decide whether an answer to the question put may reasonably have a tendency to criminate the witness, or to furnish proof of a link in the chain of evidence necessary to convict him of a crime. It is impossible to conceive of a question which might not elicit a fact useful as a link in proving some supposable crime against a witness. The mere statement of his name or of his place of residence might identify him as a felon; but it is not enough that the answer to the question may furnish evidence out of the witness's mouth of a fact which, upon some imaginary hypothesis, would be the one link wanting in the chain of proof against him of a crime. It must appear to the court, from the character of the question and the other facts adduced in the case, that there is some tangible and substantial probability that the answer of the witness may help to convict him of a crime."

Keeping in view this rule, and the principle that the court cannot compel the witness to disclose what crime the answer would tend to convict him of, as such disclosure would defeat the very object of the constitutional privilege, we proceed to an examination of such facts as appear upon the question. The charge of obtaining the sum of \$1,130 from the plaintiff by false pretenses had been preferred against the defendants at plaintiff's instance. They had been returned from Colorado by a requisition obtained upon his af-

adavit. At the time set for their preliminary examination the plaintiff failed to appear as a witness. It was again set down, and the plaintiff again failed to appear, although he had been duly subpoenaed. Thereupon an information was filed against the plaintiff, charging him with compounding the felony of which the defendants were accused, and an attachment issued to bring the plaintiff before the justice as a witness in the preliminary examination of the defendants. The statute prohibiting the compounding of a felony provides that "whoever, having knowledge of the actual commission of a crime of the grade of felony, takes any money or property of another, or any gratuity or reward, or any engagement or promise therefor, upon any agreement or understanding, express or implied, to compound or conceal such crime, as to abstain from any prosecution therefor, or to withhold any evidence thereof, or do any act to encourage or procure the absence of witnesses or other testimony on the examination or trial of such charge, is guilty of a felony, and shall be punished," etc.; prescribing imprisonment in the penitentiary. Laws 1890, p. 142. The information, filed by the prosecuting attorney, charging the petitioner with compounding the felony, first sets out the commission of the felony as in the original information, and then proceeds to state that the petitioner "then and there having knowledge of the actual commission of the felony aforesaid by the said Oliver C. Hough, alias Clifford W. Lang, did then and there feloniously take and receive from the said Oliver C. Hough, alias Clifford W. Lang, eleven hundred and thirty dollars, . . . upon the express agreement and understanding then and there to feloniously compound said felony and conceal its commission." It therefore appears that, when the witness was called upon to state from his own knowledge the facts constituting the guilt of the defendant Hough, he was thereby required to testify to the first and essential fact necessary to his own conviction, viz., his "knowledge of the actual commission of the felony aforesaid," and at the same time to supply the proof, and probably the only available proof, of the equally essential fact in the prosecution of himself,—the commission of the original felony. Adopting, then, Wharton's statement of the rule, it appears, from the nature of the evidence which the witness was called upon to give, that there was reasonable ground to apprehend that, should he answer, he would be exposed to a criminal prosecution. It can make no difference that the information against the petitioner had been dismissed. It was made under oath by the proper officer. It is not to be presumed that it was made without some basis of evidence tending to support it, and the dismissal would in no way interfere with a future prosecution. It is also urged that evidence thus extorted could not be subsequently used against the plaintiff in any prosecution against him, and that the petitioner is therefore protected. But the constitutional privilege is that the evidence shall not be extorted. It is not 49 L. R. A.

that such testimony shall not be used against him, nor that he shall not be prosecuted for a crime concerning which he has been required to give testimony tending to incriminate himself, but that he shall not be compelled to testify. The principle that evidence obtained by a violation of this privilege cannot be used against him was never intended to authorize or excuse a violation of such privilege; and, as before remarked, we have no statute which attempts to substitute immunity from the consequences of a violation of the privilege for the privilege itself.

It is insisted that the affidavit made by the plaintiff in the requisition proceedings shows that his refusal to answer and his claim of privilege were not made in good faith. We understand that counsel do not contend that the privilege of the witness was waived by making the statements contained in the affidavit. Indeed, the authorities are clear upon the proposition that previous sworn statements, in or out of court, do not constitute a waiver, and do not deprive the witness of his constitutional privilege, when he thereafter claims it. In *Emery v. State*, 101 Wis. 627, 78 N. W. 145, the supreme court of Wisconsin said: "The fact that a witness made previous self-incriminating statements in court on some other trial, or out of court, made no difference. The immunity was complete, unless waived by the witness with knowledge of his rights. That right exists under our system of constitutional guaranty to the fullest extent, and is to be protected as rigidly and fairly as any other constitutional right, and not to be weakened or impaired by inventing new methods or ways of evading it." In a Georgia case it was argued that, as the witness had voluntarily testified at a previous trial as to the very matters concerning which he had at the later trial chosen to remain silent, he had waived his privilege; but the court rejected the proposition, saying: "The fact that Lybrend [the witness] had made the waiver at a former hearing before a different jury, and under circumstances necessarily to a greater or less extent unlike those surrounding the last trial, did not preclude him from exercising his privilege at a later stage of the case. He may, on one occasion, have had reasons for speaking out which were entirely satisfactory to himself; and, on the next, he may have been influenced to keep silent by other reasons, which were, in his opinion, equally cogent. These were matters for himself alone to determine. The privilege is in the highest degree personal, and is a sacred one, which the courts should jealously guard." *Georgia R. & Bkg. Co. v. Lybrend*, 99 Ga. 421, 27 S. E. 794. In *Temple v. Com.* 75 Va. 892, it was held that the fact that the witness testified before the grand jury, and that it was on his testimony that the indictment was found, will not deprive him of his privilege to decline to testify on the trial of the party indicted. See also *Cullen v. Com.* 24 Gratt. 624, to the same effect. In Illinois a witness who claimed the privilege had instigated the prosecution, and had made a sworn statement upon the back

of the information to the effect that the allegations thereof were true; yet his conduct was held not to amount to a waiver of his constitutional privilege when called as a witness upon the trial of the accused. In that case the court said: "The privilege which a witness has of refusing to give evidence which will criminate himself is granted to him upon grounds of public policy, and as one of the safeguards of his personal liberty. It cannot be regarded as released or waived by some disclosure which he may have made elsewhere and under other circumstances. If the answer to a question put to him as a witness upon the stand might tend to criminate him, it would not tend any the less to do so because he had elsewhere made a statement having such a tendency. The question is not as to what he may have previously said in an affidavit, but the question is whether the disclosure he is asked to make as a witness upon the trial of the case will have a tendency to expose him to a criminal charge or penalty." And the court added: "We are of the opinion that his constitutional right in this regard is not abridged or waived by the fact of making the *ex parte* affidavit indorsed upon the information filed by the prosecuting attorney." [*Salem v. People*, 164 Ill. 379, 45 N. E. 728.]

In this case, however, the crime of compounding a felony, if committed by the witness, must have been committed after the affidavit in the requisition proceedings had been made; and the latter, therefore, can hardly throw much light upon the question of his good faith in declining to testify upon the subsequent trial. There seems, however, to be some misconception regarding the question of good faith. The question is not whether the witness has been in good faith with the prosecution throughout the case. It is, rather, whether his refusal to testify is really and sincerely dictated by a belief that his answers will tend to criminate him. In the case of *Ex parte Irvine*, 74 Fed. Rep. 954, 960, Judge Taft lays down the rule upon this branch of the case which seems to us to be the correct one. He says: "We do not understand any of the American authorities to go so far as to hold that where, from the evidence and the nature of the question, the court can definitely determine that the question, if answered in a particular way, will form a link in the chain of evidence to establish the commission of a crime by the witness, the court should inquire into the motive of the witness in pleading his privilege. It is only where the criminating effect of the question is doubtful that the motive of the witness may be considered; for in such a case his bad faith would have a tendency to show that his answer would not subject him to the danger of a criminal prosecution, or help to prove him guilty of crime." In the *Irvine Case* it was argued by counsel that the privilege was pleaded merely to shield the defendants on trial. The court, however, held that the witness was entitled to the privilege insisted on. That case makes the proposition entirely clear that when the court can determine from the circumstances and nature

of the question, that the question is incriminating in character, there is, then, no question of good or bad faith to be considered.

It is suggested that to permit a witness to refuse to testify under such circumstances would be to place the administration of the criminal law in the hands of witnesses, often influenced by improper motives; thus making convictions difficult, and often impossible. It is, perhaps, sufficient to say that the principle is not a new one. "It is an ancient principle of the law of evidence that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him, or subject him to fines, penalties, or forfeitures." *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; citing a number of English cases. It is said by Starkie to be based upon two grounds,—one of policy, and one of humanity; "of policy, because it would place the witness under the strongest temptation to commit . . . perjury, and of humanity, because it would be to extort a confession of the truth by a kind of duress, every species and degree of which the law abhors." Starkie, Ev. 40, 41. It long antedates our Constitution or the Constitution of the United States. It has been acted upon in the courts of this country and England for a great many years, and no such disastrous consequences in the administration of the criminal law have ensued. In practice it has been found that the privilege is very rarely claimed, and the claim is guarded against abuses as carefully and effectually as the exercise of any other of the unquestioned constitutional rights of the citizen. It must be made under oath, and the penalties of perjury attach as in other cases of false testimony if it is not made in good faith; and the witness is not the final judge whether the privilege exists in the particular case, but the decision is to be made by the court. But that it may be abused is not an argument which this court is at liberty to consider, further than to guard against such abuses as far as consistent with the maintenance of the right itself. It is imbedded in the Constitution, and embodies the wisdom of some centuries of experience upon the subject, and there is no temptation for us to evade or amend it by reason of any considerations of convenience or necessity. The cases of fancied necessity, if there were any relaxation of the principle, would undoubtedly multiply, under the pressure of officers and others naturally and often very properly eager for convictions, much more rapidly than the cases where the privilege is claimed have done, under a full and complete, but just and careful, enforcement of the constitutional right.

We are of the opinion that the imprisonment of the plaintiff is illegal, and that he must be discharged; and it is so ordered.

Potter, Ch. J., concurring:

I concur in the opinion and conclusions of Mr. Justice Corn. I regard as entirely immaterial the question whether the order of a

district court refusing to discharge a petitioner upon habeas corpus may be brought to this court for review by petition in error or otherwise. Notwithstanding that such an order might be so reviewable, I entertain no doubt whatever of the original jurisdiction of this court in habeas corpus, even in a case where upon the same facts a previous hearing has been had in the district court, and the petitioner's application denied. That jurisdiction is granted by the Constitution in unmistakable language, and the statute does not in any way attempt to restrict it, but on the contrary, confirms it. Neither in the Constitution nor statutes is the jurisdiction or its exercise made dependent upon the absence of any other remedy. It seems, therefore, unnecessary to consider or decide whether the order of the district court refusing to discharge the petitioner could be brought here by some appellate proceeding. Cases may arise where it would not be deemed expedient for this court to exercise its original jurisdiction, where, upon the same facts and in a similar proceeding, a district court or judge shall have previously denied the relief sought. But, in a case like the one now before us, where the petitioner is imprisoned in execution of a sentence, and that sentence is alleged to be illegal, and especially where such illegality is alleged to consist in the denial of a constitutional guaranty or immunity, I am convinced that it is the duty of the court to exercise its jurisdiction in the premises, and inquire into the legality of the imprisonment, and, if the imprisonment be determined to be illegal, to discharge the petitioner. Otherwise, the writ of habeas corpus would be largely deprived of its most beneficial purposes. Neither do I esteem it material whether the order of the justice committing the petitioner was or is subject to review on appeal or error by a higher tribunal. Where habeas corpus is an appropriate remedy, it matters not that a remedy also existed by writ of error, or by some other appellate proceeding. This principle is well established, and I believe that no authority disputes it. This doctrine is not to be confounded with that other one, well understood and thoroughly established, that habeas corpus does not take the place of a writ of error, and that, in such a proceeding, mere errors of law are not reviewable. To deny our jurisdiction, on the ground that the order of the justice is or was appealable, would also deny the jurisdiction of the district court in the habeas corpus proceeding, which was entertained by that court. I have alluded to the principle that habeas corpus does not usurp the prerogative of a writ of error. The decision of the committing court on questions of law or fact within its jurisdiction is conclusive; and, however erroneous the proceedings may be, they cannot be reviewed collaterally on habeas corpus. It is a fundamental principle that errors and irregularities, not jurisdictional, will not be examined or inquired into on such a writ; but questions affecting the jurisdiction of the court and errors which are jurisdictional may always be examined into on habeas corpus, and this rule is as fundamental as the other.

amined into on habeas corpus, and this rule is as fundamental as the other.

The inquiry in this case, then, is whether the decision of the magistrate, that the petitioner was guilty of a contempt in refusing to answer the questions, amounts, if erroneous, to a mere error of law, or whether a question of jurisdiction is involved in that decision. This matter is fully discussed, and the authorities reviewed, in the opinion of Judge Corn; and all I care to say in respect to it is that, upon reason and authority, if the act of the petitioner in refusing to answer the questions was not a contempt in law, the justice was without jurisdiction to commit him. This proposition is sustained by the great weight of authority, and particularly the modern decisions; and, in my judgment, it rests upon sound reasoning. If the petitioner is protected by a constitutional privilege, as he claims, then he had an absolute right, guaranteed by our Constitution, to refuse an answer, and his act in so refusing was not, in legal contemplation, a contempt. The majority of the court are of the opinion, for the reasons stated by Judge Corn, that he was so protected, and could not lawfully be required to answer the questions. The distinction is clearly laid down in *Brown on Jurisdiction of Courts*, and that author pertinently states, in substance, that, if a court attempts to deprive a party of a constitutional guaranty or privilege, its jurisdiction is exceeded. It therefore follows that the magistrate was without jurisdiction to commit petitioner, and the order committing him is void; and, where that is the case, under all the authorities, he may be discharged upon habeas corpus. The contempt charged against the petitioner is not that of disorderly conduct, or disobedience of process, nor in refusing to answer without assigning any reason. He claims that he could not do so without incriminating himself, thereby giving a reason which, if made in good faith, and under such circumstances as reasonably to disclose that the answers might tend to incriminate him, entitles him to be excused from answering.

There exists but little disagreement among the courts of this country respecting the general principles which must govern this case. Whatever differences there are grow out of the application of those principles. With most of the decisions cited and quoted from in the dissenting opinion of our brother, Mr. Justice Knight, I have no fault to find or criticisms to make. They are, most of them, at least, in perfect accord with those cited in the majority opinion of the court in this case, and, with a very few exceptions, do not at all conflict with the views entertained and applied by the court in the case at bar. Owing to the importance of the questions involved in this hearing, and the fact that they were matters of first impression in this court, I have thought it advisable to thus briefly state the reasons which have led to my conclusions.

Knight, J., dissenting:

I am unable to concur in the opinion and judgment of this court as announced, for

reasons some of which, in view of the learned discussion as submitted, at first glance may appear of little force. Admitting all that is claimed for the writ of habeas corpus,—its antiquity, that it is in the interest of the oppressed, and that it is in many instances beyond legislation, being a part of the constitutional enactments,—still I desire, after making such admission, which is in accordance with the views so ably expressed by my associates, to refer to some of the judges and courts that have pointed out the far-reaching effects of the abuse or misapplication of this writ and of its humane intendments, and illustrating the abuses to which it has been subjected. I am of the opinion that in this case, under the circumstances and upon the showing made, the writ should not have issued that has been made returnable and is being considered here; that, while it is true that the Constitution gives this court and each of its members original jurisdiction in habeas corpus, there is also abundant authority in our statute that confers upon this court power to review on error proceedings in habeas corpus; and that, while the latter authority may not take away the original jurisdiction, still, in the interest of a uniform practice, it should have such a restraining influence as would make this court and its members exercise the original jurisdiction with great care and caution, and never when the object of the writ is to review error of inferior courts. I am of the opinion that, to entitle a person called as a witness to the privilege of silence, the court must see, from all the circumstances of the case, and the nature of the evidence which the witness is called on to give, that there is reasonable ground to apprehend that the evidence may tend to criminate him if he is compelled to answer, and that a review of a ruling upon this proposition of law should not be by habeas corpus. I am of the opinion that in the case at bar there was not one fact or circumstance surrounding the case, or brought to the attention of the justice acting as a committing magistrate, that would have excused him for giving to the applicant as a witness the exemption claimed; that, if there was cause to excuse the witness from answering, such cause was known only to himself, and could not avail him. I claim that a fair and reasonable interpretation of the act of the prosecuting attorney in making the affidavit charging the applicant with having compounded a felony is that he did it for the reason that he believed the applicant, while a witness, had agreed not to appear and testify, as he was bound to do, and that, when he did appear, there was not probable cause to make such a charge, and he withdrew it before a warrant had been served or issued upon the affidavit, and that the one fact that such an affidavit was made is not sufficient to excuse the witness from answering or refusing to give any reason for such refusal; the exemption being for the witness, and not for his attorneys, to claim. Upon these various propositions of law I offer the following authorities:

The supreme court of Washington have 49 L. R. A.

this to say of a case in point: "It appears that a petition had been presented to one of the judges of the superior court of King county, and had been refused, whereupon application has been made to this court. While it is true that the Constitution invested the supreme court with original jurisdiction of habeas corpus [art. 4, § 4], it does not follow that it must take original jurisdiction in cases that have been commenced in the superior court, or before a judge thereof. It is true that this is a writ of high personal privilege, and involves personal liberty,—a right which the law most jealously guards; but a citizen's right to liberty is involved in many cases. This question, like all other questions involving his right to liberty, he has a right to have adjudicated by a competent tribunal; and that adjudication, like any other, is presumed to be right until the contrary is made to appear on appeal. It is an adjudication by a competent tribunal—not an adjudication by every competent tribunal—to which the petitioner is entitled. It does not seem to us that it accords with the orderly administration of the law to allow this application to be made to every superior judge and every justice of the supreme court in the state, which would be the practical result, in many instances, of sustaining petitioner's contention. This, we believe, is not the object of the law. The object in giving every judge in the state original jurisdiction, no doubt, was to place the remedy within easy reach of the applicant, and to insure him speedy relief when he was entitled to such, and not to give him a multiplicity of trials. It is true that in some of the states the practice is different, but such practice does not commend itself to our judgment, and we cannot follow it. When one trial has been accorded the petitioner, he has secured all the rights which the law has guaranteed him. The petition will therefore be denied. *Re Graham*, 7 Wash. 237. 34 Pac. 931.

In *Ex parte Kearney*, 7 Wheat. 38, 5 L. ed. 391, the syllabus is as follows: This court has no authority to issue a writ of habeas corpus to bring up the body of a person committed to jail for a contempt by the circuit court of the District of Columbia. Jones moved for a habeas corpus "to bring up the body of John T. Kearney, now in jail in the custody of the marshal, under a commitment of the circuit court for the District of Columbia for an alleged contempt. The petition stated that, on the trial of an indictment in that court, the petitioner was examined as a witness, and refused to answer a certain question which was put to him, because he conceived it tended materially to implicate him and criminate him as a *particeps criminis*. The objection was overruled by the court, and he, having persisted in refusing to answer the question, was committed to jail for the supposed contempt, and for no other cause." Justice Story, of the Supreme Court of the United States, in this case said, among other things: "Upon the argument of this motion, two questions have been made: First, whether this court has

authority to issue a habeas corpus where a person is in jail under the warrant or order of any other court of the United States; secondly, if it have, whether, upon the facts stated, a fit case is made out to justify the exercise of such authority. As to the first question, it is unnecessary to say more than the point has already passed in *rem judicata* in this court. In the case of *Ex parte Bollman*, 4 Cranch, 75, 2 L. ed. 554, it was expressly decided, upon full argument, that this court possessed such an authority, and the question has ever since been considered at rest. The second point is of much more importance. It is to be considered that this court has no appellate jurisdiction confided to it in criminal cases by the laws of the United States. It cannot entertain a writ of error to revise the judgment of the circuit court in any case where a party has been convicted of a public offense; and, undoubtedly, the denial of this authority proceeded upon great principles of public policy and convenience. If every party had a right to bring before this court every case in which judgment had been passed against him for a crime or misdemeanor or felony, the course of justice might be materially delayed and obstructed, and in some cases totally frustrated. If, then, this court cannot directly reverse a judgment of the circuit court in a criminal case, what reason is there to suppose that it was intended to vest it with authority to do it indirectly? It is also to be observed that there is no question here but that this commitment was made by a court of competent jurisdiction and in the exercise of an unquestionable authority. The only objection is, not that the court acted beyond its jurisdiction, but that it erred in its judgment of the law applicable to the case. If, then, we are to give any relief in this case, it is by a revision of the opinion of the court, given in the course of a criminal trial, and thus asserting a right to control its proceedings, and take from them the conclusive effect which the law intended to give them. If this were an application for a habeas corpus, after judgment on an indictment for an offense within the jurisdiction of the circuit court, it could hardly be maintained that this court could revise such a judgment, or the proceedings which led to it, or set it aside, and discharge the prisoner. There is, in principle, no distinction between that case and the present; for, when a court commits a party for a contempt, their adjudication is a conviction, and their commitment in consequence is execution. And so the law was settled upon full deliberation in the *Case of Crosby*, 3 Wils. 188." Here follows a discussion of the case referred to, and the justice continues: "So that it is most manifest, from the whole reasoning of the court in this case, that a writ of habeas corpus was not deemed a proper remedy where a party was committed for a contempt by a court of competent jurisdiction, and that, if granted, the court could not inquire into the sufficiency of the cause of commitment. If, therefore, we were to grant the writ in this case, it would be applying it in a manner not 49 L. R. A.

justified by principle or usage, and we should be bound to remand the party, unless we were prepared to abandon the whole doctrine, so reasonable, just, and convenient, which has hitherto regulated this important subject. We are entirely satisfied to administer the law as we find it, and are all of opinion that, upon the facts of this case, the motion ought to be denied. The argument of inconveniences has been pressed upon us with great earnestness; but, where the law is clear, this argument can be of no avail, and it will probably be found that there are also serious inconveniences on the other side. Wherever power is lodged, it may be abused; but this forms no solid objection against its exercise. Confidence must be reposed somewhere; and, if there should be abuse, it will be a public grievance, for which a remedy may be applied by the legislature, and is not to be devised by courts of justice. This argument was also used in the case already cited, and the answer of the court to it is so satisfactory that it would be useless to attempt any further refutation. Upon the whole, it is the opinion of the court that the motion be overruled. Writ denied."

Chief Justice Dixon, of the supreme court of Wisconsin, in the case of the petition of Crandall for habeas corpus, says: "It is conceded that for mere error, no matter how flagrant, the remedy is not by a writ of habeas corpus." 34 Wis. 177.

Judge Cooley, in his treatise on Constitutional Limitations, 4th ed., p. 430, says: "In the great anxiety on the part of our legislatures to make the most ample provision for speedy relief from unlawful confinement, authority to issue the writ of habeas corpus has been conferred upon inferior judicial officers, who make use of it sometimes as if it were a writ of error, under which they might correct the errors and irregularities of other judges and courts, whatever their relative jurisdiction and dignity. Any such employment of the writ is an abuse. Where a party who is in confinement under judicial process is brought up on habeas corpus, the court or judge before whom he is returned will inquire: First, whether the court or officer issuing the process under which he is detained had jurisdiction of the case and has acted within that jurisdiction in issuing such process. If so, mere irregularities or errors of judgment in the exercise of that jurisdiction must be disregarded on this writ, and must be corrected either by the court issuing the process or on regular appellate proceedings. Second, if the process is not void for want of jurisdiction, the further inquiry will be made whether, by law, the case is bailable, and, if so, bail will be taken if the party offers it; otherwise he will be remanded to the proper custody."

A case of interest in this discussion, and one that seems to be persuasive, is that of *People v. Cassels* (in the supreme court of New York) 5 Hill, 164. A statement of the facts is in the words following: "Cassels, the prisoner, was examined on oath (see *United States v. Wyngall*, 5 Hill, 16), and a witness was examined on his behalf. The

testimony tended to establish the following facts: In June, 1842, Cassels was arrested and examined before Justice Briggs on a charge of kidnapping and carrying off one Betsey L. Stafford from the county of Chenango to the city of Troy, Rensselaer county. After having been kept under examination about a week, he was discharged by the justice for the want of evidence. He was then summoned to appear before Justice Edwards as a witness on the 11th of July, and was then sworn and examined, for the purpose, as was said, of eliciting facts upon which a warrant might be issued against one Sally Grant, of the city of Troy, for her alleged agency in procuring the abortion of Betsey L. Stafford at the city of Troy, which was followed by the death of said Betsey. When Cassels was sworn, he was not examined touching the supposed guilt of Sally Grant, but was required to state what he knew about the transportation of Betsey L. Stafford from Chenango to Rensselaer county. When asked the question mentioned in the commitment, he declined answering it, on the ground that it might form a link in a chain of evidence tending to criminate himself. Sally Grant was not before the justice, and it was not alleged that she was in the county of Chenango, or that she had ever committed any crime in that county—the crime imputed to her having been committed in Rensselaer county, where she resided. The judge decided that Justice Edwards acted without authority in the proceeding upon which Cassels was sworn as a witness, for the reason that Sally Grant was neither before the justice nor in the county of Chenango at the time, and it was not alleged or pretended that she had committed any offense in that county, but only in the county of Rensselaer, where she lived; and on that ground an order was made discharging Cassels from imprisonment. The district attorney brought this certiorari to reverse the proceedings before the judge." And Justice Bronson, upon those facts, says: "If the justice had authority to inquire into the alleged offense of Sally Grant, the commitment of Cassels could not be impeached upon habeas corpus for any supposed error of the justice in requiring the witness to answer an improper question. A contempt was specially and plainly charged in the commitment, and it was the duty of the judge forthwith to remand the prisoner. 2 Rev. Stat. p. 567, § 40. The statute expressly forbids an inquiry into the justice or propriety of the commitment in such a case. Id. § 42. If there had been no such statute, it is clear, upon principle, that the judgment or decision of any court or officer of competent jurisdiction cannot be reviewed on habeas corpus. If there has been error the remedy is by certiorari or writ of error. When the return states the imprisonment to be by virtue of legal process, the officer may inquire whether in truth there be any process, and whether it appears upon its face to be valid; and he may also inquire whether any cause has arisen since the commitment for putting an end to the imprisonment,—as a pardon, reversal of the judgment, payment of the fine, and the like. But he cannot rejudge the judgment of the committing court or magistrate. *Re Clark*, 9 Wend. 220; *People v. McLeod*, 1 Hill, 404, 37 Am. Dec. 328; *Middlesex Sheriff*, 11 Ad. & El. 273; *People v. McLeod*, 3 Hill, 658, notes 30, 31. The principal, if not the only, object of the 48th section of the habeas corpus act, was to provide for cases where the party is restrained of his liberty without the authority of legal process. In such cases, the return is usually made by a person having an interest in the question, and who has exercised the restraint upon his own responsibility,—as the parent, husband, master, or guardian of the person imprisoned: and it is very proper that the facts which they state in the return should be open to investigation. See 3 Hill. 660, note, and the cases there cited. But it is otherwise when the return is made by an officer having legal process. It is evident from the 40th section of the statute that the legislature did not intend to provide for a retrial by habeas corpus in such a case. The review is by certiorari or writ of error. It is quite clear, therefore, that the judge had no authority to inquire into the truth of the fact adjudged by the committing magistrate, to wit, that the prisoner was in contempt for not answering a question put to him when giving his evidence; nor could he inquire whether the question was a proper one, or whether the prisoner was privileged from answering it. But the prisoner had an undoubted right to show that the committing magistrate acted without authority; and this is so, notwithstanding the commitment recite the existence of the necessary facts to give jurisdiction. No court or officer can acquire jurisdiction by the mere assertion of it, or by falsely alleging the existence of facts on which jurisdiction depends. Now, it turns out, as the judge has found the facts, that this supposed contempt did not happen, as the commitment states 'on the trial of a cause' before the justice, nor 'upon the examination of one Sally Grant on a criminal complaint.' Sally Grant was never brought before the justice. She was not in the county of Chenango, nor was it pretended that she had ever committed any offense in that county. The crime which they were attempting to fasten upon her was committed in the county of Rensselaer, where she lived. A justice of the peace is for some purposes a town officer, and for other purposes a county officer. He may issue process for the arrest of offenders where the crime was committed in his county, although the criminal may have escaped in another county (2 Rev. Stat. p. 706, §§ 1-5); and, possibly, he may issue process when the offender is in his county, although the crime was committed elsewhere. We are, however, inclined to a different opinion. But it is not now necessary to settle that question. Here neither the crime nor the offender was in Chenango, and the justice was without the shadow of authority in attempting to inquire into the matter. The whole proceeding was *coram non judice*. Indeed, it wears the appearance of an attempt to pervert justice, by getting

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up a sham complaint against Sally Grant for the purpose of compelling Cassels to criminate himself, after a failure to find evidence to sustain the charge which had previously been made against him. But I ought to mention that the justice has not been heard upon this matter; and, as there are usually two sides to every case, it is not improbable that the facts may hereafter assume a different appearance."

The supreme court of California, in the case of *Ex parte McCullough*, 35 Cal. 98, says: "Habeas corpus is undoubtedly the proper remedy for every unlawful imprisonment, both in civil and criminal cases; but an imprisonment is not unlawful, in the sense of this rule, merely because the process or order under which the party is held has been irregularly issued, or is erroneous. Process which has been irregularly issued may be set aside by the court or officer by whom it was issued, and erroneous judgments or orders may be reversed on appeal or writ of error. The writ of habeas corpus has not been given for the purpose of reviewing judgments or orders made by a court or judge or officer acting within their jurisdiction. To put it to such a use would be to convert it into a writ of error, and confer upon every officer who has authority to issue the writ appellate jurisdiction over the orders and judgments of the highest judicial tribunals in the land. County judges, though occupying an inferior position, and exercising an inferior jurisdiction, would be by such a rule empowered to review and practically reverse the judgments and orders of the district courts, and of the supreme court itself, and also of the Federal courts exercising jurisdiction within the state. Establish the doctrine that the judgments and orders of courts may be reviewed on habeas corpus, upon the ground of error, and appeals for the correction of errors may be dispensed with in all cases in which the arrest or imprisonment of persons is allowed. Every criminal action, every civil action in which an arrest is given, and every proceeding for a contempt, could be brought to the supreme court by writ of habeas corpus. Not only that, but, as already suggested, inferior tribunals would be called upon to review the judgments of superior tribunals, and tribunals of equal grade to interfere and review each other's proceedings. Such a rule would render all judicial proceedings amorphous, and lead to the utmost confusion and disorder. It is well settled that habeas corpus can be put to no such use, and that its functions, where the party who has appealed to its aid is in custody under process, do not extend beyond an inquiry into the jurisdiction of the court by which it was issued, and the validity of the process upon its face. *People v. Cassels*, 5 Hill, 167; *People ex rel. Mitchell v. New York Sheriff*, 7 Abb. Pr. 96; *Ex parte Gibson*, 31 Cal. 619."

Chief Justice Cole, in the case of *State ex rel. McCaslin v. Smith*, 65 Wis. 93, 26 N. W. 258, has this to say: "But a complaining witness, who instigates a criminal prosecution maliciously and without probable cause, 49 L. R. A.

in a sense makes himself party to it. His position is similar to that of a party who signs as surety an undertaking for the return of property replevied. Such a surety becomes a quasi party to the suit, and is liable to have judgment entered against him, with his principal, on the failure of the latter to maintain his cause. *Pratt v. Donovan*, 10 Wis. 378. We must assume that the defendant in error instituted the criminal prosecution in his own wrong, to harass and oppress an innocent party. There is no hardship in holding that by so doing he submitted himself to the jurisdiction of the examining magistrate."

The supreme court of Massachusetts, in *Whitcomb's Case*, 120 Mass. 118, 21 Am. Rep. 502, announces the following doctrine: "Justices of the peace are recognized in the Constitution of the commonwealth as exercising a part of the judiciary power, and are for some purposes courts of record. Mass. Const. chap. 3, art. 3; *Thayer v. Com.* 12 Met. 9. Their authority to punish for contempts, at least so far as is indispensable to the orderly conducting of their business, and especially in the case of the refusal of witnesses, after due summons and payment of their fees, to appear and testify before them, has been generally admitted, and has been regulated by statute from the earliest time of the commonwealth. Stat. 1784, chap. 28, § 6; Rev. Stat. chap. 85, § 33, and commissioner's note to § 31; Stat. 1838, chap. 42; Gen. Stat. chap. 120, § 50; chap. 131, §§ 5, 6; *Clarke's Case*, 12 Cush. 320; *Piper v. Pearson*, 2 Gray, 120, 61 Am. Dec. 438; *State v. Copp*, 15 N. H. 212; *Re Cooper*, 32 Vt. 253."

The supreme court of Pennsylvania, in the *Case of Williamson*, 26 Pa. 9, 67 Am. Dec. 374, has passed upon several questions here involved. Mr. Justice Black says, at different times, as follows: "This is an application by Passmore Williamson for a writ of habeas corpus. He complains that he is held in custody under a commitment of the district court of the United States for a contempt of that court in refusing to obey its process. The process for which he is confined for disobeying was a habeas corpus, commanding him to produce the bodies of certain colored persons claimed as slaves under the law of Virginia. Is he entitled to the writ he has asked for? In considering what answer we shall give to this question, we are, of course expected to be influenced, as in other cases, by the law and the Constitution alone. The gentlemen who appeared as counsel for the petitioner, and who argued the motion in a manner which did them great honor, pressed upon us no considerations except those which were founded upon their legal views of the subject. It is argued with much earnestness, and no doubt with perfect sincerity, that we are bound to allow the writ, without stopping to consider whether the petitioner has or has not laid before us any probable cause for supposing that he is illegally detained; that every man confined in prison, except for treason or felony, is entitled to it, *ex debito justitiæ*; and that we cannot refuse it without a frightful viola-

tion of the petitioner's rights, no matter how plainly it may appear on his own showing that he is held in custody for a just cause. If this be true, the case of *Ex parte Lawrence*, 5 Binn. 304, is not law. There the writ was refused because the applicant had been previously heard before another court; but if every man who applies for a habeas corpus must have it as a matter of right, and without regard to anything but the mere fact that he demands it, then a court or a judge has no more power to refuse a second than a first application. Is it really true that the special application which must be made for every writ of habeas corpus, and the examination of the commitment, which we are bound to make before it can issue, are mere hollow and unsubstantial forms? Can it be possible that the law and the courts are so completely under the control of their natural enemies that every class of offenders against the Union or the state, except traitors and felons, may be brought before us as often as they please, though we know beforehand, by their own admissions, that we cannot help but remand them immediately? If these questions must be answered in the affirmative, then we are compelled, against our will and contrary to our convictions of duty, to wage a constant warfare against the Federal tribunals, by firing off writs of habeas corpus upon them all the time. The punitive justice of the state would suffer still more seriously. The half of the Western Penitentiary would be before us at Philadelphia, and a similar proportion from Cherry Hill and Moyamensing would attend our sittings at Pittsburgh. To remand them would do very little good, for a new set of writs would bring them all back again. A sentence to solitary confinement would be a sentence that the convict should travel for a limited term up and down the state in company with the officers who might have him in charge. By the same means the inmates of the lunatic asylums might be temporarily enlarged, much to their own detriment, and every soldier or seaman in the service of the country could compel their commanders to bring them before the court six times a week. But the habeas corpus act has never received such a construction. It is a writ of right, and may not be refused to one who shows a prima facie case entitling him to be discharged or bailed; but he has no right to demand it who admits that he is in legal custody for an offense not bailable, and he does make what is equivalent to such an admission when his own application, and the commitment referred to in it, show that he is lawfully detained. A complaint must be made, and the cause of detainer submitted to a judge, before the writ can go. The very object and purpose of this is to prevent it from being trifled with by those who have manifestly no right to be set at liberty. It is like a writ of error in a criminal case, which the court or judge is bound to allow if there be reason to suppose that an error has been committed, and equally bound to refuse if it be clear that the judgment must be affirmed. We are not aware that any application to

this court for a writ of habeas corpus has ever been successful where the judges, at the time of the allowance, were satisfied that the prisoner must be remanded. The petitioner's counsel say there is but one reported case in which it was refused, and this fact is given in the argument as a reason for supposing that in all other cases the writ was issued without examination. But no such inference can fairly be drawn from the scarcity of judicial decisions on a point like this. We do not expect to find, in reports so recent as ours, those long-established rules of law which the student learns from his elementary books, and which are constantly acted upon without being disputed. The habeas corpus is a common-law writ, and has been used in England from time immemorial, just as it is now. The statute of 31 Car. II. chap. 2. made no alteration in the practice of the courts in granting these writs. 3 Barn. & Ald. 420-422; Chitty, 207. It is merely provided that the judges in vacation should have the power which the courts had previously exercised in term time (1 Chitty, Gen. Pr. 586), and inflicted penalties upon those who should defeat its operation. The common law upon this subject was brought to America by the colonists; and most, if not all, the states have since enacted laws resembling the English statute of Charles II. in every principal feature. The Constitution of the United States [art. 1, § 9] declares that 'the privilege of a writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it.' Congress has conferred upon the Federal judges the power to issue such writs according to the principles and rules regulating it in other courts. Seeing that the same general principles of common law on this subject prevail in England and America, and seeing, also, the similarity of their statutory regulations in both countries, the decisions of the English judges, as well as of the American courts, both state and Federal, are entitled to our fullest respect as settling and defining our powers and duties. Blackstone (3 Bl. Com. 132) says that the writ of habeas corpus should be allowed only when the court or judge is satisfied that the party hath probable cause to be delivered. He gives cogent reasons why it should not be allowed in any other case, and cites with unqualified approbation the precedent set by Sir Edward Coke and Chief Justice Vaughan in cases where they had refused it. Chitty lays down the same rule. 1 Chitty, Crim. Law, 101: 1 Chitty, Gen. Pr. 686, 687. It seems to have been acted upon by all the judges. The writ was refused in *Rea v. Schiever*, 2 Burr. 765, and in the case of *Three Spanish Sailors*, 2 W. Bl. 1324. In *Hobhouse's Case*, 3 Barn. & Ald. 420, it was fully settled by a unanimous court as the true construction of the statute that the writ is never to be allowed if, upon view of the commitment, it be manifest that the prisoner must be remanded. In New York, when the statute in force there was precisely like ours (so far, I mean, as this question is concerned), it was decided

by the supreme court (*Yates v. Lansing*, 5 Johns. 282) that the allowance of the writ was a matter within the discretion of the court, depending on the grounds laid in the application. It was refused in *Husted's Case*, 1 Johns. Cas. 136, and in *Re Ferguson*, 9 Johns. 239. In addition to this, we have the opinion of Chief Justice Marshall in *Watkins' Case*, 3 Pet. 202, 7 L. ed. 653, that the writ ought not to be awarded if the court is satisfied that the prisoner must be remanded. It was accordingly refused by the Supreme Court of the United States in that case, as it had been before in *Kearney's Case*. "On the whole, we are thoroughly satisfied that our duty requires us to view and examine the cause of detainer now, and to make an end of the business at once, if it appears that we have no power to discharge him on the return of the writ. The prisoner, as already said, is confined on a sentence of the district court of the United States for a contempt. A habeas corpus is not a writ of error. It cannot bring a case before us in such a manner that we can exercise any kind of appellate jurisdiction in it. On a habeas corpus, the judgment even of a subordinate state court cannot be disregarded, reversed, or set aside, however clearly we may perceive it to be erroneous, and however plain it may be that we ought to reverse it if it were before us on appeal or writ of error. We can only look at the record to see whether a judgment exists, and have no power to say whether it is right or wrong. It is conclusively presumed to be right until it is regularly brought up for revision. We decided this three years ago, at Sunbury, in a case which we all thought one of much hardship. But the rule is so familiar, so universally acknowledged, and so reasonable in itself that it requires only to be stated. It applies with still greater force, or, at least, for much stronger reasons, to the decisions of the Federal courts. Over them we have no control at all, under any circumstances, or by any process that could be devised. Those tribunals belong to a different judicial system from ours. They administer a different code of laws, and are responsible to a different sovereignty. The district court of the United States is as independent of us as we are of it,—as independent as the Supreme Court of the United States is of either. What the law and the Constitution have forbidden us to do directly on writ of error, we, of course, cannot do indirectly by habeas corpus. But the petitioner's counsel have put his case on the ground that the whole proceeding against him in the district court was *coram non iudice*, null, and void. It is certainly true that a void judgment may be regarded as no judgment at all, and every judgment is void which clearly appears on its own face to have been pronounced by a court having no jurisdiction or authority in the subject-matter; for instance, if a Federal court should convict and sentence a citizen for libel, or if a state court, having no jurisdiction except in civil pleas, should try an indictment for a crime, and convict the party,—in these cases the judgments would

be wholly void. If the petitioner can bring himself within this principle, then there is no judgment against him, he is wrongfully imprisoned, and we must order him to be brought out and discharged. What is he detained for? The answer is easy and simple. The commitment shows that he was tried, found guilty, and sentenced for contempt of court, and nothing else. He is now confined in execution of that sentence, and for no other cause. This was a distinct and substantive offense against the authority and government of the United States. Does anybody doubt the jurisdiction of the district court to punish contempt? Certainly not. All courts have this power, and must necessarily have it; otherwise, they could not protect themselves from insult, or enforce obedience to their process. Without it, they would be utterly powerless. The authority to deal with an offender of this class belongs exclusively to the court in which the offense is committed; and no other court, not even the highest, can interfere with its exercise, either by writ of error, mandamus, or habeas corpus. If the power be abused, there is no remedy but impeachment. The law was so held by this court in *M'Laughlin's Case*, 5 Watts & S. 276, and by the Supreme Court of the United States in *Kearney's Case*, 7 Wheat. 38, 5 L. ed. 391. It was solemnly settled, as part of the common law, in *Crosby's Case*, 3 Wils. 188, by a court in which sat two of the foremost jurists that England ever produced. We have not the smallest doubt that it is the law, and we must administer it as we find it. The only attempt ever made to disregard it was by a New York judge (*Yates' Case*, 4 Johns. 345), who was not supported by his brethren. This attempt was followed by all the evil and confusion which Blackstone and Kent and Story declared to be its necessary consequences. Whoever will trace that singular controversy to its termination will see that the chancellor and a majority of the supreme court, though once outvoted in the senate, were never answered. The senate itself yielded to the force of the truths which the supreme court had laid down so clearly, and the judgment of the court of errors in *Yates's Case*, 6 Johns. 503, was overruled by the same court the year afterwards in *Yates v. Lansing*, 9 Johns. 423, 6 Am. Dec. 290, which grew out of the very same transaction and depended on the same principles. Still further reflection at a later period induced the senate to join the popular branch of the legislature in passing a statute which effectually prevents one judge from interfering by a habeas corpus with the judgment of another on a question of contempt. These principles being settled, it follows irresistibly that the district court of the United States had power and jurisdiction to decide what acts constitute a contempt against it, to determine whether the petitioner had been guilty of contempt, and to inflict upon him the punishment which, in its opinion, he ought to suffer. If we fully believed the petitioner to be innocent,—if we were sure that the court which convicted him misunderstood the facts or misapplied

the law,—still we could not re-examine the evidence, or rejudge the justice of the case, without grossly disregarding what we know to be the law of the land. The judge of the district court decided the question on his own constitutional responsibility. Even if he could be shown to have acted tyrannically or corruptly, he could be called to answer for it only in the senate of the United States. "But the counsel of the petitioner go behind the proceedings in which he was convicted, and argue that the sentence for contempt is void, because the court had no jurisdiction of a certain other matter which it was investigating, or attempting to investigate, when the contempt was committed. We find a judgment against him in one case; and he complains about another, in which there is no judgment. He is suffering for an offense against the United States, and he says he is innocent of any wrong to a particular individual. He is conclusively adjudged guilty of contempt; and he tells us that the court has no jurisdiction to restore Mr. Wheeler's slaves. It must be remembered that contempt of court is a specific criminal offense. It is punished sometimes by indictment, and sometimes in a summary proceeding, as it was in this case. In either mode of trial, the adjudication against the offender is a conviction, and the commitment in consequence is execution. 7 Wheat. 38, 5 L. ed. 391. This is well settled, and, I believe, has never been doubted. Certainly the learned counsel for the petitioner have not denied it. The contempt may be connected with some particular cause, or it may consist in misbehavior which has a tendency to obstruct the administration of justice generally. When it is committed in a pending cause, the proceeding to punish it is a proceeding by itself. It is not entitled in the cause pending, but on the criminal side [*United States v. Wayne*], Wall. C. C. 134, Fed. Cas. No. 16,654. The record of a conviction for contempt is as distinct from the matter under investigation when it was committed as an indictment for perjury is from the cause in which the false oath was taken. Can a person, convicted of perjury, ask us to deliver him from the penitentiary on showing that the oath on which the perjury is assigned was taken in a cause of which the court had no jurisdiction? Would any judge in the commonwealth listen to such a reason for treating the sentence as void? If, instead of swearing falsely, he refuses to be sworn at all, and he is convicted, not of perjury, but of contempt, the same rule applies, and with a force precisely equal. If it be really true that no contempt can be committed against a court while it is inquiring into a matter beyond its jurisdiction, and if the fact was so in this case, then the petitioner had a good defense, and he ought to have made it on his trial. To make it after conviction is too late. To make it here is to produce it before the wrong tribunal. . . . Every judgment must be conclusive until reversed. Such is the character, nature, and essence of all judgments. If it be not conclusive, it is not a judgment. A court

must either have power to settle a given question finally and forever, so as to preclude any further inquiry upon it, or else it has no power to make any decision at all. To say that a court may determine a matter, and that another court may regard the same matter afterwards as open and undetermined, is an absurdity in terms. . . . It is most especially necessary that convictions for contempt in one court should be final, conclusive, and free from re-examination by other courts on habeas corpus. If the law were not so, our judicial system would break to pieces in a month. Courts totally unconnected with each other would be coming in constant collision. The inferior courts would revise all the decisions of the judges placed over and above them. A party unwilling to be tried in this court need only defy our authority, and, if we commit him, to take out his habeas corpus before an inferior judge of his own choosing, and, if that judge is of opinion that we ought not to try him, there is an end of the case. This doctrine is so plainly against the reason of the thing that it would be wonderful, indeed, if any authority for it could be found in the books. There is none, except the overruled decision of Mr. Justice Spencer of New York, already referred to, and some efforts of the same kind to control the other courts, made by Sir Edward Coke, in the King's bench, which are now universally admitted to have been illegal, as well as rude and intemperate. On the other hand, we have all the English judges, and all our own, declaring their want of power to interfere with or control one another in this way. I will content myself by simply referring to some of the books in which it is established that the conviction of contempt is a separate proceeding, and is conclusive of every fact which might have been urged on the trial for contempt, and, among others, want of jurisdiction to try the cause in which the contempt was committed: 4 Johns. 325 *et seq.*; the opinion of Chief Justice Kent on pages 370 to 375; 6 Johns. 503; 9 Johns. 423, 6 Am. Dec. 290; *People ex rel. Johnson, v. Nevins*, 1 Hill. 170; *State v. Woodfin*, 27 N. C. (5 Ired. L.) 199, 42 Am. Dec. 161; *Ex parte Summers*, 27 N. C. (5 Ired. L.) 153; *Re Smethurst*, 2 Sandf. 724; *Lockwood v. State*, 1 Ind. 161; *State ex rel. Leavenworth v. Tipton*, 1 Blackf. 166; *State v. Johnson*, 25 Miss. 836; *Com. v. Deacon*, 2 Wheeler, C. C. 1; 14 Q. B. 558. These cases will speak for themselves, but I may remark, as to the last one, that the very same objection was made there and here. The party was convicted of contempt in not obeying a decree. He claimed his discharge on habeas corpus because the chancellor had no jurisdiction to make the decree, being interested in the cause himself. But the court of Queen's bench held that, if that was a defense, it should have been made on the trial for contempt, and the conviction was conclusive. We cannot choose but hold the same rule here. Any other would be a violation of the law, which is established and sustained by all authority and all reason. But certainly the want of jurisdiction alleged in

this case would not even have been a defense on the trial. The proposition that a court is powerless to punish for disorderly conduct or disobedience of its process, in a case which it ought ultimately to dismiss for want of jurisdiction, is not only unsupported by judicial authority, but we think it is new, even as an argument at the bar. We ourselves have heard many cases through and through before we became convinced that it was our duty to remit the parties to another tribunal; but we never thought that our process could be defied in such cases more than in others. There are some proceedings in which the want of jurisdiction would be seen at the first blush, but there are others in which the court must inquire into all the facts before it can possibly know whether it has jurisdiction or not. Anyone who obstructs or baffles a judicial investigation for that purpose is unquestionably guilty of a crime, for which he may and ought to be tried, convicted, and punished. Suppose a local action to be brought in the wrong county; this is a defense to the action, but a defense which must be made out like any other. While it is pending, neither a party, nor an officer, nor any other person can safely insult the court or resist its order. The court may not have had power to decide upon the merits of the case, but it has undoubted power to try whether the wrong was done within its jurisdiction or not. Suppose Mr. Williamson to be called before the circuit court of the United States as a witness in a trial for murder, alleged to be committed on the high seas; can he refuse to be sworn, and at his trial for contempt justify himself on the ground that the murder was in fact committed within the limits of a state, and therefore triable only in a state court? If he can, he can justify perjury for the same reason. But such a defense for either crime has never been heard of since the beginning of the world. Much less can it be shown, after conviction, as a ground for declaring the sentence void."

Mr. Justice Lowrie, in the same case and in a separate opinion, makes use of the following language: "I have not been able to doubt that this court is in many cases bound to exercise its judgment as to the propriety of granting the writ before allowing it to issue. Notwithstanding the words of the act which imposes a penalty for refusing the writ, we are not forbidden to interpret the law. And the necessity of presenting a petition to the court or to a judge thereof; of stating therein whether the prisoner was detained on criminal or on civil process, or neither; of producing the warrant of committal, or accounting for not doing so; the fact that traitors and murderers and fugitives from the justice of other states are excluded from the benefit of the act, and that the writ was not intended for the relief of convict criminals (Cro. Car. 168; 1 Salk. 348), and was not extended to them by our act,—all these matters show plainly enough that the judge or court is not exercising a mere ministerial function in granting the writ. On any other supposition, there is no

reason at all for applying to the court, for the prothonotary could grant it as well. And no one can examine the provisions of Magna Charta, the petition of right (3 Car. I.) the statute repealing the star chamber court (16 Car. I. chap. 10), the habeas corpus act of 31 Car. I. and ours of 1785, and the numerous kindred statutes to which that investigation will lead him, without perceiving that a free and open court, and a full and open trial before the superior judges by due course of law, have always been regarded as the best guaranty of the liberty of the citizen. He will see, moreover, very plainly, that the habeas corpus is only a means by which this end is to be secured, so that no ignorance or tyranny of King, or King's counsel, or minister, or of mere local and inferior courts, dependent on and governed by local customs, or of justices of the peace, shall imprison a man without a chance of bail, or a hope of obtaining a speedy trial by the law of the land. See *Com. ex rel. Jack v. The Sheriff*, 7 Watts & S. 108."

The above cases cannot here be disposed of on the ground that "this was not a case where the applicant was imprisoned, but involved the question of the right to his freedom of one held as a slave," because the former (*Williamson Case*) surely undertakes the discussion of habeas corpus fully, and cites with approval the latter case (*Ex parte Lawrence*, 5 Binn. 304).

The case of *Ex parte Lawrence*, 5 Binn. 304, referred to in the foregoing opinion of Justice Black, is as follows: "Phillips, on behalf of Ann Lawrence, petitioned the court for a habeas corpus under the act of 1785 to one Joseph Vogdes, to bring up the body of Adam Lawrence, then in his custody as a slave, whereas, according to the suggestion, he was free. It was stated by the counsel that the case had been already heard upon a habeas corpus by the common pleas of Philadelphia county, who remanded the prisoner; and that there was no new evidence to lay before this court.

"Per Curiam. We do not think that the act of assembly obliges this court to grant a habeas corpus where the case has been already heard upon the same evidence by another court; and we do not think it expedient in this case, because it has been already heard upon the same evidence, and the party is not without remedy, as he may resort to a *homine replegiando*. The court are not, however, to be understood as saying that they have not authority to issue a habeas corpus in such a case, if they should think it expedient. Habeas corpus refused."

An interesting case, and one that directly passes upon many of the questions here involved, is the recent one of *Brown v. Walker* (1896) 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644, and I quote from the language of Mr. Justice Brown, of the United States Supreme Court, in that case: "This case involves an alleged incompatibility between that clause of the 5th Amendment to the Constitution which declares that no person 'shall be compelled in any criminal case to be a witness against

himself' and act of Congress Feb. 11, 1893, chap. 83, 27 Stat. at L. 443, which enacts that 'no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the interstate commerce commission, or in obedience to the subpoena of the commission, . . . on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena or the subpoena of either of them, or in any such case or proceeding.' The act is supposed to have been passed in view of the opinion of this court in *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195, to the effect that § 860 of the Revised Statutes, providing no evidence given by a witness shall be used against him, his property or estate, in any manner, in any court of the United States, in any criminal proceeding, did not afford that complete protection to the witness which the amendment was intended to guarantee." After giving the gist of the Counselman decision, and referring to statutes giving immunity from prosecution, the court says: "In the latter case [*Queen v. Boyes*, 1 Best & S. 311, 321] it was suggested, in answer to the production by the solicitor general of a pardon of the witness under the great seal, that by statute no such pardon under the great seal was pleadable to an impeachment by the commons in Parliament; and it was insisted that this was a sufficient reason for holding that the privilege of the witness still existed, upon the ground that, although protected by the pardon against every other form of prosecution, the witness might possibly be subjected to parliamentary impeachment. It was also contended in that case, as it is in the one under consideration, 'that a bare possibility of legal peril was sufficient to entitle a witness to protection; nay, further, that the witness was the sole judge as to whether his evidence would bring him into the danger of the law, and that the statement of his belief to that effect, if not manifestly made, *mala fide*, would be received as conclusive.' It was held, however, by Lord Chief Justice Cockburn, that 'to entitle a party called as a witness to the privilege of silence the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer,' although, 'if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question.' 'Further than this,' said the chief justice, 'we are of the opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary

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operation of law, in the ordinary course of things,—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of the law, and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding *inter alios*, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice.' . . . All of the cases above cited proceed upon the idea that the prohibition against his being compelled to testify against himself presupposes a legal detriment to the witness arising from the exposure. As the object of the first eight amendments to the Constitution was to incorporate into the fundamental law of the land certain principles of natural justice which had become permanently fixed in the jurisprudence of the mother country, the construction given to those principles by the English courts is cogent evidence of what they were designed to secure, and of the limitations that should be put upon them. This is but another application of the familiar rule that where one state adopts the laws of another, it is also presumed to adopt the known and settled construction of those laws by the courts of the state from which they were taken,"—citing authorities. "The danger of extending the principle announced in *Counselman v. Hitchcock* is that the privilege may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger. and for the real purpose of securing immunity to some third person, who is interested in concealing the facts to which he would testify. Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others who are desirous of seeking shelter behind his privilege." Then follows, in the opinion of the court, a discussion of the immunity afforded by the act first described, and this language is used: "It is entirely true that the statute does not purport, nor is it possible for any statute, to shield the witness from the personal disgrace or opprobrium attaching to the exposure of his crime; but, as we have already observed, the authorities are numerous and very nearly uniform to the effect that, if the proposed testimony is material to the issue on trial, the fact that the testimony may tend to degrade the witness in public estimation does not exempt him from the duty of disclosure. A person who commits a criminal act is bound to contemplate the conse-

quences of exposure to his good name and reputation, and ought not to call upon the courts to protect that which he has himself esteemed to be of such little value. The safety and welfare of an entire community should not be put into the scale against the reputation of a self-confessed criminal, who ought not, either in justice or in good morals, to refuse to disclose that which may be of great public utility, in order that his neighbors may think well of him. The design of the constitutional privilege is, not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge."

In all fairness it should be conceded that this judgment of the highest court in our land was by a divided court. Four of the justices dissent, and in two separate opinions virtually adhere to the opinion rendered in the *Counselman Case*. Mr. Justice Field, in his separate dissenting opinion, concedes all that is necessary for my contention in this case, as I shall show hereafter, by the following language: "It is conceded as an established doctrine, universally assented to, that a witness claiming his constitutional privilege cannot be questioned concerning the way in which he fears he may incriminate himself, or, at least, only so far as may be needed to satisfy the court that he is making his claim in good faith, and not as a pretext. *Fisher v. Ronalds*, 12 C. B. 762; *Adams v. Lloyd*, 3 Hurlst. & N. 351; *Reg. v. Boyes*, 7 Jur. N. S. 1158; *Ex parte Reynolds*, 22 Am. L. Reg. N. S. 21, note p. 28; *Temple v. Com.* (Va.) 2 Crim. L. Mag. & Rep. 645, note 654. To establish such good faith on the part of the witness in claiming his constitutional privilege of exemption from self-incrimination, where he is examined as a witness in a criminal case, he may be questioned as to his apprehension of criminating himself by his answer, but no further."

A leading case, and one that has come down to us as sound doctrine, and runs through a great many, if not all, of the cases since, where the question involved is whether it is for the witness or the court to say that the answer to the question propounded might, could, or would incriminate the witness, from the facts made to appear, is the case known as the *Burr Case*, where Chief Justice Marshall, after two days' argument upon the one proposition, announced his now famous opinion; and, while ninety-two years have passed since it was rendered, and this particular question has many times been before different courts, not one, so far as I have found, has denied that it was correct as a whole, but many judges have objected to parts of that opinion being referred to as announcing the doctrine that it supports without question the claim that it is for the witness alone to pass upon the constitutional right of refusing to answer, independent of the court or the circumstances under which the witness is placed at the time. Let us see what Justice Marshall says. Among other things, following the statement, that has been referred to in the main opinion here, 49 L. R. A.

that he is at liberty to refuse to answer if he will say upon his oath that his answer to that question might criminate him, comes this language: "When this opinion was first suggested, the court conceived the principle laid down at the bar to be too broad, and therefore required that authorities in support of it might be adduced. Authorities have been adduced and have been considered. In all of them the court could perceive that an answer to the question propounded might criminate the witness, and he was informed that he was at liberty to refuse an answer. These cases do not appear to the court to support the principle laid down by the counsel for the witness in the full latitude in which they have stated it. There is no distinction which takes from the court the right to consider and decide whether any direct answer to the particular question propounded could be reasonably supposed to affect the witness. There may be questions no direct answer to which could in any degree affect him; and there is no case which goes so far to say that he is not bound to answer such questions. The *Case of Gooseley*, Fed. Cas. No. 15,230, in this court, is perhaps the strongest that has been adduced. But the general doctrine of the judge in that case must have referred to the circumstances which showed that the answer might criminate him. When two principles come in conflict with each other, the court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded. They are believed both to be preserved to a reasonable extent, and according to the true intention of the rule and of the exception to that rule, by observing that course which it is conceived courts have generally observed." Fed. Cas. No. 14,692e.

In the case of *Kirschner v. State*, 9 Wis. 140, we find the following language: "Although the witness is the judge of the effect of his answer, and is not bound to disclose any facts or circumstances to show how the answer would affect him, as that would defeat the rule, and destroy the protection afforded by the law, yet the court is to determine, under all the circumstances of the case, whether such is the tendency of the question put to him, and whether he shall be required to answer; as otherwise it would be in the power of every witness to deprive parties of the benefit of his testimony by a merely colorable pretense that his answers to questions would have a tendency to implicate him in some crime or misdemeanor, or would expose him to a penalty of forfeiture, when it is clear, as we think it was in this case, that the questions have no such tendency."

In *Calhoun v. Thompson*, 56 Ala. 166, 28 Am. Rep. 754, the court says: "In the first instance it is the province of the court to determine whether any direct answer to the question proposed will furnish criminating evidence against the witness. If it is not ap-

parent such would be the tendency of the answer, the witness is not privileged from testifying. While it is of the highest importance to protect the witness from self-incrimination, it is also of importance that the privilege the law extends to him should not be perverted to the suppression of evidence which can be safely given."

In the case of *Richman v. State*, 2 G. Greene, 532, the court says: "When it is evident to the mind of the court that the answer cannot accuse the witness, the court should require him to respond to the interrogatory. If this were not the case, it would be in the power of the witness, when called upon to give testimony in a criminal case, to refuse to do so. If he is to be the sole judge whether the answer would implicate him by thus answering, it would be impossible to elicit any testimony. Perjury could not only be committed with impunity, by stating that the answer would criminate him, but the guilty would be screened from merited punishment. We cannot sanction a rule fraught with such dangerous consequences. The direct tendency of such a rule would be to suppress truth, and prevent the administration of justice. Therefore, we think the better and safer rule to be that of compelling the witness to answer, when it is apparent to the court that such answer would not interfere with his legal privilege."

The United States circuit court for the southern district of New York, in the case of *United States v. McCarthy*, 21 Blatchf. 469, 18 Fed. Rep. 87, announce the rule to be as follows: "It is not sufficient to excuse the witness from answering that he may in his own mind think his answer to the question might by possibility lead to some criminal charge against him, or tend to convict him of it if made. The court must be able to perceive that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. *Queen v. Boyes*, 1 Best & S. 311; Wharton, Ev. § 538."

The supreme court of Iowa, upon this subject, in the case of *State v. Duffy*, 15 Iowa, 427, have this to say: "The true rule upon this subject will be found discussed by Chief Justice Marshall (1 Burr, Tr. 244, Fed. Cas. No. 14,692e), and in *People v. Mather*, 4 Wend. 230, 21 Am. Dec. 122; *Bellinger v. People*, 8 Wend. 595, and the cases there cited. . . . It is not left alone for the witness to determine whether the answer would tend to criminate him. He is not required to explain how he would be criminated, for this would or might annihilate the protection secured by this rule; but it is for the court to determine 'whether the answer can criminate him, directly or indirectly, by furnishing direct evidence of his guilt, or by establishing one of the many facts which together may constitute a chain of testimony sufficient to warrant his conviction, but one of which itself could not produce such result.'"

During the discussion of the case of *Queen v. Boyes*, a case that has been referred to so many times, Justice Blackburn said: "Taylor refers to an American case (*People v.* 49 L. R. A.

Mather, 4 Wend. 229, 21 Am. Dec. 122) where Marcy, J., delivered the judgment of the court, and, after a learned and elaborate argument, decided that the witness there was not obliged to answer. His conclusion is (p. 257, Am. Dec. p. 144): 'I think the judge could not safely say that the privilege was claimed by the witness in this case as a mere subterfuge to suppress the truth, and thereby aid the escape of the guilty.' That is the reason of the decision, and it is a very sensible rule to go by."

In the case of *State v. Kent*, 5 N. D. 555, 35 L. R. A. 518, 67 N. W. 1063, the court makes use of the following language: "We must not be understood to mean that, in every case where a witness under oath claims his privilege on the ground that his answer will tend to criminate him, the privilege will be granted. Ordinarily it will, and the witness cannot be required to specify in what manner his answer may be incriminating. This would be to destroy the privilege. But, when a court can discover no reasonable theory upon which the answer could be incriminating, further investigation may be made, or the privilege denied. A witness will not be permitted to make any fraudulent use of his privilege."

In the case of *State v. Thaden*, 43 Minn. 253, 45 N. W. 447, Justice Mitchell makes use of the following language: "The first error assigned is the ruling of the trial court in compelling this witness to answer certain questions, he having previously declined to do so, claiming that the same might tend to criminate himself. While no principle of the common law is more firmly established than that which affords a witness the privilege of refusing to answer any question which will criminate himself, yet its application is attended with practical difficulties. To hold that the witness himself is the sole and absolute judge whether the answer will criminate him would be to place it in his power to withhold evidence whenever he saw fit. Such a rule could not be tolerated for a moment. On the other hand, to require him to state what answer he would have to give, or to explain fully how his answer would tend to criminate, would deprive him of the very protection which the law designs to afford. Moreover, the reason of the rule forbids that it should be limited to confessions of guilt, or statements which may be proved in subsequent prosecutions as admissions of facts sought to be established therein; but it should be extended to the disclosure of any fact which might constitute an essential link in a chain of evidences by which guilt might be established, although the fact alone would not indicate any crime. Hence, the problem is how to administer the rule so as to afford full protection to the witness, and at the same time prevent simulated excuses. All the authorities agree to the general proposition that the statement of the witness that the answer will tend to criminate himself is not necessarily conclusive, but that this is a question which the court will determine from all the circumstances of the particular case, and the nature of the evidence which the wit-

ness is called upon to give. But the question on which the cases seem to differ is as to what we may call the burden of proof; some holding that the statement of the witness must be accepted as true unless it affirmatively appears from the circumstances of the particular case that he is mistaken or acts in bad faith, while other cases hold that to entitle a witness to the privilege of silence the court must be able to see, from the circumstances of the case and the nature of the evidence called for, that there is reasonable ground to apprehend danger to the witness if he is compelled to answer. The following are a few of the leading cases treating on this subject:" 1 Burr, Tr. 255, Fed. Cas. No. 14,693; *Queen v. Boyes*, 1 Best & S. 311; and several others. "The difference is theoretical, rather than practical; for it would be difficult to conceive of an instance where the circumstances of the case and the nature of the evidence called for would be entirely neutral in their probative force upon the question whether or not there was reasonable ground to apprehend that the answer might tend to criminate the witness. After consideration of the question, and an examination of the authorities, our conclusion is that the best practical rule is that laid down in some of the English cases, and adopted and followed by Chief Justice Cockburn in *Queen v. Boyes*, 1 Best & S. 311: 'That to entitle a party called as a witness to the privilege of silence the court must see from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer.' To this we would add that, when such reasonable apprehension of danger appears, then, inasmuch as the witness alone knows the nature of the answer he would give, he alone must decide whether it would criminate him. This, we think, is substantially what Chief Justice Marshall meant by his statement of the rule in the Burr trial. As was said in *Queen v. Boyes*, 1 Best & S. 311, the danger to be apprehended must be real and appreciable with reference to the ordinary operations of law, in the ordinary course of things; not a danger of an imaginary or unsubstantial character, having reference to some extraordinary and possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. A merely remote and naked possibility, out of the ordinary course of the law, and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice."

"To entitle a person called as a witness to the privilege of silence, the court must see from all the circumstances of the case and the nature of the evidence which the witness is called on to give, that there is reasonable ground to apprehend that the evidence may tend to criminate him if he is compelled to answer. The danger to be apprehended must be real and appreciable with reference to the ordinary operation of law, in the ordinary course of things, and not imaginary or unsubstantial, or a mere remote and naked pos-

sibility." The above is found in the syllabus of a case in [*State v. Thaden*] 43 Minn. 253, 45 N. W. 447. The case is all in point, but particularly the statement that, in claiming exemption, the witness did not claim that an answer would criminate, but that it might criminate. The same distinction is here.

Chief Justice Brickell, in the case of *Calhoun v. Thompson*, 56 Ala. 169, 28 Am. Rep. 754, says: "The humane maxim of the law is that no one is bound to accuse himself. A witness, though a party to the suit, cannot be compelled to answer any question the answering of which may expose or tend to expose him to a criminal charge or to any kind of punishment. 2 Phillips, Ev. 929; 1 Greenl. Ev. § 451. In the first instance, it is the province of the court to determine whether any direct answer to the question proposed will furnish criminating evidence against the witness. If it is not apparent such would be the tendency of the answer, the witness is not privileged from testifying. While it is of the highest importance to protect the witness from self-crimination, it is also of importance that the privilege the law extends to him should not be perverted to the suppression of evidence that can be safely given. 2 Phillips, Ev. 933. We cannot discover that the evidence sought to be elicited could have the least tendency to criminate the witness."

"The argument of counsel assumes that, in this proceeding by writ of habeas corpus, we can inquire into and correct nearly all errors which may have been committed by the district court in the control of the case originally. This has been so often denied by this court, and the proposition is so clear that in a writ of habeas corpus nothing can be inquired into but the jurisdiction of the court, that it is unnecessary to pursue the entire line of argument by counsel for appellant. *Re Cuddy*, 131 U. S. 280, 33 L. ed. 154, 9 Sup. Ct. Rep. 703." Above found in *Re Wight*, 134 U. S. 148, *sub nom. Wight v. Nicholson*, 33 L. ed. 870, 10 Sup. Ct. Rep. 490.

Ex parte Senior, 37 Fla. 1, 32 L. R. A. 133, 19 So. 652, is a case that is interesting, and discusses the *Counselman Case*, that has been referred to many times, reported in 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195, and several other cases. After referring to the language of Chief Justice Marshall in the *Burr Case*, this decision says: "The authorities agree that the right of privilege against compelling disclosure of incriminating evidence is personal to the witness, he alone being entitled to invoke its protection, and that it may be waived by him. Whether the court or the witness has the right to determine the question of privilege or to what extent the claim of privilege is left to the determination of the witness, has not been so uniformly stated in the decisions. It has never been recognized that he alone has the right in all cases to decide whether his answer will tend to criminate him. Such a rule would be mischievous, and enable unscrupulous witnesses to defeat the ends of justice in many cases." And this opinion goes on and learnedly

points out distinctions that can be drawn from opinions that seem to decide otherwise.

The Georgia case, referred to in the opinion of this court in this case, was a civil action for personal injuries against a railway company, and part of the syllabus of the case is as follows: "A party, though introduced as a witness in his own behalf, may, upon cross-examination as to matters not voluntarily testified about on his direct examination, decline to give testimony which would tend to criminate him, or to bring infamy, disgrace, or public contempt upon himself or his family, notwithstanding the fact that at a previous trial of the case he had waived his privilege of remaining silent as to these matters. A waiver of this kind is not binding upon a witness at a trial subsequent to that at which the waiver was made." And in the opinion the court says: "Ordinarily, the accused in a criminal case has no right to testify at all, and generally, if not universally, statutes conferring this privilege expressly, or in effect, annex as a condition that he must submit to the fullest cross-examination. He pays this price for the benefit of swearing for himself. We have, in Georgia, no statute allowing the accused in a criminal case to be sworn as a witness, and our statute allowing parties in civil cases to testify in their own behalf contains no condition in any manner abridging their rights or privileges as witnesses arising under our Constitution, or the above-cited sections of the Code. . . . The second trial is a *de novo* investigation before another jury, whose duty it is to consider the case in the light only of the evidence adduced at that hearing." *Georgia R. & Bkg. Co. v. Lybrend*, 90 Ga. 421, 27 S. E. 794.

The case of *Temple v. Com.* 75 Va. 892, referred to, was a case where the witness thought he was under arrest, and was taken before the grand jury and gave evidence, was committed to jail for want of a bond to appear as a witness, and while in jail was advised of his constitutional right. The court makes the ruling referred to entirely consistent, and the following is some of the language used: "In the case before us it appears that the plaintiff in error, while held in jail as a witness, consulted with counsel, who advised him that he would criminate himself, if he testified in the case against Berry, and gave the same testimony which he had given before the grand jury. The court might well have inquired into the fact whether he had actually received such advice of counsel; or if it believed that such counsel was disreputable, and that the advice was given simply to protect the offender, or to shield a contumacious or bribed witness,—all these matters might have been properly inquired into by the court." And Justice Staples, in his separate opinion concurring, says: "No suggestion is made here that the witness was contumacious, or that his answer would not tend to criminate him."

In the case of *Samuel v. People*, 164 Ill. 379, 45 N. E. 728, where it is held that a witness does not lose his constitutional right by reason of the fact that he has made affidavit

on the information to the truth of the statements therein contained, the court proceeds to show that such affidavit was not a necessary part of the procedure, and, after referring to the Virginia case last above cited with approval, says: "In what is here said we merely hold that, if the witness was entitled to claim his privilege in this case, he did not waive his right to claim such privilege by reason of having made the affidavit upon the information."

As to the applicant's right of appeal I submit the following:

Section 3126 of the Revised Statutes of Wyoming is as follows: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right, made in a special proceeding, or upon a summary application in an action, after judgment, is a final order which may be vacated, modified or reversed, as provided in this chapter. [S. L. 1886, chap. 60, § 778; R. S. O. § 6707.]" And § 3128 is as follows: "A judgment rendered or final order made by the district court, may be reversed, vacated or modified by the supreme court, for errors appearing on the record. [S. L. 1886, chap. 60, § 780; R. S. O. § 6709.]" If a construction of these sections by the supreme court of Ohio was had prior to their adoption, such construction became a part of the law of Wyoming, as all will admit; and a decision of a supreme court upon a statute identical with ours is, to say the least, persuasive. In the case of *Re Collier* (1856) 6 Ohio St. 56, on habeas corpus, the court makes use of the following language: "This proceeding is brought here by the marshal, on certiorari. It is supposed that he relied, in the adoption of this form, on the 10th section of the amendatory act securing the benefit of the writ of habeas corpus, passed February 8, 1847, Swan's Rev. Stat. p. 451, which provides 'that the proceedings on any writ of habeas corpus shall be recorded by the clerks, and may be reviewed on writs of error and certiorari as in other cases now provided by law.' At the time of this enactment, writs of error and of certiorari were, by law, the remedies in use for reviewing and correcting proceedings at law, in civil or criminal cases; but the 530th section of the Code, which took effect July 1, 1853, declares that writs of error and certiorari, to reverse, vacate, or modify judgments or orders in civil cases, are abolished; and the petition in error is, by § 515 of the Code, substituted in their place. We regard this in the nature of a civil proceeding; but, if it be in the nature of a criminal proceeding against a prisoner charged with crime, it is subject to the fatal objection that no such remedy can be maintained in favor of the prosecution against the defendant. The right to prosecute a writ of error or certiorari against one who is indicted and tried for a crime or offense is not given to the state, nor to those who prosecute offenders under its laws. Section 604 of the Code enacts 'that until the legislature shall otherwise provide, this Code shall not affect proceed-

ings on habeas corpus,' etc. It may be claimed that this clause, by its peculiar phraseology, saves the habeas corpus act, and all of the remedies given by it, from the operations of the Code. The word 'proceedings' includes, we think, nothing more than the doings of the judge who allows the writ, and is limited to the hearing before him. The filing of a petition in error is a proceeding before another tribunal. It is new in its character, and effects a review of the decision of the judge, without forming any part of the case before him. The allowance of the writ, the bringing forward of the petitioner before the judge, the inquiry into the cause of his caption and detention, the introduction of evidence, and the liberation or other disposal of the relator, are all to be governed by the act relating thereto; and, as to other questions, to be determined by some other tribunal, though arising out of the case made on the writ, the Code prescribes the form by which they are to be governed. We adopt this construction the more willingly as it secures uniformity of practice in cases of error in civil proceedings, which seems to be a prominent object of the Code (see § 605), and, if carried out, will be found useful to the profession. The writ is dismissed for want of jurisdiction."

If it be urged that § 2128, Rev. Stat., does not apply, because reference is made to the district court only, an inspection of the case of *King v. King* (1882) 38 Ohio St. 370, will disclose a construction of that section which makes it applicable to proceedings before a judge at chambers. In that case the court says: "A judge of the court of common pleas is *ex officio* a judge of the district court, and as such is empowered to grant temporary alimony pending an appeal with respect to permanent alimony. 72 Ohio Laws, § 9, p. 145; 75 Ohio Laws, § 13, p. 749; Rev. Stat. § 5701. The order thus made in such special proceedings (75 Ohio Laws, p. 726; 2 Rev. Stat. 1880, p. 1361) is in its nature final, and may be reviewed on error (75 Ohio Laws, § 1, p. 804; Rev. Stat. § 6707; *O'Donnell v. O'Donnell*, 1 Disney (Ohio) 299; *Brigel v. Starbuck*, 34 Ohio St. 280; *Carpenter v. Cincinnati & W. Canal Co.* 35 Ohio St. 307, 315; *Foss v. Foss*, 100 Ill. 576; 2 Bishop, Mar. & Div. § 406). While the better practice is for the judge making such order to sign it, this is not essential to its validity, where, as here, it was entered on the journal by direction of the judge as required by statute (Rev. Stat. §§ 4963, 5331; *Osburn v. State*, 7 Ohio, pt. 1, p. 212); and the provisions as to signing the journal which the former practice act contained (*Sheehan v. Davis*, 17 Ohio St. 571) were not carried into the Code." In line with the foregoing is the decision of this court in *O.D. Smith Drug Co. v. Casper Drug Co.* 5 Wyo. 510, 40 Pac. 979, 42 Pac. 213, by the use of the following language: "An objection is made that no proceedings in error could have been instituted in the case, as the order discharging the attachment was not a final order, and is not appealable under our Code. Under Code provisions similar to ours, the 49 L. R. A.

courts of last resort in other states have held that the order dissolving or sustaining an attachment is a final order, affecting the substantial rights of the parties, and may be reviewed, without bringing up the whole case, after final judgment; and this is undoubtedly the correct rule, even though there is no direct statutory provision in our Code authorizing an appeal in such cases, except as to final orders generally. *Watson v. Sullivan*, 5 Ohio St. 42; *Harrison v. King*, 9 Ohio St. 388; *Adams County Bank v. Morgan*, 26 Neb. 148, 41 N. W. 993."

The fact that this court in this proceeding cannot review the decision of Judge Scott of the district court in the proceeding before him on habeas corpus cannot be denied, and is not claimed. I feel warranted, in view of the importance of this case, to refer to some of the authorities on that subject briefly. The supreme court of Nevada, in *Ex parte Winston*, 9 Nev. 71, says: "A habeas corpus is not a writ of error. It cannot be used to authorize appellate jurisdiction. On a habeas corpus the judgment of an inferior court cannot be disregarded. We can look at the record to see whether a judgment exists, and have no power to say whether it is right or wrong. It is conclusively presumed to be right until reversed, and, when the imprisonment is under process valid on its face, it will be deemed *prima facie* legal; and, if the petitioner fails to show a want of jurisdiction in the magistrate or court whence it emanated, his body must be remanded to custody,"—citing several authorities. In *Ex parte Shaw*, 7 Ohio St. 81, 70 Am. Dec. 55, we find the following: "Questions of doubtful jurisdiction are frequently involved in a record, which are proper subjects of consideration upon a writ of error, and which should not, therefore, be entertained or decided upon habeas corpus. . . . It is said to be the practice in some parts of this state to use the writ of habeas corpus as a short and summary mode of reviewing as upon a writ of error, and annulling the sentences of courts. If this be so, it is an abuse of the writ of habeas corpus which cannot be too soon corrected." I can see no force in the argument that a law shall be considered of less effect by reason of the arrangement of the statute. Whether it be in the Code of Civil Procedure, or included in the provisions as to habeas corpus, it is the law just the same. The fact that probate judges were given jurisdiction in habeas corpus and mandamus only shows that an unconstitutional attempt was made to confer upon citizens of the territory certain judicial powers that were being exercised by those in whose selection they had no voice or vote.

While it was admitted, in the argument of this case, that the proceedings had before Justice Scott of the district court on habeas corpus were only made a part of the petition for the reason that the law required it to be done where a second application is made, and it was conceded that those proceedings could not be reviewed here on this proceeding, still we find, all through the hearing and in the final judgment, reference

to what was done by, or in the proceeding before, Justice Scott; as, for instance, the question of good faith was not referred to in the justice's court. The affidavit made by Miskimins to obtain a requisition first came into the case during the proceedings before Justice Scott; and, as it is referred to in the opinion of the court at considerable length, I desire to set it out in full, calling attention to the fact that it was made in the presence of the justice of the peace, who also knew all the circumstances of the making of the affidavit by the prosecuting attorney, and of his virtually having withdrawn the same, and who, upon the examination before him as committing magistrate, when the applicant refused to make answer to the questions (which are set out in the opinion of the court, and it would be well to read), refused to allow the claimed privilege of applicant, because there was nothing in the questions, nor in the case or its surroundings, nor did the witness make it appear in any way, that the answer to the questions as propounded would in the remotest possibility tend to criminate him; and if he committed error in this finding and judgment, it cannot, as I claim, be reviewed on habeas corpus. Here is the affidavit:

Affidavit.

The State of Wyoming, } ss.
County of Laramie.

John Miskimins, of the county of Laramie, in the state of Wyoming, being first duly sworn according to law, upon his oath says as follows: That he is the principal and complaining witness against Clifford W. Lang and James Raff, who have fled from the justice of the state; that the application for a requisition is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purpose, and that he will not directly or indirectly use the same for any of said purposes. Affiant further says that on or about the 11th day of July, A. D. 1899, at the county of Laramie, in the state of Wyoming, James Raff represented to John Miskimins, this affiant, that he, James Raff, was worth the sum of fifteen thousand (\$15,000.00) dollars, which amount he desired to invest in cattle; that he had come out here to Wyoming for that purpose; that thereupon Clifford W. Lang represented to John Miskimins, this affiant, that he, the said Clifford W. Lang, was the owner of sixty head of cattle, that said cattle were ranging on the ranch of Bert Wilkins, in Converse county, Wyoming, and that he, the said Clifford W. Lang, desired to dispose of the same; that James Raff would purchase the said bunch of cattle, if the said bunch of cattle was larger in point of numbers; that the said James Raff said to this affiant that Clifford W. Lang was the owner of a small bunch of cattle, that he also held an interest in the Woolstein Liquor Company, that he was very foolish for selling his cattle, and that the cattle were worth more

money than Lang asked for them. Affiant further says that Clifford W. Lang represented to this affiant that he, the said Clifford W. Lang, was desirous of getting out of the cattle business, and proposed to sell to John Miskimins, this affiant, the whole bunch of cattle for the sum of nineteen dollars and fifty cents (\$19.50) per head; that this affiant, believing the said Clifford W. Lang to be the owner of said cattle, purchased the cattle from the said Clifford W. Lang; that he paid therefor the sum of eleven hundred and thirty dollars (\$1,130.00), by a sight draft on the Flato Commission Company of South Omaha, Neb., payable to the order of C. W. Lang. Affiant further says that thereupon the said Clifford W. Lang cashed the said draft at the First National Bank of Cheyenne; that thereupon he said to this affiant that he would take the next train for Salt Lake City, but was found by this affiant on the outgoing train bound for the city of Denver; that on this affiant meeting the said Clifford W. Lang on the said Denver train, he, the said Clifford W. Lang, frankly admitted to this affiant that the cattle deal had been a bogus one, but that he, the said Clifford W. Lang, had turned \$1,130.00 over to his confederate, the said James Raff, who had gone on ahead, and was awaiting him at Evans, Colorado, and if he, this affiant, would accompany him to Evans, Colo., the \$1,130.00 would be returned to this affiant. Affiant further says that thereupon he accompanied the said Clifford W. Lang to Evans, Colo., and that upon their arrival at Evans, Colo., they proceeded to a room over a saloon of one O'Grady, where he was confronted by James Raff, Clifford W. Lang, and Elmer Luther; that when this affiant demanded restitution of the \$1,130.00, the said Clifford W. Lang drew from a valise a revolver, with which he threatened to kill this affiant, using these words: "You son of a bitch, this is a game, and you got the worst of it. I sold you no cattle, and if you do not go back to Cheyenne, and keep your mouth shut, I will blow your light out." Affiant further says that Elmer Luther, on the 12th day of July, at the county of Weld, in the state of Colorado, shook his fist in this affiant's face, and said as follows: "You came down here to skin us, God damn you: but you got the worst of it. I have got the money. You better go back to Cheyenne, and keep your damned mouth shut, or some of us will get you." Affiant further says that the said Clifford W. Lang and the said James Raff have fled from the justice of this state, and are now in the state of Colorado: that they are now detained in the Weld county jail, at Greeley, at the instance of this affiant; that the aforesaid fugitives were in the state of Wyoming on the 11th day of July, A. D. 1899, at the time of the commission of this felony. And further affiant sayeth not.

John Miskimins.

Sworn and subscribed before me this 14th day of July, A. D. 1899.

John A. Martin,

[Seal.]

Justice of the Peace.

Counsel, by an ingenious appeal to the humanitarian application of habeas corpus, have partially hidden the possible effect of a decision for which they contend and have secured. I desire to call attention to some of the statements in the able opinion just rendered: "It is urged in this case that the witness had already made statements inquired about by the question propounded, and that to rehearse them as formerly stated, which he must do to make a true answer, could not by any possibility incriminate him. But, independently of the considerations, to be adverted to more fully hereafter in this opinion, that subsequent acts of the witness, such as compounding the felony, might have intervened, changing his attitude in the premises," etc. Page 840 of the opinion of this court. And again on page 842, the following language: "In this case, however, the crime of compounding a felony if committed by the witness, must have been committed after the affidavit in the requisition proceedings had been made; and the latter, therefore, can hardly throw much light upon the question of his good faith in declining to testify upon the subsequent trial." Applying this law, which, as I claim, becomes such here and now for the first time, to the facts in the case, most of them as shown by the opinion of this court, a witness may instigate and institute a criminal prosecution. Afterwards (the parties complained of being outside the jurisdiction of the court and in another state) he may, for the purpose of securing a requisition, make an affidavit, setting forth such facts as show that an infamous crime has been committed, and that he was the victim of that crime, and showing that without his evidence there could not possibly be a case presented. Upon such a showing the chief executive of the state must issue a requisition, and does. The parties complained of are apprehended and presented for a preliminary examination before a court of competent jurisdiction. The witness originally complaining, being the petitioner here, failing to appear, although duly subpoenaed, is charged by the prosecuting officer on affidavit with compounding a felony. The opinion here says of the affidavit: "It was made under oath by the proper officer. It is not to be presumed that it was made without some basis of evidence tending to support it." Afterwards, the witness appearing without having been arrested upon

any warrant issued by reason of the making of said affidavit, and there being then no evidence remaining after he had appeared that he had even attempted to compound a felony, the proceeding, so far as it had gone, was withdrawn and annulled. The witness can then be sworn, and take the stand, and refuse to answer questions based upon statements to instigate the procedure, and sworn to for the purpose of apprehending the defendants then and there on examination, because and for the reason that by answering such questions so propounded, he might incriminate himself of what he does not say and never has said. His counsel first said perjury, because the prosecuting attorney announced in the justice court that if the witness did not answer in a certain way he would proceed against him for perjury; but that reason seems to have been abandoned. And now it is said that, after he was subpoenaed as a witness in the case he had caused to be instituted, he may have compounded a felony. He has never said so, and, as is correctly stated, was not bound to say so, nor that he had committed perjury. The justice who was holding the examination, and who, it appears, was familiar with all the facts, could not see any possible danger to the witness by answering the questions, and ordered him to do so, and, upon his refusal, committed him for contempt; and a judge of the district court, reviewing the action of the magistrate on habeas corpus, after listening to all the evidence that was introduced before the magistrate, and more, could not find, from all or any of the circumstances of the case, any ground for claiming the privilege, and ordered the witness to answer, and, upon his refusing so to do, remanded him to the custody of the sheriff, stating, at the same time, that he did not believe that the claim was made by the witness in good faith, and that the judgment of the court that had jurisdiction of the case should not be disturbed. And I am of the same opinion, and that if, after instituting the prosecution and twice telling the facts, once being under oath when it was a necessary part of the proceeding, and while under the restraint of a legal subpoena to tell them again, he compounded a felony in the case, it was too late for him to plead, or be to him of any avail under the humane provision of our Constitution that declares that no one shall be compelled to give evidence against himself.

WISCONSIN SUPREME COURT.

J. THOMPSON MANUFACTURING COMPANY, *Appt.*,
v.

Gilbert S. GUNDERSON, *Respt.*

(.....Wis.....)

1. If machines manufactured under a

NOTE.—For implied warranty of fitness of property bought for special purpose, see also *McQuaid v. Ross* (Wis.) 22 L. R. A. 187, and *note*, and *White v. Oakes* (Me.) 32 L. R. A. 592. 49 L. R. A.

contract depart from the specifications with the knowledge and consent of the purchaser he cannot hold the manufacturer responsible in damages for their failure to work.

2. Departure from specifications in machines manufactured under a contract will be waived by taking them and failing to give timely notice of nonacceptance because of noncompliance with the contract.

3. It is error not to submit to the jury facts fairly in the case.

4. No warranty that shoes and gatherers

of tobacco-planting machines will scour in the ordinary soil of the locality is implied in a contract to manufacture the machines and make the shoes and gatherers of steel.

5. **Lost profits on the entire lot of machines cannot be recovered** for failure to manufacture them according to the specifications of the contract, where one, at least, has been accepted and paid for.
6. **A manufacturer of machines under contract may recover their value as chattels**, notwithstanding their unfitness for the purpose intended, if the vendee retains them without any offer to return them.

(April 6, 1900.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Rock County in favor of defendant in an action brought to recover the contract price for the manufacture of certain machines. *Reversed.*

Statement by **Bardeen, J.:**

This action is brought to recover on a written contract for the manufacturing of fifty tobacco transplanting machines in the year 1892, at \$40 each, and on a verbal contract for remodeling the same machines in 1893, at \$5 each. Credit was allowed for \$891.12, and judgment was demanded for \$1,358.88 and interest. The issue tendered was that only thirty-nine of the fifty machines were made, and they were not made according to the contract, by reason whereof they would not work properly, and defendant lost the sale of the same. By way of counterclaim, defendant set up that a part of said machine known as "gatherers" was not made, according to the model, of hard plow steel, would not scour, and the machine would not work properly, whereby said machines were a total loss to the defendant. On the trial, evidence was offered that the steel shoes of the machines were not made of the proper kind of steel, and would not scour, and the defendant was permitted to amend his answer at the close of the testimony to cover this alleged defect. The court submitted the question of the defects mentioned to the jury, with instructions that, if they found such defects existed, they might find a verdict for defendant for the amount he had paid to plaintiff, together with the profits defendant might have made on the fifty machines. The jury brought in a verdict for defendant for \$889, from which the court required the defendant to remit \$20, as a condition of denying a motion for a new trial on the ground of newly-discovered evidence. Judgment was entered for defendant, from which the plaintiff has taken this appeal.

Messrs. J. B. Dow, William Smith, and A. A. Jackson, for appellant:

The language used in the contract is inconsistent with an implied warranty with respect to the working of the machine.

Milwaukee Boiler Co. v. Duncan, 87 Wis. 120, 87 N. W. 232; *Wheaton Roller-Mill Co. v. John T. Noye Mfg. Co.* 66 Minn. 156, 68 N. W. 854.

Where a bill of sale contains any war-

ranty it is to be regarded as containing the whole agreement between the parties, and no other warranties will be implied.

J. I. Case Plow Works v. Niles & S. Co. 90 Wis. 590, 63 N. W. 1013; *Wheaton Roller-Mill Co. v. John T. Noye Mfg. Co.* 66 Minn. 156, 68 N. W. 854; *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120, 87 N. W. 232; *Grand Avenue Hotel Co. v. Wharton*, 49 U. S. App. 108, 79 Fed. Rep. 43, 24 C. C. A. 441.

Where the subject-matter of the agreement is not in existence there is no implied warranty.

Blackburn, Sales, 502; *Durbrow & H. Mfg. Co. v. Cuming*, 54 N. Y. Supp. 818.

If the plaintiff exercised reasonable care and skill in selecting the steel it performed its whole duty to the defendant.

Cunningham v. Hall, 4 Allen, 268; *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120, 87 N. W. 232; *Bancroft v. San Francisco Tool Co.* 120 Cal. 228, 52 Pac. 496; *Goulds v. Brophy*, 42 Minn. 109, 6 L. R. A. 392, 43 N. W. 834; *Cosgrove v. Bennett*, 32 Minn. 371, 20 N. W. 359.

The actual damage sustained by the defendant would be the cost of the new shoe.

Merrill v. Nightingale, 39 Wis. 247; *Aultman & T. Co. v. Hetherington*, 42 Wis. 622; *Warder v. Fisher*, 48 Wis. 338, 4 N. W. 470; *Park v. Morris Axe & Tool Co.* 41 How. Pr. 18.

The plaintiff was entitled to be credited with the value of the machines that the defendant had not returned.

Warder v. Fisher, 48 Wis. 338, 4 N. W. 470.

Whether these machines were "worthless machines" or not was a question to be determined by the jury, and not by the court.

Zonne v. Wierson, 3 Chand. (Wis.) 240, 3 Pinney (Wis.) 217; *Ketchum v. Ebert*, 33 Wis. 611; *Nau v. Suelflohn*, 45 Wis. 438.

The plaintiff was not called upon to put in any better steel than that ordinarily used in farming machinery used for planting purposes.

Locke v. Williamson, 40 Wis. 377; *John A. Roebbling's Sons Co. v. Winthrop Hematite Co.* 70 Mich. 346, 38 N. W. 310; *Studer v. Bleistein*, 48 Hun, 577, 1 N. Y. Supp. 190, 22 N. E. 243; *Olson v. Mayer*, 56 Wis. 552, 14 N. W. 640; *Durbrow & H. Mfg. Co. v. Cuming*, 54 N. Y. Supp. 818.

Mr. E. D. McGowan, for respondent:

Where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied.

Benjamin, Sales, 606, 644; 10 Am. & Eng. Enc. Law, p. 143; *Leake, Contr.* 404; *Getty v. Rountree*, 2 Pin. 379; *Walton v. Cody*, 1 Wis. 420; *Williams v. Slaughter*, 3 Wis. 347; *Bird v. Mayer*, 8 Wis. 362; *Fiske v. Tank*, 12 Wis. 276, 78 Am. Dec. 737; *Woodle v. Whitney*, 23 Wis. 55, 99 Am. Dec. 102; *Boothby v. Scales*, 27 Wis. 626; *Merrill v.*

Nightingale, 39 Wis. 247; *Morehouse v. Comstock*, 42 Wis. 626; *Buffalo Barb Wire Co. v. Phillips*, 67 Wis. 129, 30 N. W. 295; *Charles Raumbach Co. v. Gessler*, 79 Wis. 567, 48 N. W. 802; *J. I. Case Plow Works v. Niles & S. Co.* 90 Wis. 590, 63 N. W. 1013.

As a general rule no warranty will be implied where the parties have expressed in words the warranty by which they mean to be bound, but the rule does not extend to the exclusion of warranties implied by law, where they are not excluded by the terms of the contract.

Blackmore v. Fairbanks, M. & Co. 79 Iowa, 282, 44 N. W. 548; *Buoy v. Pitts Agricultural Works*, 89 Iowa, 464, 56 N. W. 541; *Boothby v. Scales*, 27 Wis. 626.

In both executed and executory contracts an implied warranty may exist.

10 Am. & Eng. Enc. Law, p. 104; *Carleton v. Lombard, A. & Co.* 149 N. Y. 137, 43 N. E. 422; *Leitch v. Gillette-Herzog Mfg. Co.* 64 Minn. 434, 67 N. W. 352; *Brown v. Sayles*, 27 Vt. 227; *Gerst v. Jones*, 32 Gratt. 518, 34 Am. Rep. 773; *Rodgers v. Niles*, 11 Ohio St. 48, 78 Am. Dec. 290; *Pope v. Allis*, 115 U. S. 363, 29 L. ed. 393, 6 Sup. Ct. Rep. 69; *Little v. G. E. Van Syckle & Co.* 115 Mich. 480, 73 N. W. 554.

The defendant was ignorant of the qualities of steel. He trusted to the plaintiff, who employed skilled mechanics and could have easily tested the material used, and, besides, he agreed to pay a fair price for the machines. The plaintiff therefore is liable for latent defects.

Leopold v. Van Kirk, 27 Wis. 152; *Carleton v. Lombard, A. & Co.* 149 N. Y. 137, 43 N. E. 422; *Rodgers v. Niles*, 11 Ohio St. 48, 78 Am. Dec. 290; *Gerst v. Jones*, 32 Gratt. 518, 34 Am. Rep. 773; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 28 L. ed. 86, 3 Sup. Ct. Rep. 537; *Bagley v. Cleveland Rolling Mill Co.* 22 Blatchf. 342, 21 Fed. Rep. 159.

There are cases where acceptance and user do not imply a waiver of an implied warranty or condition precedent.

10 Am. & Eng. Enc. Law, p. 108, note 3; *Brown v. Burhans*, 4 Hun, 227; *Parks v. Morris Ace & Tool Co.* 54 N. Y. 586; *Buffalo Barb Wire Co. v. Phillips*, 67 Wis. 129, 30 N. W. 295.

The defendant was not bound to give the plaintiff notice of the failure of the machines to work.

Locke v. Williamson, 40 Wis. 377; *Morehouse v. Comstock*, 42 Wis. 626; *Buffalo Barb Wire Co. v. Phillips*, 67 Wis. 129, 30 N. W. 295.

Where the contract price is not fully paid the measure of damages for a breach of contract is the difference between the contract price and the market price at the time when such delivery should have been made.

5 Am. & Eng. Enc. Law, p. 30; *Richardson v. Chynoweth*, 26 Wis. 656; *Hibbard v. Western U. Teleg. Co.* 33 Wis. 558; *Candee v. Western U. Teleg. Co.* 34 Wis. 479, 17 Am. Rep. 452; *Hammer v. Schoenfelder*, 47 Wis. 455, 2 N. W. 1129; *Cookburn v. Ashland Lumber Co.* 54 Wis. 619, 12 N. W. 49; *Shad* 49 L. R. A.

bolt & B. Iron Co. v. Topliff, 85 Wis. 513, 55 N. W. 854.

Bardeen, J., delivered the opinion of the court:

The facts in this case are involved in a great deal of doubt and uncertainty. Indeed, the confusion is so great that the labors of the court have been greatly increased in endeavoring to arrive at the ultimate rights of the parties. The contract regarding which the main controversy has arisen is as follows:

"Beloit, Wis., May 18th, 1892.

G. S. Gunderson, Beloit, Wis.:

We will make and furnish and complete fifty tobacco transp. machines, built like your model planter, except we will furnish steel shoes instead of cast-iron, for the sum of forty dollars (\$40.00) each. We are not to guaranty working of machines. You assume all risk, and will sell, set up, and start all machines, and get settlement for same. You to pay us six hundred dollars (\$600) cash now, and the balance to be settled by cash or good notes within ninety days.

Respectfully,

J. Thompson & Sons Mfg. Co.

Accepted. G. S. Gunderson.

Under this contract the plaintiff claims to have manufactured fifty machines, thirty-nine of which were delivered, and the remainder were held in the shop subject to defendant's order. It appears that the defendant was the inventor of the machine. It had been tested to a limited extent during the years prior to 1892 by a crude model made under defendant's directions. In the early part of 1892 defendant caused a complete model to be made, which was the one taken to plaintiff's shops, and was the one referred to in the contract. This model had a cast-iron instead of a steel shoe. Whether the gatherers, concerning which a great deal of controversy has arisen, were attached to the model or were simply delivered at the shops, is a matter of very much doubt. It is practically agreed, however, that the machines sent out in 1892 had no gatherers upon them, and that the defendant set up and attempted to operate his machines without them. These gatherers were made of a narrow strip of steel, polished on one side, and designed to run in the ground, and press the earth up to the plant after it had been set. In order for them to do good work, it was necessary that they scour. Their cost was about 50 cents for each machine. It will be observed that the contract calls for a steel instead of a cast-iron shoe. The evidence shows that a large number of these machines (just how many no one can tell from the evidence) were sent out with cast-iron shoes,—whether with defendant's consent and approval, or not, the evidence is equally uncertain. These facts, however, do appear: Prior to the date of the contract, plaintiff had manufactured a number of these machines,—just how many, no one ap-

pears to know. On May 14th one of the machines was sent to Spaulding, at Broadhead, and another to Wagley, at Orfordville. On May 21st another was shipped to Perrigo, and on the 25th one to Foltz, at Clinton Junction,—each with a cast-iron shoe, and without gatherers. On June 10th twenty more were sent to Spaulding. The defendant saw this consignment, and knew that they had no gatherers and had the cast-iron shoe. It is reasonably certain that the first four machines sent out had been made before the contract was drawn. It is equally certain that they were considered and treated as machines made under the contract. No one seems to be able to explain why the machines sent to Spaulding on June 10th had the cast-iron instead of the steel shoe, or why gatherers were not sent. The defendant knew of these facts before they were sent, and went out, set up and attempted to operate the machines, without the least objection. The machines worked unsatisfactorily. At defendant's request, steel shoes were sent out, but for how many machines the evidence fails to give any light. The steel shoes failed to work, because they would not scour. Only one of the machines sent out worked satisfactorily, and which was paid for. At some time before the opening of the season of 1893 the defendant bargained with plaintiff to remodel these machines according to his directions, for which he agreed to pay \$5 each. Changes were made, but in how many no one seems to know. The machine was again tested in 1893, and failed to work, because the shoes and gatherers would not scour. The defendant claims that, if the machines had been made according to the contract, he could have sold the entire lot the first season, and realized a handsome profit on each one. The case was submitted to the jury on that basis, with the added qualification, stated in the charges of the court, that the law implied a further condition to the contract,—that the steel to be used in shoes and gatherers should be of such quality as would scour in the soils of this country, and, if they did not meet this requirement, it was not a compliance with the contract. We do not think the case was fairly submitted to the jury. In the first place, if the machines sent out the first year with the cast-iron shoes, and without gatherers, were sent with the knowledge and consent of defendant, he cannot hold the plaintiff responsible in damages for their failure to work. Or if, with full opportunity for examination, and knowledge on his part of the variance between the machines contracted for and the ones furnished, he took them, and failed to give the plaintiff timely notice that he did not accept them as being in compliance with the contract, the defects will be deemed waived. Such is the law of this state. *Locke v. Williamson*, 40 Wis. 377; *Morehouse v. Comstock*, 42 Wis. 626; *McClure v. Jefferson*, 85 Wis. 208, 54 N. W. 777. The fact that the machines were to be made like the model furnished does not alter the rule, so long as the defects complained of are ob-

vious and conspicuous, as they were in this case. There was evidence in the case from which the jury might have inferred that the cast-iron shoes were put on by defendant's consent, and that he likewise acquiesced in sending out the machines without the gatherers. The evidence as to notice given defendant is vague and indefinite, and somewhat in dispute. Under the charge of the court, no such fact was presented to the jury; and, being fairly in the case, it was error not to so submit it. The jury might well have found a waiver of the exact conditions of the contract, under the circumstances in proof.

An important question arises as to the true construction to be given to the contract in suit. The defendant seeks to apply the rule that when a manufacturer contracts to supply an article which he produces, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment and skill of the manufacturer, there is an implied warranty that it shall be reasonably fit for the purpose for which it is to be applied. This is the rule adopted by the court when he instructed the jury that the law implied an obligation on the part of plaintiff to use a quality of steel that would scour in the soils of this country. No such engagement appears on the face of the contract. The contract is to make a given number of machines according to the model, except that the shoes were to be steel instead of cast-iron. It is nothing more nor less than an executory contract to manufacture goods. The obligation imposed by the law, as stated by some of the authorities, is that the machines shall be free from any latent defect growing out of the process of manufacture. *Durbrow & H. Mfg. Co. v. Cumming*, 54 N. Y. Supp. 818; *Cosgrove v. Bennett*, 32 Minn. 371, 20 N. W. 359; *Goulds v. Brophy*, 42 Minn. 100, 6 L. R. A. 392, 43 N. W. 834; *Carleton v. Lombard, A. & Co.* 149 N. Y. 137, 43 N. E. 422; *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163. *Durbrow & H. Mfg. Co. v. Cumming* was a case where the plaintiff contracted to make 100 machines for sewing in sweat bands, in accordance with a model. The defense was that the machines did not work properly. The court says: "The rule is well established that, in cases of executory contracts for the manufacture and sale of goods of a particular description, there is an implied warranty that they are free from any latent defect growing out of the process of manufacture, and that this is the sole warranty that attaches to such a contract. But when there are defects in the goods which could be discovered upon inspection, and the vendee neither returns nor offers to return the property, nor gives to the vendor notice or opportunity to take it back, in the absence of a collateral warranty or agreement as to quality, he is conclusively presumed to have acquiesced, and may not thereafter complain of inferior quality."—citing *Studer v. Bleistein*, 115 N. Y. 316, 5 L. R. A. 702, 22 N. E. 243; *Coplay Iron Co. v. Pope*, 108 N. Y. 232, 15 N. E. 335. We obtain the following from *Cosgrove v. Ben-*

nett, 32 Minn. 371, 20 N. W. 359; "The defendant insists that a warranty is, under the circumstances, to be implied, that the mill ordered should be reasonably fit for the business for which it was intended. To this we do not agree. . . . The general rule is stated to be that, when an article is ordered to be manufactured for a particular use or purpose, there is an implied warranty that it is to be reasonably fit for such use or purpose. But where, as in this case, the article ordered was to be of a particular design or pattern, well defined and understood between the parties, and the article made and delivered in pursuance of the contract conforms to the pattern or model, there is no warranty implied, further than it should be of good workmanship and material." Along the same line is the case of *Gachet v. Warren*, 72 Ala. 288, in which Chief Justice Brickell used the following language: "But if a manufacturer or dealer contracts to sell a known and described thing, although he may know the purchaser intends it for a specific use, if he delivers the thing sold, there is no implied warranty that it will answer or is suitable for the specific use to which the purchaser intends applying it." Another case very frequently cited is *Whitmore v. South Boston Iron Co.* 2 Allen, 52, and which fully sustains the general doctrine. In *Mason v. Chappell*, 15 Gratt. 572, it is said that where a specific article is ordered and furnished, although the purchaser states the purpose to which he intends to apply it, there is no implied warranty on the part of the vendor that it is suitable for that purpose; and he will not, in absence of fraud or an express warranty, be held liable, however unfit and defective it may turn out to be. In further support of this same rule is *Wisconsin Red Pressed Brick Co. v. Hood*, 54 Minn. 543, 56 N. W. 165, which says: "If an order be given for a specified article, of a recognized kind or description, and the article is supplied, there is no warranty that it will answer the purpose described or supposed, although intended and expected to do so." The ground upon which the seller or manufacturer is held liable on the warranty is whether the purpose, and not the specified article, is the essential matter of the contract. A copious note covering the question of implied warranty on sales of personal property may be found appended to the case of *McQuaid v. Ross* (Wis.) 22 L. R. A. 187. A case bearing a close parallel to the one at bar is *Shoenberger v. McEuen*, 15 Ill. App. 406; the holding being that where one orders an article of a manufacturer, and designates a particular kind of material out of which the article is to be made in whole or in part, such material not being made by the manufacturer himself, if he uses the designated material the law does not imply a warranty as to its quality or fitness, unless it be shown that the manufacturer failed to use reasonable and ordinary care in selecting it. In *Cunningham v. Hall*, 4 Allen, 208, the contract was for the construction of a vessel, in which it was agreed that it should be cov-

ered with pine plank; the builder to see "that she is just right in all respects." It was held that the latter agreement was qualified by the former, and that the purchaser assumed the risk of defects which were naturally incident to pine plank and not known to the builder, and could not have been discovered by him by the exercise of reasonable care and skill. And in such case there is no implied warranty which will cover the defect. Reference has been made to the authorities in other states to show how deeply the rules thus stated are entrenched in the jurisprudence of this country. Following this line of authorities, this court held in *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120, 58 N. W. 232, that when a known, described, and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the thing described be actually supplied, there is no warranty that it should answer the particular purpose intended by the buyer; and if the article is sold by a formal written contract, which is silent on the subject of warranty, no warranty can be ingrafted or added to the written contract. There is some language in the opinion in *J. I. Case Plow Works v. Niles & S. Co.* 90 Wis. 590, 63 N. W. 1013, which is supposed to encroach upon this rule. In that case the evidence tended to show that the wheels in controversy ought to have been made of refined iron. There was a stipulation against the use of defective material, and the court said, in effect, that this stipulation meant that material not suited for the purpose should not be used, and that it was no compliance with the contract to use a kind of iron unfit to be used in the manufacture of such wheels. Stress was laid upon the stipulation against the use of defective material, and it was said that this was "substantially an agreement that material not suitable to the purpose should not be used, and required that the iron for the spokes should be of the necessary grade and quality, if there was any such procurable in the market." If this is to be construed to mean that refined iron should have been used, and that such was the implied agreement, the case goes beyond any to be found in the books. If, however, the meaning intended was that the manufacturer was bound to use reasonable care in the selection of material for the wheels, and that he ought not to have used a kind of iron notoriously unfit for the purpose intended, it can easily be reconciled with the cases cited. Any broader construction than the one last suggested ought not to be sustained. This result is reached by a construction of the contract itself, and not by the interpolation of implied covenants.

Applying the principles of law hereinbefore stated to the case before us, we are satisfied that no implied warranty arose, from the contract in suit, that the steel to be used for the manufacture of the shoes and gatherers should "scour in the soils of this country." The law implied an obligation that

plaintiff should use reasonable care in the selection of the materials, and that, in so far as the plaintiff's efforts entered into the manufacture of the materials, there should be no latent defects in either materials or workmanship. The proof is undisputed that plaintiff used open-hearth steel for the shoes and gatherers,—a kind of steel in common use, and a kind the plaintiff had used for many years in the manufacture of a corn planter which it had been selling, and which had worked successfully. The instruction given the jury by the court furnished no proper test of the plaintiff's liability. The court further instructed the jury that, if they found for the defendant, he might recover the profits he would have made on the entire lot of machines. This was error, because one of the machines, at least, had been accepted and paid for. The court also proceeded upon the assumption that the machines were entirely worthless. The defendant testified that they were perfect in every respect, except as to the shoes and gatherers. The evidence does not show what it would have cost to have obtained new shoes or gatherers, but it is perfectly evident therefrom that the cost would not have exceeded \$5 or \$6 for each machine. These portions could easily have been duplicated, and the entire machine could have

been utilized. Moreover, none of the machines were returned to plaintiff. The evidence fails to disclose any basis upon which we can compute their value, but they were certainly worth something. The rule is that if the vendee retains the property, without any offer to return, he takes upon himself the burden of showing that the property purchased is entirely worthless, not only for the purpose for which it was purchased, but for every purpose. In such case the vendor may recover the real value of the chattel, if any, notwithstanding its total unfitness for the use for which it was purchased. *Warder v. Fisher*, 48 Wis. 338, 4 N. W. 470. In such case the measure of damages would be the difference between the contract price and the actual value, and, if the case should show special damages, the vendee would also be entitled to recoup or recover such as he had properly alleged and proved. Upon any proper theory of the case, the rule of recovery given by the court was erroneous.

Many other questions have been raised and discussed, but sufficient has been said to cover the main issues in the case, and furnish a proper guide upon another trial.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the First Quarter of the Judicial Year Beginning with October 1, 1900. Classified as Follows:

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS; PERSONAL CAPACITY.
- V. FIDUCIARIES OR REPRESENTATIVES.
- VI. TORTS; NEGLIGENCE; INJURIES.
- VII. PROPERTY RIGHTS; LIENS.
- VIII. CIVIL REMEDIES.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

Public money.

The right of the legislature to appropriate public money to pay the widow, heirs, or legal representatives of a deceased officer the salary which he would have received if he had not died is held to depend on the question whether the public good will be thereby served. (Mass.) 664.

Flag.

A state statute forbidding the use of the national flag for advertising purposes is held unconstitutional on the ground that it interferes with the constitutional privileges and immunities of the citizens of the United States. (Ill.) 181.

Law of the flag.

To make the law of the flag under which a ship was sailing applicable to an action for death of a passenger by drowning upon the high seas, it is held that the drowning must be shown to have been upon the vessel. (C. C. A. 7th C.) 92.

Liberty.

An ordinance making it unlawful for any woman to enter a building where a saloon is kept, or to frequent or stand within 50 feet of it, is held unreasonable and void as an unnecessary interference with personal liberty. (Ky.) 111.

Regulation of business.

A penal ordinance prohibiting any colored netting or other material which has a tendency to conceal the true color or quality of the goods to be used for covering any box, basket, or other package of fruit, berries, or vegetables of any kind is held invalid on the ground that it is a vexatious and unreasonable interference with the rights of dealers in fruit, when it is based only on the general police power of the city. (Ill.) 657.

Franchise.

A combination by numerous persons to buy and operate a ferry, though for themselves and their families exclusively, is held 49 L. R. A.

to be in violation of a grant of an exclusive franchise to another party for limits which include the new ferry. (Ky.) 248.

Vaccination.

A statute permitting municipal authorities to make regulations for the vaccination of the inhabitants under direction of the local board of health is held to be within the power of the legislature, and an ordinance requiring compulsory vaccination is held not to be invalidated by failure to exempt persons whose health renders their vaccination unsafe. (N. C.) 588.

Courts.

The affinity of husbands of an aunt and niece is held to be such as to disqualify the one from sitting as a judge in a case where the other is an interested party. (Fla.) 548.

A statute creating a court of visitation with jurisdiction to determine railroad rates and make other regulations for the operation of railroads is held unconstitutional as an attempt to confer legislative and administrative power upon a judicial tribunal. (Kan.) 662.

Municipalities.

A constitutional limit of a city's indebtedness is held not to be exceeded by a contract for the erection by an individual of a city hall on land owned by the city, which the city agrees to lease at a fair rental, with an option to purchase it, and, if this is not exercised, with an option to the lessor to remove the building or buy the land, where it does not appear that the current revenues of the city will not be sufficient to pay the rent annually with all other necessary expenses. (Ind.) 795.

A municipality which leaves a trench filled with deadly gas in a public street near a playground, with easy means of access to the bottom, without notice or warning of the danger, is held liable for the death of a 55 865

person who goes into the trench to rescue a boy who had gone into it to get a ball, and had been overcome by the gas. (Pa.) 715.

De facto town.

A bona fide attempt to incorporate a town under a statute authorizing the incorporation is held sufficient to make orders issued by the town which there has been an attempt to organize enforceable. (Wis.) 443.

Highways.

A license fee for the use of streets by private vehicles is held not to be within the power conferred upon a city for regulating the use of streets. (Ill.) 408.

A boy riding a bicycle, as he approaches a corner and meets a team coming round the corner, is held entitled to conform to the law of the road, and to an ordinance requiring vehicles to keep to the right, unless some reason is shown for an exception thereto. (Pa.) 764.

Election contest.

The determination by the legislature of a contest as to the office of governor is held to be beyond the power of the courts to review, where the Constitution of the state makes the legislature the sole tribunal to determine that question. (Ky.) 258.

Eminent domain.

Damages to a building by settling and cracking of the walls caused by the negligent performance of public work is held to give no right to assess damages therefor in the eminent domain proceeding, though the Constitution of the state allows damages for property "injured." (Pa.) 600.

See also *Telephone company, infra*, III.

Taxation.

A patented article which is leased or rented by the patentee for a valuable consideration is held to be taxable at its true value in money, although that value is enhanced by reason of the patent. (Ohio) 427.

The exemption from taxation for a term of years of manufacturing companies, as a condition of their locating in a town, is held not to violate a constitutional provision declaring that the burdens of the state ought to be fairly distributed among its citizens. (R. I.) 604.

An agreement that a city will pay the

taxes assessed against a water company for a term of years in return for a supply of water is held not to be contrary to public policy. (Me.) 294.

A charity for the benefit of the members of the Masonic Order, their widows, children, or others directly or indirectly connected with the order, is held not to be a purely public charity for the purpose of exemption from taxation. (Ky.) 252.

School tax.

A statute allowing pupils from outside the district to attend a high school free, but requiring the county to pay a certain sum as tuition out of the general county fund, is held invalid, where this sum may be greater or less than the actual cost of the tuition, since it may impose double taxation upon the inhabitants of the district. (Neb.) 343.

Assessments.

The rule that assessments for local improvements must be limited to the benefits received is fully adopted in an Indiana case which upholds a statute providing for assessments by frontage, where there is a provision for hearing of grievances before the final assessment, as the court holds that there is an implied obligation to change the frontage assessment if it is more than the benefits. (Ill.) 797.

A statute providing for the assessment of the expense of draining lands upon all persons deemed benefited thereby is held unauthorized by the New York Constitution providing for drains over lands of others upon just compensation, as this is held to contemplate payment by the petitioner alone. On the question whether or not such a drain is for a public use the majority of the court do not pass. (N. Y.) 781.

A rural highway is held not to be a local improvement for the cost of which a local assessment can be laid on farm lands. (Minn.) 757.

An assessment of the entire cost of taking land for a highway upon the remaining land of the same owner is held to be in violation of a constitutional provision requiring compensation for property taken for public use to be made in money, without deduction for benefits. (Ohio) 566.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

License.

An ordinance requiring a license for the sale of goods on the street or by soliciting orders from house to house is held valid as to residents of the state, against the claim that it discriminated against them in favor of nonresidents, though it might be invalid as to nonresidents. (Pa.) 446.

Uncertainty.

A contract by sellers of ice to purchase from another all the ice necessary to carry on their business for a period of five years is held not to be void for uncertainty, or subject to termination by a transfer of the business within that period. (Mich.) 594.

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Partial performance.

A right to recover for the partial performance of a contract to move a building is sustained where the building was destroyed by fire after the work was partly performed. (Mass.) 562.

Failure of consideration.

The death of a stallion, preventing an exercise of the privilege of return by one who had paid for a fruitless service with an agreement for the privilege of return during the season, is held not to create any failure of consideration which will give a right to repayment. (Me.) 693.

Surety.

One who signs a note as surety after the signatures of several makers is held to guarantee the genuineness of such signatures to an innocent payee, and bound thereby, even if one of the signatures is a forgery. (Ky.) 315.

Usury.

A provision in a bond for more than the legal rate of interest after maturity, by way of a penalty to insure prompt payment of the debt, is held not to constitute usury. (Va.) 550.

Attorney's fees.

A provision in a trust deed for attorney's fees in case the property is sold under the deed is held to be void as against public policy. (N. C.) 590.

Warranty.

A warranty that shoes and gatherers of tobacco planting machines will scour in the ordinary soil of the locality is held not to be implied in a contract to manufacture the machines and make the shoes and gatherers of steel. (Wis.) 859.

Support.

An oral contract by an aged person living alone in apparent destitution, whereby she agrees to give all her property, both real and personal, but which is of no great amount, to a husband and wife in return for their maintaining, caring for, and supporting her during life and after her death giving her decent burial, is held to be one which may be specifically enforced in equity after it has been executed by the other parties in all respects, but she has failed to execute any conveyance. (W. Va.) 527.

Negotiable paper.

A bank discounting negotiable paper for one who is not its debtor, and placing the amount to his credit by way of deposit, is held not to be a purchaser of the paper. But it is not deemed sufficient to show that the paper is not purchased by showing merely that the proceeds are credited to him, without showing from the state of the account that the transaction was not such as to make the bank a purchaser. (Ill.) 412.

A stipulation in an instrument for the payment of a certain sum of money with current exchange on a place other than that of payment is held not to destroy the negotiability. (Kan.) 190.

The addition of the word "trustee" to the name of the payee of a note is held not to destroy its negotiability. (Iowa) 661.

Assignment.

An assignee of a bill of lading with draft attached, who receives payment of the draft, is held to be subject to an action for the return of the money in case the property covered by the bill does not comply with the contract. (N. C.) 679.

An assignee of a mortgage holding it as collateral, who receives his pay from the mortgagor, and thereupon surrenders the mortgage and unites in having it canceled, is held not to be liable to repay the money to the mortgagor because the latter is com-
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pelled to pay a second time to a prior assignee, whose assignment, though duly recorded, was not known to either of the parties. (N. J.) 578.

Bonds.

Statements made on the face of municipal bonds as to the purpose for which they were issued are held to constitute an estoppel against the municipality which will prevent the controverting of such statements for the purpose of invalidating the bonds in the hands of bona fide purchasers. (C. C. A. 8th C.) 534.

An action for money had and received, against the municipality, by a bona fide purchaser of bonds issued without authority in payment of a stock subscription to a foreign railroad company, which the municipality had no authority to make, is denied, although the proceeds of the bonds were used in constructing tracks and depot in the municipality, and it had received the stock certificates, and might have lawfully issued bonds to a domestic corporation. (C. C. A. 6th C.) 123.

Gas supply.

A rule of a gas company, consented to by the consumer, that it will cease to furnish gas when the consumer becomes delinquent in paying bills therefor, is held to be enforceable by discontinuing the gas supply at one set of premises until payment of a delinquent bill for gas previously furnished the consumer at other premises. (Or.) 596.

Water supply.

A water company which fails to supply sufficient water for fire purposes, although the failure is due to a breaking of the pipes without any fault of the company, is held to be liable to a consumer for the loss of property by fire, where the company had expressly contracted to furnish a supply for fire purposes. (N. J.) 572.

Insurance.

Delay for nine months to give notice of an injury is held fatal to recovery on an employer's liability policy requiring immediate notice of any injury, although the notice was sent as soon as a claim was made by the injured employee. (Ohio) 760.

A policy on the life of a person in another state is held to be within the provisions of the New York statute prohibiting the forfeiture of a policy by any life insurance company doing business in that state without giving the prescribed notice. (C. C. A. 9th C.) 132.

Beneficiaries of a life insurance policy subject to the operation of the New York laws requiring notice of accrual of premium before forfeiture for nonpayment were held not to be bound, in the absence of such a notice, by statements of the insured to the company that he cannot pay premiums, and that the company may consider the policy forfeited. (But this decision was reversed by the Supreme Court of the United States on the ground that the parties had agreed to abandon the contract.) (C. C. A. 9th C.) 127.

Forfeiture of a life insurance policy for

noncompliance with the conditions of a premium note which were more onerous, as against the interests of the wife of the insured as beneficiary, than were the conditions of the policy itself, is held invalid, where the premium note was given by the husband without her consent, several years after the policy was issued. (Ohio) 737.

Temporary occupation of the platform of a car for a necessary or proper purpose is held not to be a "riding" thereon, within the meaning of an accident policy. (C. C. A. 8th C.) 116.

The damage to a cargo of lime by the protracted length of the voyage on account of rough weather was held not to be included within a policy of insurance. (Me.) 389.

Carriers.

A constitutional provision against contracts to limit the liability of carriers is held inapplicable to a contract of a corporation of that state made in another state for transportation to be performed entirely outside of the state. (Ky.) 557.

The ejection from a train of a child of tender years in the custody of an adult is held to be in effect the ejection and removal of the custodian, even if the latter had paid fare, and therefore requires a payment or tender to the latter of the fare paid, or the unearned part thereof, as a condition of the ejection. (Minn.) 319.

A condition on a round-trip excursion

ticket sold at reduced rates, that the return coupon must be stamped, is held reasonable and enforceable, even against a passenger who cannot read, and although the rule has not been enforced in some other instances. (Tenn.) 454.

A rule of a street-railway company requiring passengers to buy tickets and board cars within the station, and compelling one who boards a car outside the station to pay fare, though he had already paid in the station, while deemed reasonable, is held to be one which must be enforced in a reasonable manner, and therefore insufficient to authorize the ejection of a passenger who, after paying fare inside the station, entered a car which had started a few feet from the station and stopped, when, if he did not take that car, he would be compelled to wait twenty minutes for another. (Tenn.) 451.

A carrier refusing to accept freight tendered for transportation is held liable for its loss by theft before the owner had opportunity after notice of refusal to make some safer disposition of it than to leave it in the warehouse at the wharf. (Ky.) 270.

The loss of perishable freight carried in refrigerator cars which are not properly refrigerated is held to make the carrier liable to the shipper, although it had leased the cars from another company, which agreed to keep them properly iced. (Va.) 462.

III. CORPORATIONS AND ASSOCIATIONS.

Promoters who organize a corporation are denied the right to take any remuneration for their services as such unless a full statement thereof is incorporated in the prospectus, or unless it is voted to them after all the stock has been taken by the public. (Mass.) 725.

Reports.

False statements made in a report by a bank to the secretary of state, when made in good faith, believing them to be true, and because the statute required the report, are held not to create a liability for deceit; and a statute making the directors liable for receiving deposits knowing the bank to be insolvent is construed to mean actual knowledge on their part. (Mo.) 323.

Insolvency.

Payment by an insolvent bank of a check of a company in which the president of the bank is the chief stockholder, and of a note on which its directors are indorsers, is held to make an unlawful preference, although the bank has not yet committed a formal act of insolvency. (Md.) 698.

Employees.

Employment for life of a person to act as medical agent of a life insurance company is held to be beyond the power of officers under a by-law giving them authority to appoint and remove all persons, except agents, employed by the company, where the members of the board of trustees, who passed the by-law, hold office for only four years each. (N. Y.) 471.

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Boycott by by-law.

A by-law of a liverymen's association prohibiting members from furnishing a hearse or carriages to nonunion liverymen or for use at a funeral conducted by such nonunion liverymen is held illegal. (Wis.) 475.

Committees and tribunals.

Interference with the decision of a committee of a board of trade is held to be within the jurisdiction of a court of equity when property rights are involved, and the decision of the committee has been made in violation of the rules of the board. (Ill.) 353.

A by-law of a board of trade which gives a committee power to investigate charges against a member in order to determine the necessity of preferring formal charges against him, though this may be done without his knowledge, and a trial before the directors had at which he is not allowed the aid of professional counsel, is held valid. (Ill.) 365.

An agreement by members of a voluntary benefit association that the decision of its tribunals rejecting a claim to benefits shall be conclusive is upheld against a contention that it violates public policy as an attempt to oust the courts of jurisdiction. (Mich.) 592.

The right to resort to the courts by a member of a fraternal organization whose claim has been finally rejected by its tribunals cannot be taken away unless it is done in the clearest and most express terms, and it is held that a constitutional provision giving

the supreme lodge exclusive jurisdiction of appeals, and declaring that its decisions shall be the supreme law of the order, does not exclude resort to the courts. (Kan.) 373.

A rule of the relief department of a railroad company providing that all claims of beneficiaries should be submitted to the determination of the superintendent, whose decision should be final and conclusive unless appealed to the advisory committee, and in case of such appeal the decision of the committee should be final and conclusive upon all parties without exception or appeal, was held insufficient to bar an action in court after the rejection of a valid claim by the committee. (Ohio) 381.

Stockholders.

The rule that a stockholder cannot set off an obligation of the corporation to him against his liability as shareholder is held applicable, not only in equity, but in an action at law against him by a single creditor of the corporation. (S. C.) 448.

Liability imposed upon stockholders for debts of the corporation is held to be contractual and enforceable in foreign jurisdictions, if the statute requires no preliminary proceedings for the adjustment of equities. (Mass.) 301.

An action to enforce the liability of stockholders for corporate debts, under a statute which provides a single mode of enforcement by a single suit in the state courts in favor of all creditors and against the corporation, if it has assets, and all stockholders, is held to be maintainable only in that state, and not in any court out of the state. (Wis.) 486.

Officers.

The execution of an agreement by the president and general manager of a bank, with the approval of the vice president, is held sufficient to bind the bank without any approval or knowledge of the board of directors, where the president was allowed to do pretty much as he pleased in managing the affairs of the bank. (Cal.) 647.

Building and loan association.

A notice of withdrawal, given by a member of a building and loan association, is held not to sever his relation so completely as to preclude him from bringing suit for a receiver, when the company has not provided any fund for withdrawing members, and the stockholders have taken such action that there is no possibility of relief from that source. (Va.) 659.

Telephone company.

A telephone company is held to be entitled to exercise the power of eminent domain under a statute authorizing condemnation for "a magnetic telegraph line," where the telephone company is organized under a statute providing that the company may be organized to construct "a telegraph and telephone line," while the statute formerly provided for a corporation to organize "a telegraph or telephone line." (Tex.) 459.

Colleges.

Discrimination between regular dental colleges and other colleges authorized to grant diplomas to dentists is held constitutional, where a statute authorizes a graduate of the former to practise without being examined. (Md.) 695.

Churches.

The majority of the members of a church are held entitled to continue in control after changing their belief, where the rules of the church entitle the majority to control, and it is held that there is no implied trust that property acquired by a church shall continue to be used to teach the doctrines professed at that time. (Tex.) 617.

The right of a religious corporation to buy real estate for speculation is denied, and such contract held *ultra vires*. (Neb.) 337.

Free Masons.

An injunction against a chapter of Royal Arch Masons to prevent the trial of charges against a member on the ground that the rule which he is accused of violating was adopted as the result of a conspiracy is denied on the ground that the court has no power to interfere in such case with the work of the association. (Cal.) 400.

Partnership.

A contract by which the owner of a farm engages another to occupy and cultivate it, each furnishing a part of the seed, implements, and stock, with a provision that the products shall be divided at the end of a certain term, or sold and the proceeds divided, is held not to create a partnership which will give the occupant the rights of a surviving partner in case the owner dies, but only to make him a tenant or agent. (Ind.) 792.

The nature of a partnership in oil wells is considered in a case which holds that it constitutes a mining partnership which is not dissolved by the sale of the interest of one member. (W. Va.) 468.

IV. DOMESTIC RELATIONS ; PERSONAL CAPACITY.

An infant is held not to be liable in tort for false representations as to his age, by which he procures credit on a purchase of goods. (Mass.) 560.

Dower.

The right of dower, given to a former wife divorced without alimony, if she is the innocent party, is held not to extend to the case of such a former wife if the decedent leaves another lawful wife surviving. (Conn.) 144.

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Divorce.

Evidence in a suit for divorce on the ground of habitual intemperance, showing the condition and habits of the defendant since the commencement of the action, is held admissible on the ground that the interests of the state, as well as the parties, are involved, and that the condition justifying the divorce must be shown to exist at the very time it is granted. (Conn.) 142.

The abatement of a divorce proceeding by

the death of the appellant pending an appeal is held to terminate the power of the court over costs, where the statute makes costs depend on the judicial determination of the action. (Cal.) 141.

Separation.

A wife living in the same house with her husband, and performing some of the duties of a wife, is not denied for that reason the right to sue for separate maintenance on the ground that the husband fails to furnish her suitable support. (Mass.) 735.

Domicil.

A woman who places her husband in a home for incurables, with his expenses for life and for burial paid, is held to have no right for that reason to acquire a separate domicil which will give jurisdiction to a probate court, although in actions for divorce there is a statutory presumption that the husband's domicil does not apply to the wife. (Cal.) 138.

V. FIDUCIARIES OR REPRESENTATIVES.

Sureties on an executor's bond are held liable for his debt to the testator, although he is insolvent, when the statute makes his debt assets for which he must account in the same way as if it were the debt of another person. (N. H.) 347.

Agency.

An insurance agent forbidden to take a risk, but whose clerk forges his name to a policy without his consent and without any profit to him, is held not to be liable for the loss on the risk. (C. C. A. 3d C.) 530.

VI. TORTS; NEGLIGENCE; INJURIES.

A levy on property owned by and in possession of a stranger to the writ is held to create a liability on the part of the officer, and to be outside of the protection of his writ. (Tex.) 773.

Blasting.

A person who goes upon a boat at a wharf, and goes to sleep in the cabin, knowing that contractors are blasting nearby, is held to assume, as against them, all the risk of danger from the work, if it is done with reasonable care. (C. C. A. 9th C.) 108.

Blacklisting.

Placing a debtor's name on a blacklist as one who does not pay his honest debts is held to constitute a libel for which he is entitled to damages, notwithstanding the fact that he may not have paid his debt, where there was a valid counterclaim which justified its nonpayment. (Mass.) 612.

Negligence of bailees.

The negligence of a gratuitous bailee of a mule using the animal for the very purpose for which it was loaned is held to be imputable to the owner so as to prevent recovery against a third person whose negligence, combined with that of the bailee, causes the death of the mule. (Miss.) 322.

Negligence as to electricity.

Lack of insulation of electric-light wires where they run above an awning which is 16 feet above the street level is held not to be such negligence on the part of the electric company as will create a liability for the death of a person who touches a wire while upon the awning for the purpose of lifting the wires in order to allow a house to be moved under them. (Tex.) 771.

Negligent experiment.

An injured person who follows the suggestion of the physician employed by the person causing the injury, to try standing on the injured leg, is held to act at his peril if injury is thereby caused. (Mass.) 826.
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Injury to employee.

A teamster of experience is held to assume the risk, as a matter of law, in using short lines, although he has complained of their insufficiency, where he continues their use for months after making his complaint without any promise of the master to remedy the defects. (Cal.) 33.

Injury by mail bag.

Negligence of a mail agent in throwing mail from a moving train, causing injury to a person standing on the platform of a station, is held to render the railroad company liable only in case the carrier had notice of his improper practice in this respect. (Mich.) 308.

Injury by street car.

A passenger who was injured after leaving a street car and while attempting to pass behind the car in the dark, by falling over a fender which had become disarranged without the knowledge of the company and was projecting from the rear of the car, is held to have no right of action against the carrier. (Mass.) 421.

Injuries by trains or cars.

A railroad company which runs its train at a prohibited speed, and fails to ring its bell as required by ordinance, or keep a proper lookout, is held not to be liable for the death of a person struck by the train, who was walking ahead of it in open daylight, on a straight piece of the road, and had power up to the last moment to step off the track and prevent the accident. (N. C.) 684.

The rule that a railroad company owes no duty to a trespasser on its track until he is discovered and the trainmen have reason to believe that he will be injured unless the train is stopped is applied to a case in which the train was running at an unlawful rate of speed, and the fact that he might have been sooner discovered is held insufficient to create liability. (C. C. A. 7th C.) 98.

A passenger alighting from a train at a

place where he must cross a track to reach the public highway is held to be entitled to presume, in the absence of warning, that trains will not be so operated as to impose on him the same degree of care that would be exercised at a crossing if he were not a passenger. (C. C. A. 8th C.) 102.

The accidental death of a sick passenger who was supposed by the railway employees to be intoxicated, and who was helped from the car at the terminus of the route and led to the front of the station, at or near to the public street, and left where the way was

open in which he wished to go, but who, after the train had started again on its trip, turned and went toward the back of the station and slipped between the wheels of a car moving on a track, is held to create no right of action against the carrier. (N. J.) 424.

Negligence as to fence.

The duty to keep gates in a railroad fence closed at a private farm crossing is held to be upon the landowner for whose benefit and convenience the gates are constructed. (Minn.) 625.

VII. PROPERTY RIGHTS; LIENS.

Trademark.

The use of the word "Hygeia" as a trademark is protected, so far as the word is regarded as the name of the goddess Hygeia, but not to the extent of giving a monopoly of the English descriptive term "hygeia," as indicative of healthfulness. (Conn.) 147.

Advancements.

The allowance of interest on advancements in order to equalize the share of an heir who received none is held, where he had allowed the other heirs to enjoy their land advanced to them for many years after the ancestor's death, without taking any steps to procure a settlement of the estate, to be proper only for such reasonable time after the ancestor's death as would suffice to have the estate settled. (Tenn.) 766.

Expectancy in life insurance.

The share of a deceased beneficiary under a benefit certificate is held to be subject to a statutory rule as to a devise or legacy, and transmissible to the issue of such beneficiary if he dies during the life of the insured. (Ky.) 776.

Entireties.

A letter of credit in favor of husband and wife, purchased with the husband's money, is held to create an estate by the entireties, so that in case of his death the balance may be drawn by her without accounting therefor to his estate. (Pa.) 444.

Tenancy.

A stipulation in a deed of trust that foreclosure shall create the relation of landlord and tenant between the purchaser and mortgagor, and that upon the latter's default in surrendering possession he may be removed by a writ of unlawful detainer, is held valid. (Tenn.) 435.

Statements in letters written by a landlord to his tenant after the latter had abandoned the premises, to the effect that the premises will be leased at the tenant's risk, when they are not replied to, are held insufficient to avoid the rule that a surrender is

effected by the reletting with the consent of the former tenant, on the ground that by his silence the tenant acquiesced in the landlord's proposition. (N. Y.) 580.

Cotenancy.

The right of a cotenant, who attempts, without authority, to sell logs cut by him from land owned in common, to enforce the contract against a purchaser who refuses to receive them, is denied on the ground that he cannot give a good title. (Ky.) 416.

Easement.

An easement in an alley across the rear end of an adjacent lot is held to be created as incident or appurtenant to a building sold by the common owner, when the alley furnishes access to a cellar under the building, as well as light and air for the rear portion of it. (Ky.) 417.

License.

A license to lay a tile drain under one's land is held to be revocable at the pleasure of the licensor, and an irrevocable right to maintain such a drain is declared to be an easement which cannot be conferred except by an instrument in writing. (W. Va.) 497.

Carrier's lien.

The lien of a carrier is held not to be defeated by delivery of the goods to an assignee for the benefit of creditors of the owner of the goods, but the carrier is held entitled to be paid out of its proceeds. (Ky.) 251.

Innkeeper's lien.

An innkeeper's lien upon property of a third person brought to the inn by a guest is denied where the statute gives a lien on property of guests, and provides that effects "belonging to" any person who departs without paying his bill may be sold to satisfy it. (S. D.) 610.

Mechanic's lien.

Giving a lien to subcontractors or materialmen without regard to any notice to the owner of the claims or to the state of the account between him and the contractor is held constitutional. (Ky.) 255.

VIII. CIVIL REMEDIES.

Appeal.

The adoption of a constitution giving the supreme court jurisdiction on appeal to determine questions of fact as well as of law is held to operate upon appeals then pending, and to require a case to be remanded for 49 L. R. A.

the purpose of presenting the facts, where the record did not show sufficient for the purpose. (La.) 272.

Absence of judge.

The absence of a judge from the courtroom while the trial is in progress is held not to

constitute a prejudicial error, where the evidence demanded the verdict rendered, and there was no request to suspend the trial on account of the judge's absence, or any objection to it, or any motion for a mistrial based upon it. (Ga.) 176.

Jurors.

The fact that a man is an Odd Fellow is held not to disqualify him as a juror in an action by an Odd Fellow of another lodge. (Mich.) 423.

Damages.

Damages for personal injuries in a railroad collision are held to include the effects of a nervous shock. (C. C. A. 9th C.) 77.

Substantial damages for an instantaneous death caused by wrongful act are held to be recoverable under a statute providing for the survival of all causes of action for injuries to the person of a decedent, whether they do or do not, instantaneously or otherwise, result in death. (Conn.) 404.

Supplemental complaint.

A supplemental complaint alleging recovery of judgment in another state on the cause of action is held to be improper, since such judgment is a bar to the further prosecution of the action. (N. D.) 285.

Evidence.

Evidence of an admission by a person who was injured, that it was due to an accident, and not to the negligence of a railroad company, is held admissible against his widow in an action by her against the railroad company, charging it with negligently causing his death. (Ga.) 175.

Presumption.

A presumption of negligence on the part of a railroad company is held to arise from the fact that sparks from a passing locomotive have kindled a fire and destroyed adjacent property. (C. C. A. 8th C.) 542. *Contra* (C. C. A. 6th C.) 645.

Judgment against dead person.

A judgment for money, and also for foreclosure, is held impeachable collaterally, when rendered against a dead person, although death occurred after service of process. (Kan.) 153.

Removal of causes.

A proceeding for the probate of a will is held not to be removable either from the probate court or from a circuit court on appeal into a Federal court, as it is not deemed a suit of a civil nature at common law or in equity. (C. C. A. 8th C.) 62.

Injunction.

Letters or notices sent out by the owner of a patent for the purpose of destroying the

business of another by threatening suits for infringement, when not done in good faith but in bad faith and solely for the purpose of destroying the other's business, are held to be a fraudulent attack upon property rights against which a court of chancery should not refuse protection. (C. C. A. 3d C.) 755.

Garnishment.

A balance remaining in the hands of the clerk of the court after payment of an execution out of the proceeds of a sale of perishable property that had been attached is held not to be subject to garnishment by a creditor of the defendant. (R. I.) 351.

Partition.

Partition of oil and gas in land, the owners of which do not own the surface of the land, is held to be impossible to make by allotting sections of the territory below the surface; and it is held that the only division that can be made is a division of the proceeds. (W. Va.) 464.

Mandamus.

Mandamus to compel a street-railway company to perform the conditions on which it accepted the privilege of operating its road in the streets is held to be proper on the ground that the duty to be performed is to the public, and is not the performance of a mere private contract. (Ill.) 650.

Set-off.

One who has recovered a judgment for damages on account of the breach of a contract, and is afterwards sued by an assignee of the other party, who has become insolvent, for the price of the goods covered by the contract, is held, to be entitled to set off against such assignee his original claim for damages, as to which the assignee was in privity, although he could not set off the judgment against him because of a lack of privity. The doctrine of merger is denied application to defeat this right. (Mich.) 311.

Computation of time.

The allowance of time "until" a certain day by order of court is held to include that day. (Wyo.) 201.

Ninety full days are held to be meant after the adjournment of the legislature before a statute will take effect, where it provides that it shall not go into force "until ninety days after adjournment." (Tex.) 193.

The day on which a bill is presented to the governor is held not to be included in the computation of the five days within which he is required to act upon a bill presented to him. (La.) 218.

IX. CRIMINAL LAW AND PRACTICE.

A statute making it unlawful to publish or sell papers, books, or magazines devoted to the publication of criminal news, police reports, and pictures or stories of crime, is held valid as against a publication in which such immoralities are massed, and which is mainly devoted to such matters. (Conn.) 542.

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An ordinance making it unlawful for any person, except the husband, father, brother, or other male relative of a prostitute, to associate or speak with her on any street in the city, either by day or by night, is held to be invalid. (Ky.) 114.

Self crimination.

Refusing to uphold the constitutional

right of a witness who refused to answer incriminating questions is held to make his punishment for contempt void for excess of the jurisdiction of the court, on account of which he may be released by habeas corpus. (Wyo.) 831.

Appeal by state.

An appeal by the state in a criminal case from a general verdict of not guilty which was entered upon motion of defendant because the warrant was issued without any affidavit is held not to be authorized by a statute providing for an appeal by the state from the quashing of an indictment, where no motion to quash was made, and the court
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refused to withdraw a juror and dismiss the action. (N. C.) 585.

Jeopardy.

A defendant in a criminal case who has not been arraigned or waived arraignment and pleaded not guilty or had such plea entered for him is deemed not to have been in jeopardy. (Kan.) 186.

Pardon.

Statutory limitations on the pardoning power of the executive are held to be invalid on the ground that the pardoning power is exclusive of the legislative or judicial authority. (Okla.) 440.

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3. The abatement of a divorce proceeding by the death of appellant pending an appeal terminates the power of the court over costs, under a statute making costs dependent upon a judicial determination of the action. *Begbie v. Begbie* (Cal.) 141

4. The successor of a trial judge who presided in a case, overruled a motion for a new trial, and granted time in which to present a bill of exceptions, may, on the latter's death before presenting the bill, make the order for its allowance in open court, where the statute provides that it shall be allowed 49 L. R. A.

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5. The right of the state to appeal "upon a question reserved by the state" in a criminal case includes a case in which a person who has not actually been previously in jeopardy is discharged by the court on a plea of such jeopardy. *State v. Rook* (Kan.) 186

6. An appeal by the state in a criminal case from a general verdict of not guilty, which was entered upon motion of defendant because the warrant was issued without any affidavit, will not be granted upon the theory that the verdict is equivalent to quashing the indictment, so that the state can appeal under N. C. Code, § 1237, where no motion to quash was made, and the court refused to withdraw a juror and dismiss the action. *State v. Savery* (N. C.) 585

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7. Objections that testimony is incompetent and immaterial will not justify reversal on the ground that the plea was not sufficiently definite to warrant its admission. *Bacon v. Reich* (Mich.) 311

8. Exceptions by appellee to rulings of the trial court under which its liability for wrongful death was established cannot be considered by the appellate court upon reversal on appeal as to measure of damages, where the statute requires consideration of appellee's exceptions only where the questions could arise on a new trial. *Broughel v. Southern New England Teleph. Co.* (Conn.) 404

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9. A defendant which has defended an action on the theory that it charged negligence cannot for the first time on appeal raise the question of variance on the ground that the complaint charged it with wilful wrong. *Broughel v. Southern New England Teleph. Co.* (Conn.) 404

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10. A ruling of the trial court upon the weight of evidence is not subject to review. *Utley v. Hill* (Mo.) 323

11. A party is not entitled to have a finding of facts corrected where they are not admitted or undisputed, and the facts found are not without evidence to support them, while the record is not shown to embrace all the evidence adduced with reference to them. *Hygeia Distilled Water Co. v. Hygeia Ice Co.* (Conn.) 147

12. A conditional assessment by the trial court of substantial damages for death by wrongful act in case such damages may properly be awarded, together with an actual assessment of nominal damages only, is not conclusive in case the appellate court holds the actual assessment erroneous, since the finding was, in the view of the trial court, upon an immaterial fact. *Broughel v. Southern New England Teleph. Co.* (Conn.) 404

13. An appellate court draws conclusions of law from a special verdict, but does not draw conclusions of fact from evidence. *Behring v. Somerville* (N. J. Err. & App.) 578

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14. Error without prejudice is no ground for reversal. *Huron v. Second Ward Sav. Bank* (C. C. App. 8th C.) 534

15. Refusal to permit the filing of additional defenses to certain counts in the declaration is not error when the counts are treated as out of the case. *Hygeia Distilled Water Co. v. Hygeia Ice Co.* (Conn.) 147

16. It is error not to submit to the jury facts fairly in the case. *J. Thompson Mfg. Co. v. Gunderson* (Wis.) 859

17. Misuse of a paper admitted in evidence by counsel in argument wrongfully construing it as an admission of defendant's liability is not reversible error, if the judge cautioned the jury not to put that interpretation on it. *Shaw v. Chicago & G. T. R. Co.* (Mich.) 308

18. The absence of the judge from a courtroom while the trial is in progress, for a brief space of time, will not be ground for reversal of the judgment, where the evidence demanded the verdict rendered, and his absence was known to counsel, who made no objection and no request to suspend the trial, and no motion for a mistrial upon the judge's return. *Horne v. Rodgers* (Ga.) 176

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1. Rules enacted by a voluntary association for the government of its members must be conformed to by it in all matters relating to it in disciplining them. *Green v. Chicago Bd. of Trade* (Ill.) 365

2. The rules by which the members of an association agree to be governed constitute the charter of their rights, and the courts will decline to take cognizance of any matter arising under them in respect of matters of policy or the internal economy of the organization. *Lawson v. Hewell* (Cal.) 400

3. Any change or amendment of the rules of a voluntary fraternal organization, if adopted in accordance with the mode provided by the association therefor, is binding upon each of the members. *Lawson v. Hewell* (Cal.) 400

4. The contractual relation between an association and one of its members is that which exists by virtue of the rules of the association, and the contract is not violated so long as the association acts towards him in accordance with those rules. *Lawson v. Hewell* (Cal.) 400

5. Individuals who associate themselves in a voluntary fraternal organization may prescribe conditions upon which membership in the association may be acquired or upon which it may continue, and may also prescribe rules of conduct for themselves during their membership, with penalties for their violation, and the tribunal and mode in which the offenses shall be determined and the penalty enforced. *Lawson v. Hewell* (Cal.) 400

6. The by-laws to which a member of a voluntary association agrees to submit are such as are authorized by the nature of the association and the laws of the country, and must not be contrary to the policy of the law, or unreasonable. *Green v. Chicago Bd. of Trade* (Ill.) 365

7. A by-law of a board of trade is not made unreasonable or against public policy by the fact that it deprives members on trial before the directors for violation of its rules, of the aid of professional counsel. *Green v. Chicago Bd. of Trade* (Ill.) 365

8. A by-law of a board of trade is not unreasonable or in contravention of public policy, which provides a committee of the directors to investigate charges of grave offenses or dishonesty against a member, to determine whether or not formal charges shall be preferred against him, although the investigation is to be made without his knowledge, and the charges, if preferred, are to be tried by the directors. *Green v. Chicago Bd. of Trade* (Ill.) 365

9. A by-law of a liverymen's association which binds the members not to do business with any person who does not patronize its members exclusively, and prevents any of them from letting a hearse to a private party for a funeral where the undertaker in charge of it is reputed to patronize nonunion members, or to any person whose family for the occasion patronizes a nonunion livery,—is unlawful as against public policy. *Gatzow v. Buening* (Wis.) 475

10. The interest of a member in the property of an association, when merely incidental to his membership, will not prevent his expulsion if his right of membership has been forfeited; nor will it give the courts any right to prevent the investigation of the charge against him, or to determine its sufficiency. *Lawson v. Hewell* (Cal.) 400

11. The existence of contracts on the part of customers for the future purchase or sale of commodities at a stock exchange does not prevent the trial of the member through whom the contracts were made for violation of the rules of the exchange, although the result may be to expel him and prevent the customers from carrying out their contracts as made, since they must be presumed to have dealt with him with reference to the rules, which provide for his suspension or expulsion for misconduct. *Green v. Chicago Bd. of Trade* (Ill.) 365

12. The directors of a voluntary association are not deprived of jurisdiction to try a member of the association by the fact that the charges are preferred by some of their number. *Green v. Chicago Bd. of Trade* (Ill.) 365

13. Denial of guilt does not affect the right of a voluntary association to proceed to try one of its members for an alleged offense which is clearly in violation of its by-laws. *Green v. Chicago Bd. of Trade* (Ill.) 365

14. A decision by an association of persons jointly liable on a policy of insurance to one of its members, which provides that the association shall finally determine the amount due on any loss, although not strictly an award, but subject to the power of equity to give relief against it, will be binding on the member except for cause shown to the contrary. *Perry v. Cobb* (Me.) 389

15. A member of a voluntary association is responsible for the acts of its officers in placing the name of another member on the black list, as provided by the by-laws of the association, when he sent them the name for that purpose. *Weston v. Barnicoat* (Mass.) 612

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2. An assignee of a mortgage holding it as collateral security, who receives payment of his debt from the mortgagor, and thereupon surrenders the mortgage and joins with the mortgages in directing a cancellation of the mortgage on the record, which is effected, while both he and the mortgagor are ignorant of the fact that there is a prior assignment of the mortgage, duly recorded, cannot be compelled to repay to the mortgagor the amount received from him without being restored to his former position, although the mortgagor is compelled to pay a second time to the first assignee. *Behring v. Somerville* (N. J. Err. & App.) 578

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1. An attachment suit may be amended so as to embrace the same cause of action against persons who have intervened to claim the property as was set up against the original defendant. *Finch v. Gregg* (N. C.) 679

2. Subsequent consignments covered by bills of lading with draft attached, which had been assigned to the same person as a former one, the draft against which was paid, are subject to attachment in his hands for loss because of failure of the former consignment to comply with the contract. *Finch v. Gregg* (N. C.) 679

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A county auditor receiving a letter of instructions from the auditor of state, which commands the performance of a number of acts, some of which are proper and others not, is bound to follow the former, but may disregard the latter. *State ex rel. Guilbert v. Halliday* (Ohio) 427

BAILEMENT.

The negligence of a gratuitous bailee of a mule while using the animal for the very purpose for which it was loaned is imputable to the owner, so as to prevent recovery against a third person whose negligence, combined with that of the bailee, caused the mule's death. *Illinois C. R. Co. v. Sims* (Miss.) 322

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1. The liability of bank directors and officers under Mo. Rev. Stat. 1889, § 2760, for deposits accepted with the directors' assent after they have knowledge that the bank is insolvent or in failing circumstances, does not extend to deposits received when they did not have actual knowledge of the bank's condition, but acted in good faith and were innocent of wrongdoing, although they were negligently ignorant of the bank's condition, which they could have ascertained if they had not neglected to investigate or keep posted as to its affairs. *Utlely v. Hill* (Mo.) 323

2. False statements in a report which a banking corporation is required to make to the secretary of state by Mo. Rev. Stat. 1889, § 2752, making it a misdemeanor punishable by fine or imprisonment for the directors to refuse to make the statement, or wilfully and corruptly to make a false statement, will not make the directors liable to a common-law action for deceit by one who makes a deposit in the bank, relying on such report, if they make the statements in good faith, honestly believing them to be true. *Utlely v. Hill* (Mo.) 323

Insolvency.

3. Payment by an insolvent bank of a check of a company in which the president of the bank held most of the stock, and of a note on which its directors are indorsers, although it has not committed the formal act

of insolvency, will be held to be unlawful preference, whether the estate be administered in equity or under the insolvent law, and will be set aside in an action by receivers appointed under Md. Code Gen. Pub. Laws, art. 23, relating to the dissolution of insolvent corporations, art. 47, § 22, of which prohibits preferences made when insolvent or in contemplation of insolvency. *James Clark Co. v. Colton* (Md.) 698

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The right of members of a fraternal organization to resort to courts when their claims have been finally rejected by its tribunals is not taken away by a constitutional provision that no claim shall be paid until all the laws or rules of the order have been fully complied with and proof made according to the laws of the order, and also that the supreme lodge shall have exclusive jurisdiction of all appeals from the grand or subordinate lodges and members, and its decisions upon all questions and appeals shall be the supreme law of the order. *Supreme Lodge O. of S. F. v. Raymond* (Kan.) 373

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1. A bank does not become a purchaser of negotiable paper by discounting it for one not its debtor at the time, and placing the amount to the credit of the holder by way of deposit. *Warman v. First Nat. Bank* (Ill.) 412

2. The maker of a note cannot show that a bank which discounted it did not become its purchaser merely by showing that the proceeds were placed to the credit of the transferor, but must prove by the state of accounts between the bank and the transferor that it was not such, or had not, by the drawing of the deposit, become such, as to make the bank a purchaser. *Warman v. First Nat. Bank* (Ill.) 412

3. Mere negligence in making inquiries as to the validity of negotiable paper before purchasing does not charge one with notice of infirmities. *Central State Bank v. Spurlin* (Iowa) 661

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4. A stipulation in an instrument for the payment of a certain sum of money, payable with current exchange on a place other than the place of payment, is not destructive of negotiability. *Clark v. Skeen* (Kan.) 190

5. A note for the payment of a certain sum at a fixed date is not rendered non-negotiable by a stipulation that upon default in the payment of interest the whole amount shall become due, at the option of the holder, and then draw a greater rate of interest. *Clark v. Skeen* (Kan.) 190

6. The addition of the word "trustee" to the name of the payee of a note does not destroy its negotiability. *Central State Bank v. Spurlin* (Iowa) 661

Defense.

7. One who, at the request of the principal debtor, places his name as surety on a note after the signatures of several makers, guarantees the genuineness of such signatures to an innocent payee, and cannot be released from liability on the ground that one signature is a forgery. *Wheeler v. Traders' Deposit Bank* (Ky.) 315

8. The failure of a vendee under a bond for title, to obtain possession of the premises, is no defense to a suit on a note given for the purchase price, where it appears that he not only never desired possession, but also that he could have obtained possession at any time on demand. *Horne v. Rodgers* (Ga.) 176

9. One who bought land, paid a part of the purchase money, gave a promissory note for the balance, and took a bond for titles with knowledge of an existing encumbrance on the property, and who subsequently entered into an agreement with the vendor recognizing liability on the note and, in effect, the promise to pay therein contained, upon the vendor's removing the encumbrance, could not defeat a recovery upon the note by the vendor when it affirmatively appeared that the latter had complied with the terms of the agreement, and could, and would, on the payment of the note, have made the vendee a good title. *Horne v. Rodgers* (Ga.) 176

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1. An assignee of a bill of lading with 49 L. R. A.

draft attached will, in case he receives payment of the draft, be subject to action for a return of the money in case the property covered by the bill does not comply with the contract. *Finch v. Gregg* (N. C.) 679

2. Assignment for value of a bill of lading made "to order of shipper" transfers title to the property covered thereby as against all the world except the shipper, so that the property can no longer be attached by a third person for the shipper's debts. *Finch v. Gregg* (N. C.) 679

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A passenger who goes upon a boat at a wharf, and sits down and goes to sleep in the cabin, knowing that blasting is being done by contractors near by, assumes, as against such contractors, all risks necessarily incident to such work if prosecuted with skill and reasonable care. *Smith v. Day* (C. C. App. 9th C.) 106

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A majority of the trustees of a corporation, acting in their individual names, cannot act for the board itself and bind the corporation, without any meeting of the board. *Thompson v. West* (Neb.) 337

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1. A municipal corporation which has certified on the face of its bonds that they were issued for funding floating indebtedness—a lawful purpose—cannot repudiate

them after they have reached the hands of bona fide holders, on the ground that the proceeds were actually intended and used to take up invalid warrants. *Huron v. Second Ward Sav. Bank* (C. C. App. 8th C.) 534

2. A municipal corporation is estopped from controverting statements made upon the face of its bonds as to the purpose for which they were issued, so as to invalidate them in the hands of bona fide purchasers. *Huron v. Second Ward Sav. Bank* (C. C. App. 8th C.) 534

3. Recitals by municipal officers who are invested with authority to perform a precedent condition to the issue of negotiable bonds, or with authority to determine when that condition has been performed, that the bonds have been issued "in pursuance of," or "in conformity with," or "by virtue of," or "by authority of," the statute, will preclude inquiry, as against an innocent purchaser for value, as to whether or not the precedent conditions had been performed before the bonds were issued. *Huron v. Second Ward Sav. Bank* (C. C. App. 8th C.) 534

4. Power to borrow money and issue bonds for all municipal purposes includes the power to do so to pay or refund indebtedness of the municipality. *Huron v. Second Ward Sav. Bank* (C. C. App. 8th C.) 534

5. Unlimited power to issue bonds, granted to a municipal corporation by special charter, is not revoked by a general law giving such corporations power to issue bonds for specified purposes, where a proviso to the general law expressly provides that it shall not be construed to limit the powers theretofore conferred by any special charter. *Huron v. Second Ward Sav. Bank* (C. C. App. 8th C.) 534

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Notice of withdrawal given by a member of a building and loan association does not sever his relation so completely as to preclude him from bringing a suit for the appointment of a receiver and the winding up of the affairs of the company, when it has failed in its duty to set apart a fund to meet its obligation to withdrawing members, and the stockholders have taken such action as to preclude the possibility of relief from that source. *Andrews v. Roanoke B. A. & I. Co.* (Va.) 659

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BURDEN OF PROOF.

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Of Association, see ASSOCIATIONS, 6-9.
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CARRIERS.

Question for Jury as to Passenger's Negligence, see TRIAL, 8, 9.

See also BLASTING; COURTS, 3, 4; DAMAGES, 7; EVIDENCE, 24, 30-32; PLEADING, 5.

1. A railroad company must not permit the continuance of dangerous habits of a mail agent in delivering heavy packages from the car in such manner as to endanger persons lawfully on its premises. *Shaw v. Chicago & G. T. R. Co.* (Mich.) 308

2. Continuance, for a considerable length of time, of a practice by mail agents to deliver mail bags from the car in such a manner as to endanger persons on the premises, will charge the carrier with notice. *Shaw v. Chicago & G. T. R. Co.* (Mich.) 308

Of passengers.

3. The law implies a contract on the part of a parent who enters a railroad train with a child *non sui juris* and subject to payment of fare, to pay the fare of such child. *Braun v. Northern P. R. Co.* (Minn.) 319

4. A parent who refuses to pay the fare of a child in his custody who is subject to the payment of fare may be ejected from the train with the child, though the parent tenders payment of his own fare. *Braun v. Northern P. R. Co.* (Minn.) 319

5. The fare paid by a parent who refuses to pay the fare rightfully demanded for a child in his custody must be returned or tendered to the parent, or such part thereof as may be unearned, before the child can lawfully be ejected from the train, since the forcible ejection and removal of the child for nonpayment of fare is in effect the ejection and removal of the parent. *Braun v. Northern P. R. Co.* (Minn.) 319

6. A rule of a street-railway company requiring passengers to buy tickets and board the cars within the station, and compelling one who boards a car without the station to pay fare, even though he has previously paid a fare within the station, is a reasonable regulation for facilitating the transfer of passengers and the dispatch of cars; but it must be enforced in a reasonable manner. *Nashville Street R. Co. v. Griffin* (Tenn.) 451

7. The ejection for refusal to pay a second fare, of a passenger who, after paying fare within a station, has boarded a car that has left the station and is standing a few feet outside of it, and who would otherwise have to wait twenty minutes for another car, is an unreasonable and arbitrary enforcement of a rule of the company requiring passengers to board the cars within the station

or pay another fare if they board them beyond the station limits, and will subject the company to liability for injuries sustained in consequence of the ejection, where the conductor knows that he has already paid fare at the station. *Nashville Street R. Co. v. Griffin* (Tenn.) 451

8. The mere starting of a car upon its journey, by the conductor, with knowledge that a person has boarded the car without the station, after paying fare within the station, is not an acceptance of such person as a passenger, or a waiver of a rule of the street-railway company requiring passengers to pay fare and board cars within the station, and compelling one who has boarded a car without the station to pay a fare, although he has already paid his fare on entering the station. *Nashville Street R. Co. v. Griffin* (Tenn.) 451

9. A sale of round-trip excursion tickets at reduced rates is itself sufficient to put a purchaser upon inquiry and affect him with notice of unusual terms and conditions attached to the use of such ticket. *Watson v. Louisville & N. R. Co.* (Tenn.) 454

10. A condition printed on the return part of a round-trip excursion ticket, "Not good for passage unless stamped by joint agent at" the place of departure, is a reasonable regulation by the carrier. *Watson v. Louisville & N. R. Co.* (Tenn.) 454

11. That the purchaser of a round-trip excursion ticket is unable to read or write, and is not specially notified of the requirements and conditions upon which the tickets are sold, does not relieve him from the necessity of complying with a condition printed on the return portion of the ticket, requiring it to be stamped by the agent of the company on the day of departure. *Watson v. Louisville & N. R. Co.* (Tenn.) 454

12. The fact that other passengers are allowed to travel upon round-trip excursion tickets without having them stamped as required by a rule of the company does not abrogate the rule, or relieve a purchaser of such a ticket from the duty to comply with the condition, unless such violations of the rule are so frequent as to amount to a custom and to mislead the purchaser. *Watson v. Louisville & N. R. Co.* (Tenn.) 454

13. A passenger alighting from a train at a place where he must cross a track to reach the public highway may, in the absence of warning, presume that trains will not be so operated as to impose on him the same degree of care which he would be obliged to exercise if he were not a passenger. *Chesapeake & O. R. Co. v. King* (C. C. App. 6th C.) 102

14. If a passenger alights by direction or implied invitation of the carrier at a place where, in order to leave the carrier's premises, it is necessary to cross the carrier's track, there is an implied agreement that in using that mode of egress trains will not be so operated as to make the exit unnecessarily dangerous. *Chesapeake & O. R. Co. v. King* (C. C. App. 6th C.) 102
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15. A street-car passenger who was injured after leaving the car and while attempting to pass behind the car in the dark, by falling over a fender which had become disarranged without the knowledge of the company, and was projecting from the rear of the car, cannot hold the street-railway company liable for the injury. *Gargan v. West End Street R. Co.* (Mass.) 421

16. A carrier is not liable for the death of a passenger who was sick, but supposed to be under the influence of liquor, and who was helped from the car at the terminus of the route, and led by the conductor to the front of the station, at or near the public street, where the way was open in the direction that the passenger wished to go, but who, after the conductor had started on his outward trip, turned and went towards the back of the station, and subsequently slipped down between the wheels of a moving car. *Bageard v. Consolidated Traction Co.* (N. J. Err & App.) 424

17. A railroad company is liable to a passenger for injuries caused by a collision on account of the negligence of the agents of a receiver who were jointly using the track under a lease. *Denver & R. G. R. Co. v. Roller* (C. C. App. 9th C.) 77

18. A passenger escaped from a wrecked and burning car is not guilty of contributory negligence in failing to close her ears and shut her eyes as to everything that transpires resulting from the collision, while remaining for about thirty minutes upon an embankment to which she has climbed out of a deep trench, although the horrors incident to the collision may thus increase the fright or nervous shock which she sustains. *Denver & R. G. R. Co. v. Roller* (C. C. App. 9th C.) 77

Of freight.

19. The loss of perishable freight on account of lack of proper refrigeration, when shipped in refrigerator cars, renders the railroad company liable to the shipper, although the cars were leased by the railroad company from a transportation company which agreed to keep them properly refrigerated. *New York, P. & N. R. Co. v. Cromwell* (Va.) 462

20. A carrier refusing to accept freight tendered may be held liable for its loss by theft before the owner has opportunity, after notice of refusal, to make some safer disposition of it than to leave it in the warehouse at the wharf. *Seasongood, S., K. & Co. v. Tennessee & O. R. Transp. Co.* (Ky.) 270

21. An agreement between rival carriers, that each will accept only freight destined to points within certain specified limits, will not absolve one from liability to shippers for refusal to accept freight destined for points within another's territory. *Seasongood, S., K. & Co. v. Tennessee & O. R. Transp. Co.* (Ky.) 270

22. That freight is destined to a point beyond its line will not authorize a carrier to refuse to accept it when tendered to it

for transportation. *Seasongood, S., K. & Co. v. Tennessee & O. R. Transp. Co. (Ky.)* 270

23. A carrier which knowingly permits one to act as its agent in such manner and for such length of time as to induce a person of ordinary prudence to believe that such assumed agent is in fact a general agent will be bound by his acts within the apparent scope of his authority. *Seasongood, S., K. & Co. v. Tennessee & O. R. Transp. Co. (Ky.)* 270

Liens.

24. The lien of a common carrier for his charges upon property carried is not defeated by an assignment made for the benefit of creditors by the owner of the property shipped. *Caye v. Fabel (Ky.)* 251

25. A delivery by a common carrier, to an assignee for creditors, of property subject to the carrier's lien, is for the benefit of all creditors, including the carrier, according to their respective interests, and does not defeat the carrier's right to be paid out of the proceeds of the property. *Caye v. Fabel (Ky.)* 251

26. A fund arising from the collection, by an assignee for creditors, of money on a contract, in the performance of which property subject to a carrier's lien has been used, is chargeable with such lien. *Caye v. Fabel (Ky.)* 251

Limiting liability.

27. The prohibition against contracts by common carriers for relief against their common-law liability, which is contained in Ky. Const. § 196, does not make it unlawful for a railroad corporation created by the authorities of that state to make a contract in another state limiting its liability for a transportation of goods between points in other states, and which is to be performed entirely outside of the state of Kentucky. *Tecumseh Mills v. Louisville & N. R. Co. (Ky.)* 557

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See also ACTION OR SUIT, 2-4.

CONFLICT OF LAWS.

See also ADMIRALTY, 2; CARRIERS, 27; COURTS, 4, 8; RECEIVERS, 5, 6.

1. In all cases where a court is called upon to give effect to a right dependent upon a foreign statute, it involves the enforcement of foreign law, and its action in that regard depends upon the rule of comity. *Finney v. Guy (Wis.)* 486

2. A statute of a state in which a railroad employee is injured, providing that proof of a defect in an appliance shall be presumptive evidence of knowledge thereof on the part of a railroad company, does not govern in an action brought for the injury in another state. *Jones v. Chicago, St. P. M. & O. R. Co. (Minn.)* 640

3. The law of the place where the death occurred, and not where the accident happened, governs in an action for death by wrongful act. *Rundell v. Compagnie Générale Transatlantique (C. C. App. 7th C.)* 92

4. To make the law of a flag under which a ship was sailing applicable to an action

for death of a passenger by drowning while upon the high seas, the drowning must be shown to have been upon the vessel. *Rundell v. Compagnie Générale Transatlantique* (C. C. App. 7th C.) 92

5. Policies of insurance made and executed in New York, reciting that they are payable there, and that premiums are to be paid there, and containing a waiver of the service of notices required by statute, which reference is to a New York statute, are to be governed by the laws of that state, where the applications therefor recite that they are subject to the laws of New York, although they are made in another state where the applicant resides and where the policies are delivered to him by an agent of the insurer upon payment of premiums. *Mutual L. Ins. Co. v. Dingley* (C. C. App. 9th C.) 132

6. The liability imposed by statute upon stockholders for debts of the corporation is contractual as well as statutory, and may be enforced in foreign jurisdiction, if the statute requires no preliminary local proceedings to adjust equities. *Howarth v. Lombard* (Mass.) 301

7. No action will lie in courts out of the state to enforce liability of stockholders for corporate debts, where the statutes imposing such liability provide a single method of enforcing it by one suit in the state courts in favor of all creditors and against the corporation, if it has assets, and all stockholders. *Finney v. Guy* (Wis.) 486

8. Collection may be made from stockholders wherever they may be found, after the preliminary proceedings required by statute, and the adjustment of the rights and liabilities of the corporation, creditors, and stockholders, under a statute imposing liability for corporate debts upon stockholders after proceedings showing the insolvency of the corporation and the need of payment by stockholders to satisfy the claims of creditors. *Howarth v. Lombard* (Mass.) 301

9. Where a statutory right is created, coupled with a specific remedy to enforce it, such remedy is exclusive, and cannot be pursued in foreign jurisdictions. *Finney v. Guy* (Wis.) 486

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CONSTITUTIONAL LAW.

Delegation of Power to Court of Visitation, see **COURTS**, 3.

Delegation of Power to Appropriate Public Money, see **PUBLIC MONEY**.

As to Rights of Criminals, see **CRIMINAL LAW**.

See also **DISORDERLY PERSONS**; **FREEDOM OF SPEECH AND PRESS**.

1. A state's forbidding the use of the national flag for advertising purposes is an interference with the constitutional privileges and immunities of citizens of the United States. *Ruhrstrat v. People* (Ill.) 181

2. A municipal ordinance making it a misdemeanor for a woman to go into any building where liquor is sold, or to stand within 50 feet of such building, is void as an unnecessary interference with individual liberty. *Gastineau v. Com.* (Ky.) 111

Equal protection or privileges.

3. An unconstitutional discrimination is made by the law which permits the use of the national flag for public or private exhibitions of art, but forbids its use, under penalty, for advertising purposes generally. *Ruhrstrat v. People* (Ill.) 181

4. Discrimination in favor of the graduates of a regular college of dentistry, in a statute requiring graduates of other universities or colleges authorized to grant diplomas in dental surgery to be examined with reference to qualifications, is not an arbitrary and unconstitutional discrimination in violation of U. S. Const. 14th Amend. and Md. Declaration of Rights, art. 23. *State v. Knowles* (Md.) 695

Due process of law.

Due Process in Assessment for Public Improvement, see **PUBLIC IMPROVEMENTS**, 9, 10.

5. A determination against the claim of a right to an office is not a deprivation of life, liberty, or property within the provision of U. S. Const. 14th Amend., as to due process of law. *Taylor v. Beckham* (Ky.) 258

6. The lien given to a subcontractor, materialman, or laborer by Ky. act March 1896 (Ky. Stat. § 2463), though given irrespective of any notice of the claim or of the state of the account between the owners and the contractors, is not unconstitutional, as to future contracts, as a taking of one man's property to pay the debt of another without giving any day in court, or as an unwarrantable interference with the right to make contracts. *Hightower v. Bailey* (Ky.) 255

7. The drainage of agricultural lands by "necessary drains, ditches, and dykes upon the lands of others, under proper restrictions, and upon just compensation," for which pro-

vision may be made by general laws under the amendment of N. Y. Const. art. 1, § 7, adopted in 1894, is a taking of private property for a private use, in violation of U. S. Const. 14th Amend., prohibiting a state from depriving any person of his property without due process of law. *Re Tuthill* (N. Y.) 781

Police power.

Authorizing Compulsory Vaccination, see VACCINATION, 1.

8. The police power does not extend to the prohibition of the use of the national flag for advertising purposes. *Ruhrstrat v. People* (Ill.) 181

9. When the police power is exerted for the purpose of regulating a useful business or occupation and the mode in which that business may be carried on or advertised, the legislature is not the exclusive judge as to what is a reasonable restraint upon the constitutional right of the citizen to pursue his calling, or to exercise his own judgment as to the manner of conducting it. *Ruhrstrat v. People* (Ill.) 181

10. The legislature has power to declare that certain acts shall constitute a criminal offense, on the ground that they endanger public morals, although such acts may not be sufficient to sustain an indictment at common law for nuisance or libel. *State v. McKee* (Conn.) 542

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See also CRIMINAL LAW, 3; HABEAS CORPUS, 2.

That the privilege of a witness to refuse to give self-incriminating testimony is subject to abuse cannot be considered by the courts in determining the validity of a conviction for contempt for refusing to answer, further than to guard against such abuses as far as consistent with the maintenance of the right itself. *Ex parte Miskimins* (Wyo.) 831

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By Corporations, see CORPORATIONS, 1-3.

Breach by Water Company to Supply Water for Fire Purposes, see WATERERS.

See also CONSTITUTIONAL LAW, 6.

1. The right of drainage through the lands of another is an easement requiring for its enjoyment an interest in such lands, which cannot be conferred except by deed or conveyance in writing. *Pifer v. Brown* (W. Va.) 497

2. Full performance of the consideration of a contract for real estate, by caring for and supporting the owner until death and then providing for her burial, is sufficient to take the contract out of the statute of frauds, even as to a piece of real estate included in the property of which actual possession has not been taken under the contract, where there is no evidence that anyone else had or claimed possession of it, and there is evidence that the owner had surrendered entire possession of the property, including herself, to the other party to the contract. *Bryson v. McShane* (W. Va.) 527

3. A signature to an agreement by a president of a corporation who is also the general manager may be sufficient when he signs as president without signing also as manager. *Wells, F. & Co. v. Enright* (Cal.) 647

4. An agreement on behalf of a bank, executed by the president and manager, with the approval of its vice president, to waive a defense under the statute of limitations, may be sufficient to bind the bank, although it was not ratified by the directors and they were not aware of its execution, where the entire management of the business was left to the president and vice president, and they were not accustomed to report their actions to the directors, or to ask a ratification thereof, or to first obtain special authority before performing particular acts, while a by-law of the bank provided that the manager should have power to perform all duties which the interests of the bank might require. *Wells, F. & Co. v. Enright* (Cal.) 647

5. A contract by sellers of ice to purchase from another all the ice necessary to carry on their business for a period of five years is not void for uncertainty, and their liability under it cannot be avoided by the transfer of their business within that period, so that they need no more ice under the contract. *Hickey v. O'Brien* (Mich.) 594

6. If machines manufactured under a contract depart from the specifications, with the knowledge and consent of the purchaser, he cannot hold the manufacturer responsible in damages for their failure to work. *J. Thompson Mfg. Co. v. Gunderson* (Wis.) 859

7. Departure from specifications in machines manufactured under a contract will be waived by taking them and failing to give

timely notice of nonacceptance because of noncompliance with the contract. *J. Thompson Mfg. Co. v. Gunderson* (Wis.) 859

8. Recovery for the work done in the partial performance of a contract to move a building may be had where it was entirely consumed by fire after the contract was partly performed. *Angus v. Scully* (Mass.) 562

Consideration.

9. Ample consideration is furnished for contract obligations of a street-railway company to perform the conditions of a contract with a city, by the grant of the privilege of using the streets for an electric railway. *People ex rel. Jackson v. Suburban R. Co.* (Ill.) 650

10. Forbearance to bring suit on a claim is a sufficient consideration for an agreement not to plead the statute of limitations thereto. *Wells, F. & Co. v. Enright* (Cal.) 647

11. The death of a stallion, preventing an exercise of the privilege of return by one who had paid for a fruitless service, with an agreement for the privilege of return during the season, does not create any failure of consideration which will give a right to repayment. *Pinkham v. Libby* (Me.) 693

Validity.

12. An agreement not to plead the statute of limitations is not void as against public policy. *Wells, F. & Co. v. Enright* (Cal.) 647

13. Public policy will not avoid a contract by a municipality to pay for a reasonable length of time a portion of the taxes assessed against a water company, as part consideration for a water supply, merely because the gross and annual amounts to be paid are uncertain and the return to be received is also uncertain, where the contract is limited to the taxes assessed on the property owned by the company at the time of its execution, and on pipe lines, hydrants, and fixtures thereafter laid. *Maine Water Co. v. Waterville* (Me.) 294

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See also *ACTION OR SUIT*, 2; *RELIGIOUS SOCIETIES*, 1.

1. A contract for the purchase of real estate by a religious corporation as a matter of speculation merely is *ultra vires* and void. *Thompson v. West* (Neb.) 337

2. A contract for the employment during life of a person to act in a medical capacity for a life insurance company is not within the authority conferred upon the president and actuary by a by-law empowering them to "appoint, remove, and fix the compensation of each and every person, except agents, employed by the company," where the members of the board of trustees, to whom the management and control of the corporation are given, hold office only for four years each. *Carney v. New York L. Ins. Co.* (N. Y.) 471

3. A corporation cannot ratify a contract which it had not the power to make. *Thompson v. West* (Neb.) 337

4. A stockholder of a corporation is liable for interest on obligations which bear interest, under a statute making him liable for his proportion of the debts of the corporation. *Wells, F. & Co. v. Enright* (Cal.) 647

5. A set-off by a stockholder, of a debt due him from the corporation, cannot be made in an action against him by a creditor of the corporation under S. C. Rev. Stat. 1893, § 1500, providing that the stockholders shall be jointly and severally liable to the creditors of the corporation in an amount not exceeding 5 per cent of their stock, in addition to their share or shares, since there is no mutuality in the claims. *Lauraglen Mills v. Ruff* (S. C.) 448

6. Promoters of a corporation cannot honestly take any remuneration for their services as such, unless a full statement thereof is incorporated in the prospectus, or unless it is voted to them after all the stock has been taken by the public. *Hayward v. Leeson* (Mass.) 725

7. A vote by all the stockholders of a corporation at a time when none but promoters or their nominees are stockholders, authorizing the issuance of paid-up stock to the promoters for their services, is not sufficient to validate such issuance. *Hayward v. Leeson* (Mass.) 725

8. It is a fraud for promoters to undertake to decide for the future stockholders in the corporation to be organized, that one third of the whole capital stock is a fair remuneration for their services, to issue that amount to themselves as such remuneration, and then to invite the public to subscribe to the stock without disclosing that fact and getting the subscribers' consent to the payment of that remuneration. *Hayward v. Leeson* (Mass.) 725

9. Stock taken by promoters for services, in fraud of the rights of future stockholders, may be followed by the corporation, and the shares or their proceeds recovered in the promoters' hands, or damages for their loss. *Hayward v. Leeson* (Mass.) 725

10. Expenses of organization paid by promoters may be deducted by them in accounting for stock fraudulently taken by them in payment for services as promoters. *Hayward v. Leeson* (Mass.) 725

11. The value of stock fraudulently taken by promoters for services, for which they are required to account to the corporation, is to be fixed, not as of the time of the taking, when it had no value, but at the time when, by the launching of the corporation, its value was established. *Hayward v. Leeson* (Mass.) 725

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resulting from the unwarranted procedure of a committee of a board of trade, where property rights are involved. *Ryan v. Cudahy* (Ill.) 353

2. Courts will not interfere to control the enforcement of by-laws of voluntary associations for the discipline of members who have assented to them, where they infringe no public policy or rule of law, and are not unreasonable. *Green v. Chicago Bd. of Trade* (Ill.) 365

3. An act creating a court of visitation, and giving it jurisdiction to try and determine all questions as to what are reasonable freight rates, switching charges, etc., with power to establish rates for the future, apportion charges between connecting carriers, require the construction and maintenance of depots, and make other regulations for the operation of railroads,—is unconstitutional and void as an attempt to confer legislative and administrative power upon a judicial tribunal. *State ex rel. Godard v. Johnson* (Kan.) 662

4. Courts in California have jurisdiction of the subject-matter of an action by a passenger against a foreign railroad company for injuries sustained by collision on its railroad in another state, under the provisions of Cal. Code Civ. Proc. § 395, providing for trial in any county which the plaintiff may designate, if the defendants do not reside in the state, and § 411, providing for service of summons on an agent of the corporation. *Denver & R. G. R. Co. v. Roller* (C. C. App. 9th C.) 77

5. A court is not deprived of jurisdiction to grant an injunction against numerous persons, many of whom live within the county, against the violation of an exclusive ferry franchise for a ferry across a river which is a boundary of the county, merely because the franchise has been granted by the county court of the adjoining county. *Warren v. Tanner* (Ky.) 248

Judges.

6. Husbands of an aunt and niece are so related to each other by affinity as to disqualify the one from sitting as a judge in a case in which the other is an interested party, under Fla. Rev. Stat. § 967. *State, ex rel. Perez v. Wall* (Fla.) 548

Rules of decision.

7. The courts will not construe language so as to invalidate an act, when it is fairly susceptible of a construction consistent with validity, but will give effect to a legitimate legislative purpose plainly indicated, if it can reasonably be done. *State v. McKee* (Conn.) 542

8. The construction of a statute creating stockholders' liability for corporate debts, by the state courts, will not be followed in other states, if to do so would be unjust to their citizens and violate the policy of their laws. *Finney v. Guy* (Wis.) 486

9. The construction of a statute imposing liability upon stockholders for debts of a corporation, made by the highest court of the state in which it was enacted, is binding

upon the courts of another state in which it is sought to be enforced. *Howarth v. Lombard* (Mass.) 301

10. The rules of evidence in the Federal courts are questions of general law, not controlled by state decisions. *Garrett v. Southern R. Co.* (C. C. App. 6th C.) 645

11. The question of the validity of municipal bonds is one of commercial law, upon which the Federal courts are bound to exercise their own judgment. *Huron v. Second Ward Sav. Bank* (C. C. App. 8th C.) 534

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CRIMINAL LAW.

Right of State to Appeal, see **APPEAL AND ERROR**, 5, 6.

See also **EVIDENCE**, 37.

1. A trial without arraignment of the accused, or a waiver of it by him, and without a plea of not guilty, or the entry of it for him, does not put the accused in jeopardy so as to entitle him to plead a former acquittal or conviction to a subsequent trial for the same offense. *State v. Rook* (Kan.) 186

2. A court loses jurisdiction of an accused person by wrongfully interpreting his constitutional rights or immunities against him, or by refusing him a constitutional right, so that its judgment against him is void. *Ex parte Miskimins* (Wyo.) 831

3. When any constitutional right or immunity of accused is violated in a proceeding for contempt in refusing to give testimony, a judgment of conviction is void. *Ex parte Miskimins* (Wyo.) 831

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DAMAGES.

Conclusiveness of Assessment on Appeal, see **APPEAL AND ERROR**, 12.

From Negligent Construction of Subway, see **EMINENT DOMAIN**, 3.

See also **APPEAL AND ERROR**, 12; **TRIAL**, 17.

1. Seven thousand dollars is not so grossly excessive as to require interference by the appellate court, as damages for injuries to an intending railway passenger by a mail bag thrown through the station window, which injuries were very painful, and caused permanent disfigurement and loss of sight of one eye. *Shaw v. Chicago & G. T. R. Co.* (Mich.) 308

2. Substantial damages may be recovered for an instantaneous death caused by wrongful act, under a statute providing that all causes of action for injuries to the person of a decedent, whether the same do or do not instantaneously or otherwise result in death, shall survive to his executor or administrator. *Broughel v. Southern New England Teleph. Co.* (Conn.) 404

3. Lost profits on the entire lot of machines cannot be recovered for failure to manufacture them according to the specifications of the contract, where one, at least, has been accepted and paid for. *J. Thompson Mfg. Co. v. Gunderson* (Wis.) 859

4. Injuries caused by fright or shock resulting from a bodily injury in connection with a railroad collision, the accompanying explosion, fire, and wreck of cars, and the surrounding circumstances directly connected therewith and solely attributable thereto, may be included in a recovery of the damages sustained in the accident. *Denver & R. G. R. Co. v. Roller* (C. C. App. 9th C.) 77

5. No damages for injury to feelings can be recovered in an action for conspiracy in pursuance of which the hearse and carriages were taken away from a funeral just at the time when they were needed, since there is no physical injury with which the injury to feelings is connected. *Gatzow v. Buening* (Wis.) 475

Punitive.

6. Compelling the withdrawal of a hearse and carriages from a funeral just at the time when they were wanted, in pursuance of an unlawful by-law of a liverymen's association which prohibited doing business with any person who did not deal exclusively with its members, will justify an award of exemplary damages, where the act was done with full knowledge of the situation, and for the purpose of demonstrating the power of the association to punish liverymen for doing business in an independent way, and to punish other persons for dealing with nonunion liverymen. *Gatzow v. Buening* (Wis.) 475

7. Punitive damages may be awarded for injuries sustained in consequence of an ejection from a street car for refusal to pay fare, where the ejection was unwarranted and arbitrary, causing serious injuries to the passenger, who shortly afterwards suffered from

an attack of pneumonia, the severity of which was to some extent due to his injuries and the condition of his system in consequence thereof. Nashville Street R. Co. v. Griffin (Tenn.) 451

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To Note, see BILLS AND NOTES, 7-9.

DEFINITIONS.

The term "conspiracy" cannot be predicated of the deliberate vote of a governing body. Lawson v. Hewel (Cal.) 400

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To Appropriate Public Money, see PUBLIC MONEY.

DEMURRER.

See PLEADING, 6.

DENTIST.

See also CONSTITUTIONAL LAW, 4; STATUTES, 7.

A statute providing that any person desiring to practise dentistry may be examined "with reference to qualifications" by the board of medical examiners will not be held unconstitutional on the ground that its language is so vague and indeterminate as to permit an examination upon any subject, since it will be presumed that the qualifications referred to are those appropriate to and requisite for the practice of dentistry. State v. Knowles (Md.) 695

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See PLEADING, 9, 10.

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DIRECTING VERDICT.

See TRIAL, 15.

DIRECTORS.

Of Association, see ASSOCIATIONS, 12.

Of Bank, Liability of, see BANKS, 1, 2.

DISORDERLY PERSONS.

An ordinance making it unlawful for any person to associate, escort, converse, or loiter with any female known as a common prostitute, either by day or by night, upon any of the streets or alleys of the city, except her husband, father, brother, or other male relative, is invalid, as there can be no good reason in exempting any other male relative than the husband, father, or brother from its provisions, or for failing to give her mother and sister the same privilege allowed to the father or brother, while any person should be allowed to converse with her long enough to transact any necessary and legitimate business. Hechinger v. Maysville (Ky.) 114

DIVORCE.

See APPEAL AND ERROR, 3; EVIDENCE, 28.

DOCUMENTARY EVIDENCE.

See EVIDENCE, 12-18.

DOMICIL.

Placing her husband in a home for incurables, with his expenses for life and for burial paid, does not entitle a woman to acquire a separate domicile which will give jurisdiction to a probate court, notwithstanding a statutory provision that in actions for divorce the presumption of law that the domicile of the husband is that of the wife does not apply. Re Wickes (Cal.) 138

DOUBLE TAXATION.

See HIGHWAYS, 2.

DOWER.

The right to dower which a former wife "divorced without alimony, where she is the innocent party," is given by Conn. Gen. Stat. § 618, does not exist in favor of any former wife of a man who had another lawful wife at the time of his death, since that section gives the right first to a woman "living with her husband at the time of his death," and the provision for the divorced wife, when construed in connection with § 2803, permitting both parties to marry again, and § 630, providing for the shares of husband and wife in the distribution of intestate estates, shows the intent to give dower to the lawful wife surviving, if any, and to no one else. Brown's Appeal (Conn.) 144

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Dower; of divorced wife. 144

DRAINS.

Drainage; Mode of Transferring Right of Drainage, see **CONTRACTS**, 1.

See also **CONSTITUTIONAL LAW**, 7; **LICENSE**, 1.

The assessment of the expense of constructing a drain upon other landowners deemed benefited thereby, as well as upon the petitioner, for which provision is made by N. Y. Laws 1895, chap. 384, permitting an owner of agricultural lands to institute proceedings for the drainage of such lands, or the protection thereof from overflow, by the construction of drains or dykes upon the lands of other persons, is not authorized by N. Y. Const. art. 1, § 7, providing for the passage of general laws for the construction of such drains and dykes, since the Constitution contemplates that the expense shall be borne by the petitioner. *Re Tuthill* (N. Y.) 781

DRUNKENNESS.

See **NEGLIGENCE**, 5.

DUE PROCESS OF LAW.

Assessment for Local Improvement as Taking Property without, see **PUBLIC IMPROVEMENTS**, 9.

See also **CONSTITUTIONAL LAW**, 5-7.

EASEMENTS.

Mode of Conveying, see **CONTRACTS**, 1.

An easement in an alley across the rear end of an adjacent lot is created as incident or appurtenant to a building sold by the common owner, when the alley furnishes access to a cellar under the building, as well as light and air for the rear portion of it. *Irvine v. McCreary* (Ky.) 417

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EJECTION.

See **CARRIERS**, 4, 7.

ELECTIONS.

See **VOTERS AND ELECTIONS**.

ELECTRICAL USES.

Failure to insulate electric-light wires extending across a street, at and above the point where they were fastened to a wooden awning 16 feet above the level of the street, does not render the electric-light company liable for the death of a person by contact therewith while upon the awning for the purpose of raising the wires to permit the passage thereunder of a house which he was 40 L. R. A.

engaged in moving, where the awning was not used as a place of resort, and it could not reasonably have been expected that anyone would ever be upon it, and the height at which the wires were strung precluded the possibility of any traveler upon the street coming in contact with them. *Brush Electric Light & P. Co. v. Lefevre* (Tex.) 771

NOTES AND BRIEFS.

Negligence in touching wires. 771

EMINENT DOMAIN.

Assessment for Full Amount of Compensation for Land Taken, see **PUBLIC IMPROVEMENTS**, 10.

1. A telephone company organized under Tex. Rev. Stat. 1891, § 642, subd. 8, providing that a corporation may be formed to construct and maintain "a telegraph and telephone line," which statute, as it formerly read, provided for a corporation to maintain "a telegraph or telephone line," is entitled to exercise the power of eminent domain under Tex. Rev. Stat. 1871, § 699, giving such power to corporations created for the purpose of constructing and maintaining "a magnetic telegraph line." *San Antonio & A. P. R. Co. v. Southwestern Tele. & Teleph. Co.* (Tex.) 459

2. Notice from viewers in an eminent domain proceeding, and an appearance in response thereto, cannot give them any authority to assess damages for injury by negligent construction of the work, as that is not within their jurisdiction. *Stork v. Philadelphia* (Pa.) 600

3. Damage to a dwelling house by settling and cracking of the walls, caused by the improper manner of performing the work of constructing a subway on a street, cannot be assessed as part of the compensation given by Pa. Const. art. 16, § 8, for property "taken, injured, or destroyed" by the construction of public improvements, since those damages extend only to injuries which are the direct, immediate, and necessary or inevitable consequence of the act of eminent domain itself, irrespective of care or negligence in the doing of it. The only appropriate remedy for injury by negligent performance of the work is by action of trespass. *Stork v. Philadelphia* (Pa.) 600

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Drainage of private lands as public purpose for which power of eminent domain may be exercised:—Taking must be for public purpose; necessity; what is public purpose; public health; reclamation of large tracts; for all drainage purposes; other purposes; limited public, sufficient; presumption as to public character. 781

Proceeding before viewers; recovering for negligent work. 601

ENTIRETIES.

Created in Letter of Credit, see **HUSBAND AND WIFE**, 1.

ENTRY.See **LANDLORD AND TENANT**, 3.**ERROR.**See **APPEAL AND ERROR**.**ESTOPPEL.**By Recitals in Bonds, see **BONDS**, 1-3.
See also **INSURANCE**, 5.

1. Voluntary submission by a member of a board of trade to a trial of a dispute by a committee under rules of the board estops him from denying the jurisdiction of the committee either in respect to person or subject-matter. *Ryan v. Cudahy* (Ill.) 353

2. An equitable estoppel to assert a claim on an insurance policy will not arise from the default of the assured in the payment of premiums, or his acquiescence in the claim that the policy has lapsed, when the relation of the parties has not been changed thereby, and the insurer has not done or refrained from doing any act to its injury, in reliance thereon. *Mutual L. Ins. Co. v. Dingley* (C. C. App. 9th C.) 132

3. An electric street-railway company which takes and retains all the advantages and benefits of an ordinance under which it is permitted to operate its road in the streets cannot escape the performance of duties to the public imposed upon it by the ordinance, on the ground that the ordinance and the duties imposed by it are *ultra vires* both the municipality and the railway company. *People ex rel. Jackson v. Suburban R. Co.* (Ill.) 650

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EVIDENCE.

Presumption that Word Used in Same Sense throughout Statute, see **STATUTES**, 6.

See also **COURTS**, 10.

Judicial notice.

1. The United States courts take judicial notice of all the public statutes of the several states. *Mutual L. Ins. Co. v. Hill* (C. C. App. 9th C.) 127

2. A Federal court in which an action is brought will take judicial notice of all the statutes of the several states of the Union. *Mutual L. Ins. Co. v. Dingley* (C. C. App. 9th C.) 132

3. The court does not judicially know that the art of burning coal in a locomotive, and of providing preventives for the emission of sparks, has reached the stage of perfection that it is improbable that a fire could be communicated except through the negligence of the railroad company, either in the construction or the operation of the locomotive. *R. A.*

Garrett v. Southern R. Co. (C. C. App. 6th C.) 645

Presumptions and burden of proof.

4. The burden of showing facts which justified noncompliance with an ordinance requiring vaccination is upon the one refusing to comply. *State v. Hay* (N. C.) 588

5. In an action by an indorsee of a promissory note, where its illegality is established, he has the burden of showing that he is an innocent holder for value before maturity. *Thompson v. West* (Neb.) 337

6. The presumption of negligence on the part of a railroad company is not raised, as matter of law, by mere proof that sparks from its locomotive set fire to adjacent property. *Garrett v. Southern R. Co.* (C. C. App. 6th C.) 645

7. A presumption of negligence on the part of the railroad company arises from the fact that sparks have issued from a passing locomotive, of such size and in such volume as to kindle a fire and destroy adjacent property. *McCullen v. Chicago & N. W. R. Co.* (C. C. App. 8th C.) 642

8. The presumption against suicide will stand and be decisive of the case until overcome by testimony which shall outweigh the presumption, where a passenger on a sleeping car disappears from it in the night, and is found the next morning dead upon the track, between the rails, with his overcoat on, and the facts exclude every hypothesis except suicide or accident. *Standard L. & A. Ins. Co. v. Thornton* (C. C. App. 6th C.) 116

9. Officers of a bank will be presumed to have had knowledge of its insolvent condition at the time of certain payments to them, attacked as unlawful preferences, where the bank had been insolvent for many years, and became hopelessly insolvent the day following the payments. *James Clark Co. v. Colton* (Md.) 698

10. There is no presumption that contributions to aid the building of a church are intended to be made on condition that the building shall continue to be used for the teaching of the peculiar views then professed by the members of the church or declared by the religious body to which it belongs. *First Baptist Church v. Fort* (Tex.) 617

11. It must be presumed that the legislature did its duty and had before it such evidence as was satisfactory to it in determining an election contest on a report by a contest board, where the question required evidence and the journals are silent as to what evidence the legislature heard. *Taylor v. Beckham* (Ky.) 258

Documentary evidences.

12. An ordinance requiring vehicles, when meeting and passing, to keep to the right, is admissible in evidence on the question of negligence in a collision. *Foot v. American Product Co.* (Pa.) 764

13. An answer to an interrogatory as to usury, in a suit to enjoin enforcement of a bond in which no interest is provided for

until maturity, but usurious interest afterwards, which states that legal interest until maturity made up part of the face of the bond, and that the illegal interest was a penalty for not paying at maturity, will not be excluded from evidence for contradicting the bond. *Ward v. Cornett* (Va.) 550

14. An answer denying usury, directly responsive to the special interrogations of a bill of discovery in aid of an injunction suit against a sale under a deed of trust securing a bond, is to be taken as evidence in favor of defendant. *Ward v. Cornett* (Va.) 550

15. The possibility that a letter written after the commencement of an action may be manufactured evidence goes to its weight, not its competency. *Weston v. Barnicoat* (Mass.) 612

16. A letter declining to deal with one because his name is on the black list is not inadmissible in an action for placing it there, because it contained a compliment to the one to whom it was written, the plaintiff in the action. *Weston v. Barnicoat* (Mass.) 612

17. Letters declining to deal with one because his name is on the black list, written after the beginning of an action for damages for placing it there, are proper evidence in the action, since all damages must be included in one recovery. *Weston v. Barnicoat* (Mass.) 612

18. The whole paper alleged to have been sold must go to the jury in a prosecution for unlawfully selling a paper devoted to the publication of criminal news. *State v. McKee* (Conn.) 542

Photographs.

19. Photographs of a railroad wreck are admissible for the purpose of enabling witnesses to explain their testimony as to the facts, or to assist the jury in arriving at a better understanding of such testimony. *Denver & R. G. R. Co. v. Roller* (C. C. App. 9th C.) 77

Opinions.

20. Expert evidence as to what appliances are safe and what are unsafe is not admissible in an action by a teamster to recover from his employer for injuries caused by short lines and absence of a wagon seat. *Limberg v. Glenwood Lumber Co.* (Cal.) 33

21. An opinion by a physician that the condition of a patient is the result of injury and shock of some sort is not incompetent, when it is derived from his own knowledge, attendance, treatment, and examination of the patient, though based in part upon her statements and complaints, made at different times, as to her pains and sufferings. *Denver & R. G. R. Co. v. Roller* (C. C. App. 9th C.) 77

22. A hypothetical question need not embrace or cover all the facts in the case, when it assumes the existence of a state of facts which the evidence directly, fairly, and reasonably tends to establish or justify, and does not transcend the range of evidence. 49 L. R. A.

Denver & R. G. R. Co. v. Roller (C. C. App. 9th C.) 77

Admissions.

23. An admission that an injury was caused by an accident, and not by negligence of a railroad company, made by the injured person, who subsequently dies of the injuries, may be proved on behalf of the defendant in an action by his widow against the railroad company for damages on account of his death. *Georgia R. & Bkg. Co. v. Fitzgerald* (Ga.) 175

Res gestæ.

24. Evidence as to what was seen and heard after a passenger left a burning and wrecked car and climbed out of a deep trench, up a steep embankment, where she remained about thirty minutes while the cars were burning and injured persons were being brought up, is part of the *res gestæ*, and competent evidence on the question of fright or nervous shock sustained by the passenger. *Denver & R. G. R. Co. v. Roller* (C. C. App. 9th C.) 77

Relevancy.

25. Evidence assailing the integrity of legislative journals, which the Constitution requires to be kept, by showing the falsity of entries as to the presence of members when determining an election contest, is inadmissible, since the court is without jurisdiction to go behind the record made by the legislature under the Constitution. *Taylor v. Beckham* (Ky.) 258

26. Evidence of a certificate issued by the city clerk as to assessed valuation of the property in the city and the amount of indebtedness is not admissible in an action to enforce payment of bond coupons, where it does not appear that the holder of the bonds ever saw or relied upon it. *Huron v. Second Ward Sav. Bank* (C. C. App. 8th C.) 534

27. On the trial of an issue of fact, where the bona fides of a claim is challenged, it is competent to prove that on a former trial of the same issue, in which the party whose claim is challenged testified to an entirely different state of facts, he produced, also, a witness to corroborate his statement. The evidence is not to be received as affirmative proof of what was deposed, but as discrediting such party. *Bageard v. Consolidated Traction Co.* (N. J. Err. & App.) 424

28. Evidence of the habits or condition of defendant subsequent to the commencement of the action is admissible for the defense in an action for divorce on the ground of habitual intemperance, since a divorce concerns the state as well as the parties, and the condition justifying it must be found to exist at the very time when the divorce is granted. *Allen v. Allen* (Conn.) 142

29. Evidence of a railroad company's rule in relation to running switches is inadmissible in an action against the company for negligence in "kicking" a car, in the absence of evidence to show that a running switch and a kick are the same. *Georgia R. & Bkg. Co. v. Fitzgerald* (Ga.) 175

30. Evidence that other persons had been struck by mail thrown onto the platform is admissible in an action for injuries to an intending passenger by a mail bag going through the station window; and its admission cannot be made erroneous by merely showing on cross-examination that such accidents were at remote periods of time, but advantage of that fact must be taken by motion to strike out or to limit. *Shaw v. Chicago & G. T. R. Co.* (Mich.) 308

31. To render previous acts of a mail agent in ejecting mail from a moving train admissible in evidence in an action for injuries caused by the bag going through a window in the station building and injuring an intending passenger, it is not necessary that they show the prior occurrence of such an accident; it is sufficient if they indicate that in common prudence the carrier ought to have anticipated that such an accident was liable to happen. *Shaw v. Chicago & G. T. R. Co.* (Mich.) 308

32. Evidence that a navigation company had an agreement with contractors who were blasting near a wharf, under which it used the wharf at its own peril, is inadmissible in an action against the contractors by a person who was injured by the blasting while he was a passenger on a boat at the wharf. *Smith v. Day* (C. C. App. 9th C.) 108

33. Evidence that the shortness of lines was remedied after injury to the teamster, because thereof, is not admissible in an action to recover for the injury. *Limberg v. Glenwood Lumber Co.* (Cal.) 33

34. Evidence that land declined in value after maturity of a note given for the purchase money is immaterial in an action on the note. *Horne v. Rodgers* (Ga.) 170

35. Evidence that property under encumbrance is not ordinarily marketable is inadmissible for defendant in an action on a note given for purchase money with knowledge of the encumbrance. *Horne v. Rodgers* (Ga.) 176

36. A general denial by an insurer that the insured has performed all or any of the conditions of his contract, when coupled with a specific averment of particulars in which he has failed to perform, will not permit proof of failure in other particulars. *Mutual L. Ins. Co. v. Dingley* (C. C. App. 9th C.) 132

37. Evidence in support of a plea of the statute of limitations may be given under the issue of not guilty, as a defense to an information for crime. *State v. Rook* (Kan.) 186

Weight; sufficiency.

38. Evidence to prove usury must be such as to establish it beyond a reasonable doubt. *Ward v. Cornett* (Va.) 550

39. The death of a passenger on a sleeping car is not so palpably one of suicide as to compel the jury to reach that conclusion, where he disappeared from the car during the night, and was found the next morning, with his overcoat on, on the railroad track, between the rails, face down, with head

towards the direction in which the train was going, with his arms stretched above his head, and his feet between the cross ties, while there was an injury upon his skull sufficient to produce death, and a small quantity of blood on the cross ties between the rails, although there was evidence that he had, some months before, resigned his position under charges affecting his character, and some conflict in the evidence as to whether he was despondent or not, but he was in good credit, and not in danger of want. *Standard L. & A. Ins. Co. v. Thornton* (C. C. App. 6th C.) 116

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See also ACTION OF SUIT, 1; DOMICIL; INTEREST, 2.

1. A decree on the settlement of an executor's account is binding on his sureties. *Judge of Probate v. Sulloway* (N. H.) 347

2. An executor's sureties are not bound by a decree on the settlement of the account of an administrator *de bonis non* of testator's estate. *Judge of Probate v. Sulloway* (N. H.) 347

3. Sureties upon an executor's bond are liable for the payment of his personal debt to the testator, although he is insolvent, under a statute making such debt assets in his hands for which he must account in the same way and manner as for a debt against any other person. *Judge of Probate v. Sulloway* (N. H.) 347

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See RAILROADS, 1, 2, NOTES AND BRIEFS.

FERRY.

See also COURTS, 5.

A ferry established by numerous persons who buy ferry boats and hire a person to run the ferry, within limits for which an exclusive franchise has been granted to another party, violates his exclusive privilege although their ferry is established exclusively for themselves and their families. *Warren v. Tanner* (Ky.) 248

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FREEDOM OF SPEECH AND PRESS.

Prohibiting Publication of Criminal News, see NEWSPAPERS.

An act making it a penal offense to sell, or offer to sell, lend, or give a paper principally made up of criminal news, police reports, and pictures and stories of bloodshed, lust, and crime, does not violate Conn. Const. art. 1, § 5, providing that every citizen may freely speak, write, and publish his sentiments on all subjects, or § 6, providing that no law shall be passed to restrain the liberty of speech or of the press. *State v. McKee* (Conn.) 542

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Prohibiting Colored Netting for, see MUNICIPAL CORPORATIONS, 3.

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Damages for Taking away Hearse at, see DAMAGES, 5, 6.

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GARNISHMENT.

A balance of the proceeds of a sale of attached perishable property remaining in the hands of the clerk of the court after payment of an execution in favor of the plaintiff cannot be garnished by a creditor of the defendant, as the clerk continues to be the le-

gal custodian of the money in his official capacity under control of the court. *Allen v. Gerard* (R. I.) 351

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Garnishment; of funds in registry of court. 351

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Compelling Furnishing of, see *MANDAMUS*, 1.

City's Liability for Injury from, see *MUNICIPAL CORPORATIONS*, 10; *NEGLIGENCE*, 1.

See also *PARTITION*.

A rule of a gas company, consented to by the consumer, that it will cease to furnish gas when a consumer becomes delinquent in paying bills therefor, may be enforced by discontinuing the gas supply at one set of premises until payment of a delinquent bill for gas previously furnished the consumer at another set. *Mackin v. Portland Gas Co.* (Or.) 596

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Gas; compelling supply of, by gas company; rule as to cutting off supply. 597

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In Railroad Fences; see *RAILROADS*, 1, 2, *NOTES AND BRIEFS*.

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Of Signatures on Note, Warranty of, see *BILLS AND NOTES*, 7.

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Gifts; *inter vivos*; by husband to wife. 444

GOVERNOR.

1. The death of a governor elect pending a contest to determine the election of governor and lieutenant governor will not defeat the right of the person elected lieutenant governor to have the contest determined and thus entitle him to the office of governor. *Taylor v. Beckham* (Ky.) 258

2. The governor has no power to adjourn the legislature, when there has been no disagreement between the two houses, under Ky. Const. § 36, providing for sessions to be held at the seat of government, "except in case of war, insurrection, or pestilence, when it may, by proclamation of the governor, assemble for the time being elsewhere," which seems to refer, not to an adjournment, but to a provision for a place to assemble and organize, and § 80, authorizing him to adjourn the legislature in case of disagreement between the two houses with respect to the matter. *Taylor v. Beckham* (Ky.) 258

GUARANTY.

Of Genuineness of Signatures on Note, see *BILLS AND NOTES*, 7.

HABEAS CORPUS.

1. The supreme court, having jurisdiction 40 L. R. A.

to issue writs of habeas corpus, may issue a writ to release from imprisonment one entitled to relief, although a writ has been previously refused or dismissed by a lower court, if the statute does not provide for appeal, and plainly contemplates repeated applications for the writ. *Ex parte Miskimins* (Wyo.) 831

2. Want of jurisdiction to punish a witness for contempt for refusing to answer questions tending to incriminate himself, because punishment will violate his constitutional rights, will entitle him to release on habeas corpus in case of imprisonment, although the conviction might be reviewed by writ of error. *Ex parte Miskimins* (Wyo.) 831

HEALTH.

See *VACCINATION*.

HEIRS.

Enforcing Contract for Support against, see *SPECIFIC PERFORMANCE*, 1.

HIGHWAYS.

Assessing Farm Land for Cost of, see *PUBLIC IMPROVEMENTS*, 11.

Negligence of Bicycle Rider on, see *NEGLIGENCE*, 2-4.

See also *PUBLIC IMPROVEMENTS*, 10.

1. Power to regulate the use of streets does not authorize the exaction of a license fee for their use by private vehicles. *Chicago v. Collins* (Ill.) 408

2. Invalid double taxation is effected by imposing a license tax for the benefit of the highway fund upon vehicles for which an ad valorem tax has already been paid equal to that assessed upon other personal property in the city. *Chicago v. Collins* (Ill.) 408

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Highways; invalid permit to move building in. 772

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HUSBAND AND WIFE.

Dower of Divorced Wife, where Other Wife Living at Husband's Death, see *DOWER*.

See also *APPEAL AND ERROR*, 3; *DOMICIL*; *EVIDENCE*, 28.

1. A letter of credit in favor of husband and wife, purchased with the husband's money, creates an estate by entireties, so that in case of his death the balance may be drawn by her without accounting therefor to his estate. *Re Parry* (Pa.) 444

2. That a wife is living in the same house with her husband, and performing some of the duties of a wife, will not prevent her from maintaining a suit for separate maintenance under a statute permitting such suit "when the husband fails, without just cause, to furnish suitable support for his wife," where the

contingency of the parties living apart is made a separate ground for the suit. *Bucknam v. Bucknam* (Mass.) 735

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Incompetent persons; insanity of member as affecting decision of lodge against him. 371

INDEPENDENT CONTRACTOR.

Physician Acting for Defendant in Examining Plaintiff, see PHYSICIANS, 2.

INDICTMENT.

1. An exception in a statute, after general words of prohibition, is matter of defense, which must be interposed by the accused in a prosecution for a violation of the statute, and need not be negated by the indictment. *State v. Knowles* (Md.) 695

2. A complaint under Conn. Pub. Acts 1895, p. 558, prohibiting the sale of papers, books, or magazines devoted to the publication of criminal news, police reports, or pictures or stories of deeds of bloodshed, lust, and crime, is sufficient if the offense is charged in the words of the statute, and it need not state that the prohibited matter is obscene, blasphemous, scandalous, or libelous. *State v. McKee* (Conn.) 542

NOTES AND BRIEFS.

Indictment; allegations of concealment. 187

INFANTS.

Parent's Duty to Pay Fare, see CARRIERS, 3-5.

See also NEGLIGENCE, 4.

An infant is not liable in tort for false representations as to his age, whereby he obtains credit in the purchase of goods. *Slayton v. Barry* (Mass.) 560

NOTES AND BRIEFS.

Infants; liability for false representations as to age. 560

INFRINGEMENT.

Of Patent, Enjoining Threat to Sue for, see INJUNCTION, 1.

INJUNCTION.

See also COURTS, 5.

1. Letters or notices sent out by the owner 49 L. R. A.

of a patent for the purpose of destroying the business of another by threatening the latter's agents and customers with suits for infringement, when this is not done in good faith to warn against infringement, but in bad faith and solely for the purpose of destroying the business of another, is a fraudulent attack upon property rights, against which a court of chancery should not refuse protection. *A. B. Farquhar Co. v. National Harrow Co.* (C. C. App. 3d C.) 755

2. An injunction to restrain a chapter of Royal Arch Masons from proceeding with the trial of charges against a member cannot be granted, when the proceedings are in strict accordance with the rules of the order, on the ground of the invalidity of the rule which the member is charged with violating, because it was adopted as the result of a conspiracy in the furtherance of which the proceedings are being taken. *Lawson v. Hewell* (Cal.) 400

3. Payment of deposited margins in accordance with the decision of a committee of a board of trade may be prevented by injunction, when the committee practically denied a hearing to the defeated party by refusing to hear evidence which he was entitled to have considered under the rules of the board. *Ryan v. Cudahy* (Ill.) 353

4. Equity has jurisdiction of a suit by a large number of taxpayers to enjoin a municipality from enforcing a void ordinance imposing a tax on private vehicles, which would affect thousands of persons, although a remedy at law may exist by suit to recover back the tax after paying it. *Chicago v. Collins* (Ill.) 408

5. An injunction may be granted against so much of a proposed local improvement as is not authorized by law. *Adams v. Shelbyville* (Ind.) 797

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Injunction; against infringement of trademark. 150

Against trial of member by board of trade. 366

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Dissolution of. 468

INNKEEPERS.

No innkeeper's lien exists upon property of a third person brought to the inn by a guest, under a statute giving a lien on property placed by guests under his care, and providing that effects "belonging to" any person who departs without paying his bill may be sold to satisfy the claim. *McClain v. Williams* (S. D.) 610

NOTES AND BRIEFS.

Innkeepers; lien of; on what property. 610

INSOLVENCY.

Effect on Carrier's Lien, see CARRIERS, 24-26.

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See TRIAL, 16, 17.

INSURANCE.

Necessity as to Pleading Forfeiture of Policy, see PLEADING, 9, 10.

Conclusiveness of Decision as to Amount Due, see ASSOCIATIONS, 14.

Estoppel to Assert Claim on Policy, see ESTOPPEL, 2.

See also ACTION OR SUIT, 5; BENEVOLENT SOCIETIES; CONFLICT OF LAWS, 5; CORPORATIONS, 2.

1. Policies of insurance, like other contracts, should be reasonably construed, so as not to defeat the intention and express language of the parties. *Travelers' Ins. Co. v. Myers* (Ohio) 760

2. The conditions and agreements in a policy of life insurance form the contract between the parties, and will not be varied or controlled by the subsequent course of dealing between them, in the absence of fraud or bad faith. *Union C. L. Ins. Co. v. Buxer* (Ohio) 737

3. Authority to a clerk to deliver insurance policies does not include the delivery of policies upon which the clerk has forged his principal's signature, so as to make the principal responsible for the act. *Bradford v. Hanover F. Ins. Co.* (C. C. App. 3d C.) 530

4. An insurance agent is not liable to the company for loss on a risk which he was forbidden to take, where the policy was issued without his knowledge, consent, or ratification, by a clerk in his office who forged his name to it, where the wrong was not committed for his purposes, and he never consented to profit by it. *Bradford v. Hanover F. Ins. Co.* (C. C. App. 3d C.) 530

5. Merely employing and retaining a clerk in an insurance office, without any ground for suspecting that he would abuse any confidence reposed in him, will not estop the agent from repudiating his act in forging the agent's name to a policy, where he was given no authority to sign the agent's name, and the agent had done nothing to make it appear that such authority was given him. *Bradford v. Hanover F. Ins. Co.* (C. C. App. 3d C.) 530.

6. An agent has no power to waive a stipulation in a policy of insurance against loss from liability for injuries to employees, providing for immediate written notice of any injury, where the policy also provides that no agent shall have authority to waive or alter anything therein contained, since the insured is bound by the terms of the policy. *Travelers' Ins. Co. v. Myers* (Ohio) 760

7. The right of resort to the courts by members of a fraternal organization will not be deemed to be taken away by mere inference; and if it can be done at all it will only 49 L. R. A.

be where the restriction is stated in the clearest and most express terms. *Supreme Lodge of O. of S. F. v. Raymond* (Kan.) 373

8. An agreement by members of a voluntary benefit association, that the decision of its tribunals rejecting a claim to benefits shall be conclusive, is not against public policy as an attempt to oust courts of jurisdiction. *Hembeau v. Great Camp of the K. of M.* (Mich.) 592

9. Loss of value of a cargo due to a bad reputation on account of injury to a part of it is not within the terms of an insurance policy when the damage actually done was below the particular average or partial loss excepted. *Perry v. Cobb* (Me.) 389

10. Damages to a cargo of lime, caused by a shrinking of barrel staves and slacking up of the cooperage, allowing the contents to sift out, and leaving the barrels so tender that they could not easily be hoisted without danger of falling to pieces, is not caused by peril of the sea, if the protracted length of the voyage, due to rough weather, was the proximate cause of the condition of the cargo. *Perry v. Cobb* (Me.) 389

11. A voluntary benefit association which by the contract is given power to pass on claims is not guilty of fraud in rejecting a death claim on the ground of want of interest in the beneficiary, although at the time the beneficiary was designated the local agent assured the applicant that the beneficiary was a "dependent" within the meaning of the contract, if no oppression or bad faith in the ruling of the association is shown. *Hembeau v. Great Camp of the K. of M.* (Mich.) 592.

12. A condition in a life insurance policy to the effect that "in case of default for non-payment of premium after three years, and no legal surrender having been made, the insured having paid at maturity all notes given for premium, then this policy shall, without surrender, but upon payment of all outstanding premium notes, become a paid-up term policy without change of terms or conditions," requires the payment of all outstanding premium notes, though given after three annual premiums have been paid, and is a condition precedent to such policy becoming a paid-up term policy. *Union C. L. Ins. Co. v. Buxer* (Ohio) 737

13. A temporary occupation of the platform of a car by a passenger for a necessary or proper purpose is not a "riding" thereon, within the meaning of a clause in an accident policy which contains a condition against riding on a car platform. *Standard L. & A. Ins. Co. v. Thornton* (C. C. App. 6th C.) 116

14. The share of one of the beneficiaries of a benefit certificate who dies, leaving issue, during the life of the insured, is in the nature of a testamentary gift, and will therefore pass to such issue in accordance with the rule as to a devise or legacy declared by Ky. Stat. § 4841, providing that it shall pass to the issue of a devisee or legatee who dies during the life of testator, although a by-

law of the society is to the effect that the share of a beneficiary who dies during the life of the insured shall go to the other beneficiaries pro rata, since this must be construed, in the light of the statute, to apply only when the deceased beneficiary leaves no issue. Supreme Council C. K. of A. v. Densford (Ky.) 776

Forfeiture.

15. Notice of accrual of premium, as required by N. Y. Laws 1877, chap. 321, is necessary to a forfeiture of a policy for nonpayment of premium, in the absence of which forfeiture cannot be effected by agreement of the parties. Mutual L. Ins. Co. v. Hill (C. C. App. 9th C.) 127

16. Beneficiaries of a life insurance policy subject to the operation of the New York laws requiring notice of accrual of premium before forfeiture for nonpayment will not be bound, in the absence of such notice, by statements of the insured to the company that he cannot pay premiums, and that the company may consider the policy forfeited. Mutual L. Ins. Co. v. Hill (C. C. App. 9th C.) 127

17. Policies issued and delivered by a New York company in another state are subject to the terms of N. Y. Laws 1892, chap. 690, § 92, providing that "no life insurance company doing business in this state" shall declare a policy forfeited without having given prescribed notice. Mutual L. Ins. Co. v. Dingley (C. C. App. 9th C.) 132

18. Oral statements by an insured, recognizing the forfeiture of his policies, and refusing to continue them, when made without any consideration, will not be sufficient to annul the express provisions of a statute prohibiting a forfeiture for nonpayment of premiums without the giving of specified notice. Mutual L. Ins. Co. v. Dingley (C. C. App. 9th C.) 132

19. An insured is not entitled to a loan on his policy, under a provision therein for a loan upon it, after he is in default in the payment of a premium or premium note, where such default works a forfeiture of the policy by its terms and conditions, unless such default is waived by the company. Union C. L. Ins. Co. v. Buxer (Ohio) 737

20. A forfeiture clause in a premium note given by the insured, if more onerous than that in the policy as against the interests of his wife, who is the beneficiary in the policy in case of his death, will not avail the insurance company as against the wife, unless she assents thereto, where the note is given for a premium after the policy has been in force several years. Union C. L. Ins. Co. v. Buxer (Ohio) 737

Notice of injury.

21. Immediate notice of an injury, stipulated for in a contract of insurance against loss from liability for injuries to employees, means notice within a reasonable time. Travelers' Ins. Co. v. Myers (Ohio) 760

22. Delay for nine months to give notice of an injury will defeat a policy of insurance against loss from liability for injuries to employees under circumstances which shall im-

pose upon the insured a common-law or statutory liability, providing that immediate written notice shall be given of any injury, although the notice was sent as soon as a claim was made by the employee on account of the injury, since the stipulation as to notice is of the essence of the contract. Travelers' Ins. Co. v. Myers (Ohio) 760

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Insurance; first and last days in computing time on. 208

Determination as to, by tribunals of association. 353

Liability of agent for act of employee. 530

Effect of conditions in policy; waiver; construction; agent's knowledge. 761

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Power of insured to destroy rights of beneficiary:—(I.) In cases of regular life policies: (a) Generally; (b) assignments; (c) allowing lapse; (d) procuring new policy; (e) procuring surrender value; (f) giving policy by will; (g) Wisconsin cases; (II.) in cases of benefit societies: (a) generally; (b) assignments; (c) allowing lapse or forfeiture; (d) change by surrender; (e) giving certificate by will; (f) alteration of certificate, etc.; (g) power under constitutions, by-laws, contract or statute. 737

Proviso against standing or riding on car platform. 117

On life; forfeiture by failure to pay premiums; statute affecting contract in other state. 129, 134

On life; rescission of contract. 134

Marine; construction of contracts; loss from inherent nature of articles. 390

INTEREST.

See also CORPORATIONS, 4; USURY, 1.
NOTES AND BRIEFS.

1. The difference between the value of land at the time of the assignment of dower and homestead and at the time when those estates fall in is not an increment to the estate, within the meaning of a rule for allowance of interest on advancements up to the amount of an increment to the estate, since the additional value accrues merely by the removal of an encumbrance. Wysong v. Rambo (Tenn.) 766

2. Interest on advancements of land to some of the heirs of a person, which may be charged for the purpose of equalizing the share of another heir, should be allowed only from the death of the ancestor until the lapse of a reasonable time for the settlement of the estate, where the heir whose share is to be equalized failed to take any steps to procure the settlement for many years after the ancestor's death, and in the meantime permitted the other heirs to enjoy the possession of their lands. Wysong v. Rambo (Tenn.) 766

INTOXICATING LIQUORS.

See also CONSTITUTIONAL LAW, 2; NEGLIGENCE, 5.

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Intoxicating liquors; discrimination against women in granting licenses to sell. 111

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JUDGE.

Disqualification of, see COURTS, 6.
See also APPEAL AND ERROR, 4.

JUDGMENT.

Conclusiveness as to Executors' Sureties, see EXECUTORS AND ADMINISTRATORS, 1, 2.

Conclusiveness of Decree Dissolving Corporation, see RECEIVERS, 7.

Setting off Original Claim for Damages after Recovery of, see SET-OFF.

In Other State after Action Commenced, see ACTION OR SUIT, 8.

See also MANDAMUS, 4; PLEADING, 9.

1. A judgment foreclosing a deed of trust cannot be ordered when neither party to the suit has sought a foreclosure, and there is no pleading to sustain it. *First Baptist Church v. Fort* (Tex.) 617

2. A judgment for money and for the foreclosure of a mortgage upon real estate, against a deceased defendant who had theretofore been duly served with process, is void, although the fact of death does not appear of record; and it may be collaterally impeached because thereof by the heirs of the deceased, if not made parties to the foreclosure proceeding, in an action brought by them for the recovery of the land sold and conveyed in satisfaction of the judgment. *Kager v. Vickery* (Kan.) 153

3. A party to a judgment is not bound by it as against strangers to it. *Judge of Probate v. Sulloway* (N. H.) 347

4. A nonresident holder of stock in a corporation is bound by the action of the court in appointing a receiver for it and determining the amount necessary to satisfy the statutory liability of stockholders for its debts. *Howarth v. Lombard* (Mass.) 301

5. A judgment in a statutory proceeding to enforce the liability of stockholders for corporate debts, to which all stockholders within the jurisdiction are required to be parties, and in which all equities between stockholders are required to be settled, is a bar to any other action to enforce such liability, even against stockholders who were out of the jurisdiction and therefore not parties to the action. *Finney v. Guy* (Wis.) 486

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Judgments; first and last days in computing time for rendition and docketing. 224

Effect of judgment entered against dead person:—(I.) Judgments against parties dying before institution of suit; (II.) judgments on confession; (III.) void judgments; (IV.) voidable judgments; (V.) where death 40 L. R. A.

occurs at certain stages of the action: (a) before issue joined; (b) before default taken; (c) after default taken, but before final judgment; (d) before interlocutory order; (e) before verdict, report, or decision; (f) after verdict; (g) after interlocutory order; (VI.) judgment by relation back to time prior to death; (VII.) death of party pending appeal; (VIII.) judgments *in rem*; (IX.) classification by states where death occurs after suit is brought. 153

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As new debt. 286

Against corporation; binding stockholder; effect in other state. 301

Merger of cause of action in. 311

Against stockholders; enforcing in other states. 420

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See EVIDENCE, 1-3.

JURY.

Selection and Qualification of, see TRIAL, 1-3.

Question for, on Submission to, see TRIAL, 4-14.

LANDLORD AND TENANT.

1. A contract by which the owner of a farm agrees with another person that the latter shall occupy and cultivate it, each furnishing a certain part of the seed, implements, and stock, and providing that the products shall be divided at the end of a given term, or sold and the proceeds divided, does not make the occupant a partner of the owner, who will have the powers of a surviving partner on the owner's death, but only a tenant or agent. *Shrum v. Simpson* (Ind.) 792

2. Statements in letters written by a landlord to his tenant after the latter has abandoned the premises, to the effect that the premises will be leased at the tenant's risk, which are not replied to, will not avoid the rule that a surrender is effected by the letting with the consent of the former tenant, on the ground that by his silence the tenant acquiesced in the landlord's proposition. *Gray v. Kaufman Dairy & Ice Cream Co.* (N. Y.) 580

3. A constructive entry attaches as soon as title is acquired by a purchaser under a deed of trust containing an agreement by the mortgagor that the relation of landlord and tenant will be created by a foreclosure of the deed. *Griffith v. Brackman* (Tenn.) 435

4. No express reservation of a formal right of re-entry by the purchaser under a deed of trust is necessary where such deed contains a stipulation that a foreclosure thereof shall create the relation of landlord and tenant between the mortgagor and purchaser, and that if the former refuses to surrender possession he shall be removable by the writ of unlawful detainer. *Griffith v. Brackman* (Tenn.) 435

5. The maker of a deed of trust in possession may contract in such deed with the trustee that foreclosure of the deed of trust shall create the relation of landlord and tenant between the purchaser and mortgagor, and that upon the latter's default in surrendering possession he may be removed by writ of unlawful detainer. *Griffith v. Brackman* (Tenn.) 435

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Landlord and tenant; first and last days in computing time for proceedings in case of. 239

First and last days in computing time on contracts of. 210

Reletting as acceptance of surrender. 581

Effect of stipulation that vendee or mortgagor shall, on default, become a tenant:— (I.) in general; (II.) rent: (a) in general; (b) landlord's lien; (c) distress; (III.) recovery of possession; (IV.) rights of purchaser under trust deed. 435

LAWS.

Judicial Notice of, see EVIDENCE, 1, 2.

LEASE.

See LANDLORD AND TENANT.

LEGISLATIVE JOURNALS.

Assailing Integrity of, see EVIDENCE, 25.

LEGISLATURE.

Power of Governor to Adjourn, see GOVERNOR, 2.

A determination of an election contest for the offices of governor and lieutenant governor, by the legislature, which by Ky. Const. § 90, is made the sole tribunal to determine such contest, and which proceeds under Ky. Stat. § 1596a, suba. 8, by referring the matter to a board, and receives its report before determining the contest, cannot be reviewed by the courts on the grounds that the notice of contest or the evidence was insufficient, or that the contest board was not fairly drawn by lot, as required by statute, or that the election should have been held void, where the findings by the legislature do not show that it was void. *Taylor v. Beckham* (Ky.) 258

LETTER OF CREDIT.

Estate by Entireties Created by, see HUSBAND AND WIFE, 1.

LETTERS.

As Evidence, see EVIDENCE, 15-17.

LEVY AND SEIZURE.

A sheriff is not protected by a writ of sequestration issued in conformity to law, in the seizure of property which is in the possession of, and owned by, a stranger to the writ. *Vickery v. Crawford* (Tex.) 773

LIBEL AND SLANDER.

Placing Member of Association on Black List, see ASSOCIATIONS, 15.

1. The placing of the name of a member 49 I. R. A.

of a voluntary association upon the black list, for failure to pay a debt, as authorized by its by-laws, is not privileged as matter of law. *Weston v. Barnicoat* (Mass.) 612

2. The existence of a debt will not defeat a recovery for placing a debtor's name on the black list, on the ground that the publication imported a general habit of not paying debts, that there was a counterclaim which justified the nonpayment, or that the publication was malicious. *Weston v. Barnicoat* (Mass.) 612

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Libel; truth as a defense, by mercantile agency; privilege. 614

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LIBERTY OF THE PRESS.

NOTES AND BRIEFS.

Liberty of the press; constitutional right of; restricting newspaper publications. 543

LICENSE.

On Vehicles, see HIGHWAYS; INJUNCTION, 4.

1. A parol license from one lotowner in a town to another to pass a tile drain under the former's lot for the purpose of draining the lot of the latter is revocable at the pleasure of such licensor. *Pifer v. Brown* (W. Va.) 497

2. An ordinance providing for the licensing of all persons selling or offering to sell on the streets, or soliciting orders from house to house, when it makes no discrimination on any ground, is not invalid as to residents of the state on the ground that it works a discrimination against them and in favor of nonresidents, as to whom it may be invalid. *Brownback v. North Wales* (Pa.) 446

3. A merchant who pays a mercantile license tax in the city where his place of business is, is not for that reason relieved from the operation of an ordinance of another municipality in the same state, requiring licenses for all persons who sell goods on the streets or solicit orders from house to house. *Brownback v. North Wales* (Pa.) 446

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License; invalid ordinance for; as a tax; unreasonable and oppressive. 409

Revocability of license to maintain a burden on land after the licensee has incurred expense in creating the burden:—(I.) Introduction; (II.) how far permission to place burden is a mere license; (III.) effect of consideration paid or expense incurred: (a) consideration; (b) expense incurred; (IV.) writing is necessary; (V.) duration of right; (VI.) exception in case of abandonment or change of easement; (VII.) equitable exceptions: (a) specific performance: (1) general principle; (2) illustrative cases: (3) mutual or joint action; (4) what expenditure required; (5) erroneous application of the doctrine; (6) cases involving public-service corporations; (b) estoppel: (1) the principle involved; (2) cases which have

applied the doctrine against licensors; (3) correctness of application of principle; (c) trustee *ex maleficio*; (VIII.) doctrine of executed license; (IX.) how far relief may be afforded; (X.) statutory changes; (XI.) conclusion 497

LIENS.

Of Innkeeper, see INNKEEPERS.

Of Carrier, see CARRIERS, 24-26.

See also CONSTITUTIONAL LAW, 6;
PARTNERSHIP, 4.

A materialman who furnishes materials to another materialman is not entitled to any lien therefor, under Ky. Stat. § 2463, giving a lien for labor performed or materials furnished under contract with the "owner, contractor, subcontractor, architect, or authorized agent." *Hightower v. Bailey* (Ky.) 255

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Liens; of subcontractor and materialman; settlement with contractor; constitutionality of statute as to. 255

First and last days in computing time for. 236

LIEUTENANT GOVERNOR.

See GOVERNOR.

LIMITATION OF ACTIONS.

Admissibility of Evidence to Support Plea of, see EVIDENCE, 37.

Agreement to Waive, see CONTRACTS, 4, 12.

See also CONTRACTS, 10.

1. A delay of fourteen months after an agreement not to bring suit in six months, in consideration of a promise not to plead the statute of limitations to the action, is not too long to make the promise still operative. *Wells, F. & Co. v. Enright* (Cal.) 647

2. The statute of limitations does not run against the right of a withdrawing stockholder in a building and loan association to compel payment of his demand, until a fund accrues out of which, in accordance with the charter and by-laws of the association, his claim should be paid. *Andrews v. Roanoke, B. A. & I. Co.* (Va.) 659

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1. Mandamus will not be granted to compel a gas company to furnish gas to a consumer pending the settlement of a dispute over a bill rendered for gas alleged to have been previously furnished. *Mackin v. Portland Gas Co.* (Or.) 596

2. The interest of a citizen in having the right of the public enforced under an ordinance limiting the rates of fare to be charged by a street-railway company is sufficient to enable him to be a relator in a petition for mandamus to enforce it. *People ex rel. Jackson v. Suburban R. Co.* (Ill.) 650

3. The performance of conditions beneficial to a municipality, on which a street-railway company is expressly required to accept from municipal authorities the privilege of using the streets, is not the performance of a mere private contract, but is the performance of a duty to the public which may be compelled by mandamus. *People ex rel. Jackson v. Suburban R. Co.* (Ill.) 650

4. Final judgment on an issue of law on which both parties have been fully heard should be rendered on overruling a demurrer to the petition in a mandamus proceeding, notwithstanding an application for permission to raise an issue of fact, where it is substantially admitted that the averments of the petition were true at the time they were made, and the entire argument on behalf of the respondent is as to the legal right to do what the petition complains of. *People ex rel. Jackson v. Suburban R. Co.* (Ill.) 650

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MASTER AND SERVANT.

Physician Acting as Independent Contractor in Examining Plaintiff, see PHYSICIANS, 2.

See also CONFLICT OF LAWS, 2.

1. A teamster of experience cannot complain that he was unaware of the danger attendant on using a wagon without a seat, to avoid the conclusion that he assumed the risk by voluntarily doing so without protest. *Limberg v. Glenwood Lumber Co.* (Cal.) 33

2. A teamster of experience will, as matter of law, assume the risk attendant on the use of short lines if he proceeds to perform his work with such appliances, although he has complained to his employer of their insufficiency, where the latter has made no promise to remedy the defects, and nine months have elapsed since the last complaint. *Limberg v. Glenwood Lumber Co.* (Cal.) 33

3. A latent defect in a stake on a flat car, consisting of a rotten spot inside of it, which is not visible until after it has broken, does not make the railroad company liable for injury to a brakeman on account of the breaking of the stake. *Jones v. Chicago, St. P. M. & O. R. Co.* (Minn.) 640

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Master and servant; contributory negligence in entering or remaining in an employment:—(I) When the servant's action is barred: (a) Introductory; (b) servant's knowledge as an element of the defense, generally; (c) contributory negligence held to be a question for jury where servant's knowledge of defects only is shown; (d) contributory negligence inferred from servant's knowledge of defects and resulting dangers; (e) contributory negligence inferred from servant's knowledge of defects alone; (f) the *rationale* of the principle; (g) knowledge of danger held to be not necessarily a bar to the action; (h) Missouri doctrine as to the effect of the servant's continuance of work with knowledge; (i) failure of servant to report defect; (j) duty of the servant to quit the employment when he ascertains that he is exposed to an abnormal danger; (II.) relation between the defenses of assumption of risks and contributory negligence: (a) introductory; (b) logical independence of the two defenses; (c) assumption of risk a conclusive defense irrespective of whether servant exercised due care; (d) contributory negligence in respect to risks assumed; (e) defenses confused owing to inaccuracies of terminology; (f) doctrinal confusion between the defenses; (g) concluding remarks. 33

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1. Actio personalis moritur cum persona. *Broughel v. Southern New England Teleph. Co.* (Conn.) 454

2. Equity will regard that as certain which can be made so. *Bryson v. McShane* (W. Va.) 527

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Agreement to Pay Tax of Water Company, see CONTRACTS, 13.

See also CONSTITUTIONAL LAW, 2; ESTOPPEL, 3; INJUNCTION, 4; STATUTES, 8; TAXES, 1; VACCINATION.

1. The duty to pay orders issued by a *de facto* town which is subsequently dissolved in a direct proceeding for that purpose devolves upon the towns from which the territory was taken and to which it returns after the dissolution. *Gilkey v. Howe* (Wis.) 483

2. To render enforceable orders issued by a town organized under statutory authority, the requirements of the statute need not be shown to have been substantially complied with, it being sufficient to show a valid law authorizing the incorporation, and a bona fide attempt to comply with it. *Gilkey v. Howe* (Wis.) 483

3. A penal ordinance prohibiting any colored netting or other material which has a tendency to conceal the true color or quality of the goods to be used for covering any box, basket, or other package of fruit, berries, or vegetables of any kind, is a vexatious and unreasonable interference with and restriction upon the rights of dealers in fruit, and is therefore void when based only on the general police power of the city. *Frost v. Chicago* (Ill.) 657

4. The choice of the method by which the current expense warrants of a city shall be paid is left to the discretion of the council, where it has authority to levy taxes to pay such warrants, and to borrow money and issue bonds. *Huron v. Second Ward Sav. Bank* (C. C. App. 8th C.) 534

5. Bonds do not contravene the limitation of municipal indebtedness, which are issued to take up what the city is estopped to deny are just debts, although the total indebtedness exceeds the permitted amount. *Huron v. Second Ward Sav. Bank* (C. C. App. 8th C.) 534

6. That the indebtedness of a city was temporarily increased beyond the prescribed limit by the sale of bonds and failure immediately to apply the proceeds to retire existing indebtedness will not defeat them in the hands of a bona fide purchaser, where they might have been exchanged directly for the existing evidences of debt, so that there would have been no unlawful increase, which method duty required the municipal authorities to pursue. *Huron v. Second Ward Sav. Bank* (C. C. App. 8th C.) 534

7. A city does not become indebted beyond its constitutional limit by a contract under which a person is to erect upon its land a city hall, to be leased to the city at an agreed and fair rental for a term of years, with the option to purchase the building, or, if this is not exercised, with an option to the lessor to remove it or buy the land at its statutory appraised valuation, where it does not

appear that the current revenues of the city will not be sufficient to pay the indebtedness for rent each year, together with all other expenses for which the city is liable. *South Bend v. Reynolds* (Ind.) 795

8. An unconstitutional exemption from taxation is not effected by an agreement by a municipal corporation to pay the taxes assessed against a water company in return for a supply of water which constitutes an adequate consideration for the agreement. *Maine Water Co. v. Waterville* (Me.) 294

9. A municipal corporation having authority to contract for a water supply may agree to pay a portion of the taxes assessed for any year against a water company, in addition to the specified amount for water to be supplied by the company, if the consideration for the agreement is reasonably adequate, and the contract is reasonable and fair and for a reasonable length of time. *Maine Water Co. v. Waterville* (Me.) 294

10. A municipal corporation which leaves in a public street near a playground trenches filled with deadly gas, with easy means of access to the bottom, without notice or warning of the danger, may be liable for injury inflicted by the gas upon persons who go into a trench for a ball accidentally there, although the particular consequences of the negligence are not, and could not by any ordinary prudence be, anticipated. *Corbin v. Philadelphia* (Pa.) 715

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Of Plaintiff in Following Suggestion of Defendant's Physician, see PHYSICIANS, 1.

Presumption of, from Fire, see EVIDENCE, 6, 7.

Submitting Question of, to Jury, see TRIAL, 8, 9, 11-14.

See also BAILMENT; ELECTRICAL USES; EVIDENCE, 12, 20, 29-33; MUNICIPAL CORPORATIONS, 10.

1. Going into a trench filled with deadly gas, negligently left in a public street by a municipality, to rescue one who, having gone there to recover an article accidentally dropped, has been overcome by the gas, is not, as a matter of law, such negligence as will relieve the municipality from liability for the rescuer's death in case he also is overcome and dies. *Corbin v. Philadelphia* (Pa.) 715

2. The rider of a bicycle is not required to give way to a heavily laden wagon when turning a corner and keeping on the right

side of the street, as required by the law of the road and the express terms of an ordinance, unless some apparent necessity is shown for an exception to the rule. *Footte v. American Product Co. (Pa.)* 764

3. One riding a bicycle, as he approaches a corner keeping on the right side of the street, has a right to assume that the driver of a wagon approaching the corner from another direction will keep to the right if they meet, so that the bicycle can pass between the wagon and the curb. *Footte v. American Product Co. (Pa.)* 764

4. A boy on a bicycle, who is placed in a dangerous position by the negligence or carelessness of the driver of a wagon, will not be held to the same strict measure of care as under ordinary circumstances, in attempting to release himself from the perilous situation. *Footte v. American Product Co. (Pa.)* 764

5. One who, by reason of his own voluntary intoxication, exposes himself to danger and receives injuries which he could, and by the exercise of ordinary prudence would, have avoided if sober, is guilty of contributory negligence, and cannot recover for such injuries. *Bageard v. Consolidated Traction Co. (N. J. Err. & App.)* 424

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See DAMAGES, 4; EVIDENCE, 24; PLEADING, 2.

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See also FREEDOM OF SPEECH AND PRESS; INDICTMENT, 2; TRIAL, 7.

The gist of the offense committed by a violation of Conn. Pub. Acts 1895, p. 558, prohibiting the sale, or offering for sale, of papers, books, or magazines devoted to the publication of criminal news, police reports, and pictures or stories of crime, is the massing of such immoralities in one publication, whatever the motive, and that the paper is mainly devoted to such matters. *State v. McKee (Conn.)* 542

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See also AUDITOR; CONSTITUTIONAL LAW, 5.

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Issued by *De Facto* Town, see MUNICIPAL CORPORATIONS, 1, 2.

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See CONSTITUTIONAL LAW, 2; EVIDENCE, 12; INJUNCTION, 4; MUNICIPAL CORPORATIONS, 3.

PAID-UP POLICY.

See INSURANCE, 12.

PARDON.

1. A pardon is an act of grace, proceeding from the powers intrusted with the execution of the laws, which exempts the individual upon whom it is bestowed from the punishment which the law inflicts for the commission of a crime. It is a remission of guilt, and a declaration of record by the authorized authority that a particular individual is to be relieved from the legal consequences of a particular crime. *Territory v. Richardson (Okla.)* 440

2. A pardon extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. *Territory v. Richardson (Okla.)* 440

3. A territorial legislature has no power to impose limitations upon the manner in which the pardoning power shall be used, set up, alleged, or called to the notice of the

court as a defense. *Territory v. Richardson* (Okla.) 440

4. A pardon granted by the governor in the exercise of his constitutional authority is not invalid because it was not procured in pursuance of statutory regulations. *Territory v. Richardson* (Okla.) 440

5. In order to impeach a pardon for fraud it must be done in a direct manner, and not collaterally by contesting its validity when set up as a bar to a prosecution. *Territory v. Richardson* (Okla.) 440

6. The benefit of a pardon as a bar to a prosecution is not waived by a plea of not guilty, or by other steps taken in the proceedings, but the pardon may be set up at any time or stage of the proceedings before the execution of the sentence. *Territory v. Richardson* (Okla.) 440

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PARENT AND CHILD.

As to Paying Minor's Fare, see *CARRIERS*, 3-5.

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See *ACTION OR SUIT*, 7; *JUDGMENT*, 3.

PARTITION.

Partition of oil and gas contained in land, the co-owners of which do not own the surface of the land, cannot be made by any assignment or allotment of sections of the land below the surface, but can be made only by sale and division of the proceeds. *Hall v. Vernon* (W. Va.) 464

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PARTNERSHIP.

What Constitutes, see *LANDLORD AND TENANT*, 1.

Appointment of Receiver for, see *RECEIVERS*, 1.

1. A mining partnership is created where tenants in common or joint tenants of an oil lease or mine unite and co-operate in working it. *Childers v. Neely* (W. Va.) 468

2. Those who own a majority interest control the management of a mining partnership in all things necessary and proper for its operation, if the members cannot agree in the management. *Childers v. Neely* (W. Va.) 468

3. A mining partnership is not dissolved by the sale of the interest of one member to another member or to a stranger, although this would dissolve an ordinary partnership. *Childers v. Neely* (W. Va.) 468

4. Partners have a lien on the social property for advances or a balance due them after debts, but not on the property or product of the business after it has been divided between the members in severalty, as in case 49 L. R. A.

of division orders by which partners, by agreement, have had pipe lines deliver to each of them a certificate of his share of oil produced from their wells. *Childers v. Neely* (W. Va.) 468

5. A partner is personally accountable in an accounting between the members for any loss which comes to the firm by his culpable negligence, breach of duty, or wrongful conduct, or by his diversion of the social property from the firm business to other business. *Childers v. Neely* (W. Va.) 468

6. A decree for dissolution of a partnership and full account should be granted, but not one for merely a partial account, where the bill demands a dissolution and abundant cause therefor is shown, as in case the business is hopeless of success and prosperity, and one partner has the property entirely in his hands and management, excluding the other therefrom. *Childers v. Neely* (W. Va.) 468

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Enjoining Threat to Sue for Infringement, see *INJUNCTION*, 1.

Amount of Tax on, see *TAXES*, 4.

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See also *LICENSE*, 2, 3.

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Peddlers; who are; regulation of. 448

PHYSICAL EXAMINATION.

See *PHYSICIANS*, 2.

PHYSICIANS.

1. A plaintiff in an action for negligent injuries acts at his peril in following the suggestion of defendant's physician, who has been sent to examine him, to try standing on the injured leg after he and his physician have stated that he cannot bear his weight upon it. *Pearl v. West End Street R. Co.* (Mass.) 826

2. A physician acting for defendant in making a physical examination of plaintiff in an action for negligent injuries is an independent contractor, and not a servant or agent, so as to charge defendant with liability for his acts. *Pearl v. West End Street R. Co.* (Mass.) 826

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Physicians; obeying or disobeying physician as affecting remedy of injured person against one who injured him:—(I.) Scope of note; (II.) effect of obeying improper directions; (III.) effect of disobeying directions. 826

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Refusal to Permit Filing of Additional Defenses, see *APPEAL AND ERROR*, 15.

Evidence Admissible Under, see *EVIDENCE*, 36, 37.

As Evidence, see *EVIDENCE*, 14.

See also *ACTION OR SUIT*, 8; *JUDGMENT*, 1.

1. An affidavit to a plea, sufficient to put

plaintiff to proof of execution of the instrument sued on, as provided by § 34 of the Illinois practice act, cannot be made by an agent of defendant. *Warman v. First Nat. Bank (Ill.)* 412

2. A fright and nervous shock sustained by a passenger on account of the horrors incident to a collision, while remaining on a railroad embankment after climbing out of a deep trench, must be deemed general, and not special, damages, which are recoverable under general allegations as to bodily pain and mental anguish caused by the violence of the collision and by being forced to alight from the coach. *Denver & R. G. R. Co. v. Roller (C. C. App. 9th C.)* 77

3. A complaint which sets forth a conspiracy to commit a wrong and acts pursuant thereto, resulting in injury to the plaintiff, states a case in tort, and not for breach of contract, although the wrong done was in violation of a contract. *Gatzow v. Buening (Wis.)* 475

4. An exception to the allegations of a petition on the ground of indefiniteness should be sustained where it merely sets out the conclusions of the pleader as to the legal effect of an ordinance prescribing regulations for the suspension of electric wires, and fails to state in terms or in substance the provisions of the ordinance. *Brush Electric Light & P. Co. v. Lefevre (Tex.)* 771

5. Knowledge by a carrier of a dangerous practice by its employees is implied from an allegation in a complaint that it, by its servants, made a practice of permitting and allowing the act to be done in a manner and at a place which subjected the person or persons who might chance to be lawfully upon the premises to hazard. *Shaw v. Chicago & G. T. R. Co. (Mich.)* 308

6. An allegation in a pleading, which is not deemed sufficiently specific, should be demurred to. *Shaw v. Chicago & G. T. R. Co. (Mich.)* 308

Supplemental complaint.

7. The facts embodied in a supplemental complaint under the North Dakota Code must relate to the cause of action set forth in the original complaint, and must be in aid thereof. *Swedish American Nat. Bank v. Dickinson Co. (N. D.)* 285

8. It is not proper to bring into a case, by supplemental complaint, new facts which have arisen since the action was commenced, and which by themselves constitute a new and independent cause of action, without reference to the facts alleged in the original pleading. *Swedish American Nat. Bank v. Dickinson Co. (N. D.)* 285

Departure.

9. A judgment sustaining a cause of action on an insurance policy does not depart from the cause of action pleaded because it holds that there has not been any forfeiture of the policy by nonpayment of premiums, for the reason that the insurer had not given notices required by a statute, although that statute is not pleaded by either party. *Mutual L. R. A.*

tual L. Ins. Co. v. Dingley (C. C. App. 9th C.) 132

10. Permitting a recovery in an action upon a policy of insurance, on the ground that there had been no forfeiture for failure to pay premiums because the requisite statutory notice of their accrual had not been given, which fact does not appear in the complaint, does not contravene the rule against departure in pleading, since forfeiture is a matter of defense, which the plaintiff is not bound to anticipate. *Mutual L. Ins. Co. v. Hill (C. C. App. 9th C.)* 127

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Guaranty of Genuineness of Other Signatures, see BILLS AND NOTES, 7.
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Guaranty, by one signing obligation as surety, of the genuineness of other signatures:—(I.) Introductory; (II.) promissory notes: (a) prior signatures; (b) subsequent signatures; (III.) bonds: (a) prior signatures; (b) subsequent signatures. 315

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See ACTION OR SUIT, 2; CORPORATIONS, 6-11; RECEIVERS, 2, 4, 6.

PROSTITUTES.

See DISORDERLY PERSONS.

PUBLIC IMPROVEMENTS.

See also DRAINS; INJUNCTION, 5.

1. A special assessment of property for a local improvement must be limited to the benefits which it actually receives. *Adams v. Shelbyville* (Ind.) 797

2. The legislature may declare conclusively that special assessments on account of local improvements within a taxing district shall be limited to property within that district. *Adams v. Shelbyville* (Ind.) 797

3. The legislature may create, or authorize a municipality to create, a local taxing district for local improvement purposes, which includes part only of the property within the municipality. *Adams v. Shelbyville* (Ind.) 797

4. A taxing district as a whole may be assessed on account of a local improvement therein, only to the extent of the sum of the special benefits actually received by the several parcels of contributing property. *Adams v. Shelbyville* (Ind.) 797

5. A primary obligation is imposed upon a city for such deficit, if any, as there may be in the special benefits received to meet the cost of a local street improvement, where the assessment scheme is pursued in making such improvements,—especially where the statute expressly makes the city liable to the contractor for the contract price. *Adams v. Shelbyville* (Ind.) 797

6. The cost of a local improvement in excess of the special benefits resulting to the several parcels of property in the taxing district must be borne by the general treasury on account of the benefit to the municipality at large. *Adams v. Shelbyville* (Ind.) 797

7. Property owners affected by an improvement within a taxing district are entitled to a hearing on the question of special benefits. *Adams v. Shelbyville* (Ind.) 797

8. An ordinance for the assessment upon abutters of the cost of filling with rich dirt and sodding between sidewalk and curb is not authorized by a statute providing for grading and paving the street or the sidewalk. *Adams v. Shelbyville* (Ind.) 797

9. Property is not taken without due process of law by an assessment for a local improvement under Ind. Acts 1889, p. 237, 49 L. R. A.

authorizing by § 3 an estimate of the assessments on the basis of frontage, but providing in § 7 for a hearing of persons aggrieved before the assessment is made, as this provision impliedly authorizes and requires an adjustment of the assessments in conformity with the actual benefits. *Adams v. Shelbyville* (Ind.) 797

10. An assessment upon land of the full amount of compensation paid for other land of the owner taken for the purpose of a public highway, together with all the cost and expense of the condemnation proceedings, violates Ohio Const. art. 1, § 19, providing that private property shall ever be held inviolate, and, when taken for public use, a compensation therefor shall first be made in money, without deduction for benefits, which is a limitation upon the power of assessment conferred by art. 13, § 6. *Cincinnati, L. & N. R. Co. v. Cincinnati* (Ohio) 566

11. A rural highway is not a local improvement for the cost of which a local assessment on farm land can be laid, under Minn. Const. art. 9, § 1, authorizing special assessments for local improvements, but providing that all other taxes shall be as nearly equal as may be. *Sperry v. Flygare* (Minn.) 757

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Public improvements; assessment of street railroad for. 568

What are local improvements; nature of assessment; rule as to benefits. 757

Constitutionality of assessments; due process of law. 798

PUBLIC MONEY.

The legislature has the right to appropriate public money to pay to the widow, heirs, or legal representatives of a person who died while holding an office, the salary for any period of time after such decease to which he would have been entitled if living and continuing to hold such office, where the public good will be served by the grant of such a reward, but not where the only public advantage is such as may be incident to the relief of a private citizen; and it may delegate such power to counties, cities, or towns. *Opinion of Justices* (Mass.) 564

PUBLIC POLICY.

See also CONTRACTS, 12, 13; INSURANCE, 8.

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PUNITIVE DAMAGES.

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See also COURTS, 3; EVIDENCE, 29;
TRIAL, 9.

1. A railroad company owes no duty to the landowner at whose instance and for whose convenience and upon whose land gates are put into the railroad fence, or to those in privity with him, to keep such gates closed. Its full duty is performed if the gates are kept in reasonably good repair. *Swanson v. Chicago, M. & St. P. R. Co.* (Minn.) 625

2. It is the duty of the landowner, for whose benefit and convenience gates are constructed and placed in a railroad right-of-way fence at a private farm crossing upon the land of such owner, to keep such gates closed. *Swanson v. Chicago, M. & St. P. R. Co.* (Minn.) 625

3. A railway company is not liable for the death of a person walking upon its track, going in the same direction as the train which killed him, in open daylight, on a straight piece of road, where he could have seen the train for 150 yards, and had power, up to the last moment, to prevent the accident, although the railroad company was guilty of negligence in running its engine at a prohibited rate of speed, and in not ringing its bell as required by ordinance, and in not keeping a proper lookout. *Neal v. Carolina C. R. Co.* (N. C.) 684

4. No duty of care to avoid injury to trespassers by a railroad train arises until those in charge of the train have discovered their presence on or dangerously near the track, and have reasonable cause to believe that injury will result unless the progress of the train is arrested, although by the exercise of due care their presence might have been sooner discovered, and the train is running at an unlawful rate of speed. *Cleveland, C. C. & St. L. R. Co. v. Tartt* (C. C. App. 7th C.) 98

5. It is not the duty of trainmen to arrest the progress of a train as soon as they discover a trespasser on or dangerously near the track; but they have the right to proceed on the assumption that the trespasser, having a due regard for his own personal safety, will voluntarily withdraw from the track, and not remain in a place of known danger until he is injured or killed. *Cleveland, C. C. & St. L. R. Co. v. Tartt* (C. C. App. 7th C.) 98

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general rules; upon whom duty rests: (a) conflict of authority; (b) rule placing duty on the company; (c) rule placing duty on adjacent owner; (III.) duty as affected by the question, Who opened the gate? (a) generally; (b) rule when opened by railroad company; (c) rule when opened by adjacent owner; (d) rule when opened by stranger; (e) rule when opened through defective construction or fastenings; (IV.) duty as affected by ownership of stock: (a) stock of adjacent owner; (b) stock of tenant or licensee; (c) stock of third persons; (V.) diligence required to keep gates closed; (VI.) necessity of affirmative proof of negligence: (VII.) what crossings are within the statutory rule; (VIII.) conclusion. 625

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Liability for injury to trespasser by train: assuming risk by going on railroad track: duty to keep lookout; assumption that person will leave track. 100

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By Corporation, see CORPORATIONS, 3.

RECITALS.

Estoppel by, see BONDS, 1-3.

RECEIVERS.

Of Building and Loan Association, see BUILDING AND LOAN ASSOCIATIONS.
See also JUDGMENT, 4.

1. A receiver is properly appointed for a partnership on a bill for dissolution, where one member of the firm has entire charge of the property, excluding the other therefrom. *Childers v. Neely* (W. Va.) 468

Actions by.

2. A receiver of an insolvent corporation cannot maintain an action in his own name for secret profits of promoters, if the claims have not been assigned to him. *Hayward v. Leeson* (Mass.) 725

3. The appointment of a receiver to "collect, take possession of, preserve, and care for" the property of an insolvent corporation does not transfer to him the title to choses in action, so that he can sue thereon in his own name. *Hayward v. Leeson* (Mass.) 725

4. That suits to recover secret profits from promoters are prosecuted by a receiver of the corporation for the exclusive benefit of part only of the creditors is immaterial, if they alone contribute to the expenses of the suit. *Hayward v. Leeson* (Mass.) 725

5. A receiver appointed to enforce the statutory liability of stockholders of an insolvent corporation, who, under the statute, has legal title to the fund as trustee for creditors, and who is the only person who can legally demand and collect the money, may bring actions against stockholders in his own name, in courts of other states. *Howarth v. Lombard* (Mass.) 301

6. Persons for whose benefit a suit is prosecuted to recover secret profits made by promoters of a corporation, by a receiver appointed for it in another jurisdiction, need not be shown to be creditors of the corporation to maintain the jurisdiction of the court in which the suit is brought, since that is a question for the court which appointed the receiver and directed the bringing of the suit. *Hayward v. Leeson* (Mass.) 725

7. The claim that a bill for a receivership was not filed under Md. Code Gen. Pub. Laws, art. 23, §§ 264, 264a, relating to the dissolution and winding up of insolvent corporations, and that therefore the court had no jurisdiction to decree dissolution, cannot be set up by the officers of the corporation to defeat an action by the receivers against them to recover the amount of unlawful preferences, where the decree was made at their instance, and provides that the estate and assets of the corporation shall be administered according to the insolvent law, and that the receivers shall have the same powers as to setting aside illegal preferences which are thereby given to permanent trustees. *James Clark Co. v. Colton* (Md.) 698

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Prosecution of suits against promoters. 728

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REFERENCE.

A court may act upon the evidence reported by a referee, and find therefrom different conclusions of fact from those reported by him, instead of again referring the case. *Utley v. Hill* (Mo.) 323

RELIGIOUS SOCIETIES.

See also CORPORATIONS, 1; EVIDENCE, 10.

1. An incorporated religious society has no power to acquire or hold real estate for any purpose other than that of promoting the object of its creation. *Thompson v. West* (Neb.) 337

2. An implied trust for the promulgation of the tenets and doctrines of a particular religious denomination does not arise on the acquisition of property by a church of that denomination. *First Baptist Church v. Fort* (Tex.) 617

3. A change of belief on the part of a majority of the members of a church by the rules of which a majority shall control will not forfeit their right to control, or entitle the minority to interfere in order to prevent the use of the church property for teaching the new beliefs. *First Baptist Church v. Fort* (Tex.) 617

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Ultra vires acts of; borrowing money; meetings of board of. 338

Who are lawful trustees; validity of mortgage by; right of majority to rule; change of doctrine. 617

REMEDY.

See CONFLICT OF LAWS, 9.

REMOVAL OF CAUSES.

The probate of a will is not "a suit of a civil nature at common law or in equity," within the meaning of the corrected act of Congress of August 13, 1888, §§ 1, 2, and is therefore not removable into a Federal court, under that statute, either from a probate court or from a circuit court on appeal therefrom under Sand. & H. (Ark.) Dig. § 1152, providing for trial *de novo* on such an appeal. *Wahl v. Franz* (C. C. App. 8th C.) 62

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REVOCATION.

Of Parol License, see LICENSE, 1.

ROUND-TRIP TICKETS.

See CARRIERS, 9-12.

RULE.

Of Association, see ASSOCIATIONS, 1-5.

SALE.

Waiver of Defects, see CONTRACTS, 6, 7.

1. A sample of granite sent by seller to buyer does not become a part of a subsequent contract for a monument ordered to be of "first quality white Westerly granite," free from imperfections, and first class in every respect. *Weston v. Barnicoat* (Mass.) 612

2. No warranty that shoes and gatherers of tobacco-planting machines will scour in

the ordinary soil of the locality is implied in a contract to manufacture the machines and make the shoes and gatherers of steel. *J. Thompson Mfg. Co. v. Gunderson (Wis.)* 859

3. A manufacturer of machines under contract may recover their value as chattels, notwithstanding their unfitness for the purpose intended, if the vendee retains them without any offer to return them. *J. Thompson Mfg. Co. v. Gunderson (Wis.)* 859

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SCHOOLS.

A statute providing that pupils outside the limits of a highschool district in the state may attend such school free of charge to them, and that for their tuition an arbitrary sum shall be paid to the district out of the general fund of the county, which may fall below or exceed the cost of such tuition, violates a constitutional provision for uniformity of taxes in respect to persons and property within the jurisdiction of the body imposing them, since the taxpayers in the school district may be unfairly burdened by being compelled to pay their portion of the county tax, and, in addition thereto, all the deficiency that there may be in the cost of the tuition of the nonresident pupils. *High School Dist. No. 137 v. Lancaster County (Neb.)* 343

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Schools; unequal tax on school district; uniformity in school system; taxation for high school. 344

SEA PERIL.

See INSURANCE, 10.

SEPARATE MAINTENANCE.

See HUSBAND AND WIFE, 2.

SEQUESTRATION.

Of Third Person's Property, see LEVY AND SEIZURE.

SET-OFF AND COUNTERCLAIM.

See also CORPORATIONS, 5.

One who has recovered a judgment for damages on account of the breach of a contract, and is afterwards sued by an assignee of the other party, who has become insolvent, for the price of the goods covered by the contract, is not precluded by the doctrine of merger from setting off his original claim for damages against such assignee, who is in privity therewith, although he could not set off the judgment against him because of a lack of privity. *Bacon v. Reich (Mich.)* 311

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Seizing Third Person's Property, see LEVY AND SEIZURE.

SIGNATURE.

Of Corporation, see CONTRACTS, 3.

SPECIFIC PERFORMANCE.

1. A contract to maintain, care for, support, clothe, and bury an aged person, in consideration of her property, consisting of a small amount of personalty and realty, when it has been fully executed by the persons assuming the duty, will be specifically enforced against persons claiming to be heirs by reason of remote relationship. *Bryson v. McShane (W. Va.)* 527

2. Specific performance of a contract for real property does not depend upon the complainant's possession of it, when the consideration therefor has been fully performed by maintaining the owner of the property until death and then bearing the expense of burial. *Bryson v. McShane (W. Va.)* 527

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Specific performance; to prevent revocation of license. 497

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See AUDITOR.

STATUTES.

Construction of, by Courts, see COURTS, 7-9.

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Assailing Integrity of Legislative Journals, see EVIDENCE, 25.

Time for Presenting Bill to Governor, see TIME, 3.

Decision by Court as to Constitutionality of, see TRIAL, 6.

See also BONDS, 5.

1. Ninety full days must expire after the adjournment of the legislature before the taking effect of an act passed by it unless an emergency clause is added, under Tex. Const. 1876, art. 3, § 39, providing that no law shall take effect or go into force until ninety days after the adjournment of the session at which it is enacted. *Halbert v. San Saba Springs L. & L. S. Asso. (Tex.)* 193

2. The day on which a bill is presented to the governor is not to be included in the computation of the five days allowed for his action thereon, but the last day of the period is to be computed. *State ex rel. State Pharmaceutical Asso. v. Michel (La.)* 218

3. Sunday is not to be computed as one of the constitutional five days allowed to the governor in which to return a bill, with his objections. *State ex rel. State Pharmaceutical Asso. v. Michel (La.)* 218

4. A bill which has passed both houses of the general assembly, and been signed by

the presiding officers thereof, is presented to the governor, within the meaning of the Louisiana Constitution, when the clerk of the house of representatives or secretary of the senate carries the same to the executive office, and offers or tenders it to the governor or his secretary. State ex rel. State Pharmaceutical Asso. v. Michel (La.) 218

5. A presentation of a bill to the governor for his signature, within the meaning of a constitutional provision which allows five days after its presentation to him for his action thereon in the way of a veto, is duly made when the bill is properly tendered to him, notwithstanding the fact that he then refuses to receive it. State ex rel. State Pharmaceutical Asso. v. Michel (La.) 218

6. In construing a statute in which a word susceptible of more than one meaning is repeated in different parts of the act, a presumption arises that it is used in the same sense throughout; but the presumption fails where such a construction will nullify the law, if this result can be avoided by any fair and reasonable construction of the whole act. State v. Knowles (Md.) 695

7. The word "may," in an act creating a board of dental examiners, and providing that a graduate from a university or college authorized to grant diplomas in dental surgery may be examined by such board with reference to qualifications, will be construed "must," since the duty of examination is for the benefit of both the public and the applicant. State v. Knowles (Md.) 695

8. Powers and privileges granted to a city by special act or charter are not affected by general legislation on the same subject. Huron v. Second Ward Sav. Bank (C. C. App. 8th C.) 534

9. A suit brought before the repeal of a statute, to enforce a right founded on or granted under it, is saved by Neb. Comp. Stat. chap. 88, § 2, from being in any manner affected by the repeal. Thompson v. West (Neb.) 337

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Statutes; as to organization and division of towns; when mandatory. 483

"May" as equivalent of "must." 696

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STOCK AND PRODUCE EXCHANGE.

By-Law of, see ASSOCIATIONS, 7, 8.

Trial of Member, see ASSOCIATIONS, 11.
See also COURTS, 1; ESTOPPEL, 1; INJUNCTION, 3.

1. The committee of the Chicago board of trade, appointed under § 6 of rule 20 to determine the rights in a margin deposit, is a tribunal of limited jurisdiction the judgment of which is not binding unless the proceedings are in accordance with the charter and by-laws of the board. Ryan v. Cudahy (Ill.) 353

2. The fact that a call for margins might have been defeated by a party who made the deposit under § 1 of rule 20 of the Chicago 49 L. R. A.

board of trade, by showing that an alleged rise in the market was fictitious, does not preclude him from showing on a hearing before a committee that the alleged rise in the market was fictitious. Ryan v. Cudahy (Ill.) 353

3. The refusal by a committee of the Chicago board of trade to hear evidence that the alleged market price on which the right to a margin deposit depends was fictitious is in violation of § 7 of rule 20, and renders its decision against the party offering such evidence invalid. Ryan v. Cudahy (Ill.) 353

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As Carrier, see CARRIERS.

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MANDAMUS, 2, 3.

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See PLEADING, 7, 8.

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Specific Performance of Contract for, see SPECIFIC PERFORMANCE, 1.

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Ground for Excusing, see TRIAL, 1.

TAXES.

Of Water Company, Payment by City, see CONTRACTS, 13.

On Vehicles, see HIGHWAYS.

See also MUNICIPAL CORPORATIONS, 8, 9; SCHOOLS.

1. The exemption from taxation for ten

years of two private corporations, by vote of a town council under authority of R. I. Pub. Laws, chaps. 386, 389, on condition that they locate manufacturing property in the town, is not void as in violation of R. I. Const. art. 1, § 2, providing that the burdens of the state ought to be fairly distributed among its citizens. *Crafts v. Ray* (R. I.) 604

2. A charity which is confined exclusively to the members of the Masonic order and their families, or to the widows and children of deceased members, or those who are directly or indirectly connected with the association, is not a "purely public charity," within the provisions of Ky. Const. § 170, relating to the exemption of institutions of purely public charity from taxation. *Newport v. Masonic Temple Asso.* (Ky.) 252

3. The earnings or rental of an article should be considered as one of the facts or circumstances bearing on the question of its true value in money in the hands of its owner, for the purpose of taxation. *State ex rel. Guilbert v. Halliday* (Ohio) 427

4. An article of tangible personal property the manufacture of which is protected by a patent, when it is not put on the market for sale, but its ownership retained by the manufacturer in himself, and the article merely leased or rented to another for a valuable consideration, should be taxed to the manufacturer as his property at "its true value in money" although that value is enhanced by reason of the patent. *State ex rel. Guilbert v. Halliday* (Ohio) 427

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See EMINENT DOMAIN, 1.

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Power of Legislature to Impose Limitations on Pardoning Power, see PARDON, 3.

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See CARRIERS, 9-12.

TIMBER.

See COTENANCY.

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TIME.

For Presenting Bill to Governor, see STATUTES, 2, 3.

Of Taking Effect of Statute, see STATUTES, 1.

1. Time "until" a certain day, within the meaning of an order of court, may be either inclusive or exclusive of the day mentioned, according to the intention of the court; and this intention may be inferred from the subject-matter and other considerations. *Conway v. Smith Mercantile Co.* (Wyo.) 201

2. An order giving a party "until" a certain day to prepare and present a bill of exceptions includes the day named, under a statutory rule that the last day mentioned shall be included in the time within which an act is to be done when required by law. *Conway v. Smith Mercantile Co.* (Wyo.) 201

3. A "day" within the meaning of a constitutional provision allowing five days for action by a governor upon a bill presented to him begins at 12 o'clock midnight and extends through twenty-four hours to the next 12 o'clock midnight. *State ex rel. State Pharmaceutical Asso. v. Michel* (La.) 213

4. When the time stipulated is such that it does not necessarily include Sunday, Sunday is excluded from the computation without express mention of the fact. When the time stipulated must necessarily include Sunday, to exclude that day from the computation there must be an express declaration to that effect. *State ex rel. State Pharmaceutical Asso. v. Michel* (La.) 213

5. The general rule is that, where a limitation of time is fixed within which a particular act or thing is required to be done, if done at all, after which performance or the doing of the thing would be without effect, if the time limited exceed a week, an intervening Sunday is included in the computation; if less than a week, Sunday is excluded. *State ex rel. State Pharmaceutical Asso. v. Michel* (La.) 213

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Time: rule as to first and last days in computation of time:—(I.) General rule as to inclusion or exclusion; (II.) early rule as to which day is counted; (III.) the modern common-law doctrine: (a) general rules; (b) application and reasons for: (IV.) the statutory rule: (a) statement and effect of: (b) application of; (V.) construction of particular provisions as to time: (a) difference in language of provisions; (b) "from" or "after" a day or event; (c) "before" a day or event. (d) "within" a designated period: (e) "between" designated dates or events: (f) "until" a designated time or event: (g) notice without reference to terminal; (h) "at least" prefacing period of time; (VI.) the rule when Sunday or a holiday is the first or last day: (a) at common law; (b) the statutory rule; (VII.) application of rules with reference to subject-matter and surrounding circumstances: (a) general rule; (b) to contracts: (1) general and miscellaneous: (2)

negotiable instruments; (3) insurance policies; (4) leases and rental contracts; (c) to statutes of limitations: (1) in civil actions; (2) in criminal prosecutions; (d) to provisions for time in civil actions: (1) general statement as to; (2) service and return of process; (3) pleading; (4) notices of trial; (5) notices, motions, and proceedings in general; (6) attachment, replevin, and arrest; (7) rendition and docketing of judgments; (e) to provisions for time in criminal cases and penal actions; (f) to provisions for time in proceedings for review: (1) motions for new trial; (2) appeal, error, review; (3) steps taken to perfect appeal; (g) to executions: (1) notices and sales under, generally; (2) redemption from sale under; (h) to sales under mortgages and trust deeds; (i) to mechanic's liens; (j) to taxes: (1) assessment and collection; (2) redemption from tax sales; (k) to eminent domain; (l) to matters of administration of estates; (m) to proceedings to dispossess tenant or distrain for rent; (n) to bankruptcy and insolvency laws; (o) to poor debtor acts; (p) to provisions for recording and filing instruments; (q) to enactment and taking effect of statutes and resolutions; (r) to elections and offices; (s) miscellaneous provisions for time; (VIII.) conclusion. 193

TOWN.

See MUNICIPAL CORPORATIONS, 1, 2.

TRADEMARK.

1. The word "Hygeia," as indicating the name of the mythological goddess, is not so merely descriptive of the quality of goods in connection with which it is used that it cannot be protected as a trademark. *Hygeia Distilled Water Co. v. Hygeia Ice Co.* (Conn.) 147

2. One adopting the name of the Goddess Hygeia as a trademark is entitled to protection against anyone using it upon similar products as indicating their origin, but not to a protection which will result in a partial monopoly of the English word "hygeia." *Hygeia Distilled Water Co. v. Hygeia Ice Co.* (Conn.) 147

3. The adoption of the name of the Goddess Hygeia as a trademark will not prevent the use of the word "hygeia," in its natural signification of healthfulness, as part of the corporate or business name of a rival, although some injury is thereby done to the owner of the trademark. *Hygeia Distilled Water Co. v. Hygeia Ice Co.* (Conn.) 147

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TRIAL.

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See also ACTION OR SUIT, 4; APPEAL AND ERROR, 16, 17; EVIDENCE, 30.

JURY.

1. A talesman in a justice's court is not to be excused because he is not a taxpayer. *Reed v. Peacock* (Mich.) 423

2. Odd fellows are not disqualified as jurors in an action by an Odd Fellow of a lodge to which they do not belong, on a lease assigned to him by his lodge. *Reed v. Peacock* (Mich.) 423

3. The failure to make any objection to the collected jury waives objections to the improper exclusion of questions to individual jurors. *Gatzow v. Buening* (Wis.) 475

Questions for court or jury.

4. What is a reasonable time is a question of law, when the facts are not disputed. *Travelers' Ins. Co. v. Myers* (Ohio) 760

5. The meaning of a by-law and its reasonableness are questions for the court, and not for the jury, when there is no dispute as to the facts. *Carney v. New York L. Ins. Co.* (N. Y.) 471

6. The constitutionality of a statute is a question of law, to be settled by the court, and is not to be submitted to the jury. *State v. McKee* (Conn.) 542

7. The question whether the matter published by a newspaper comes within the statutory definition is for the court, in a prosecution for selling a paper devoted to the publication of criminal news in violation of statute, where the sale and the fact that the paper was devoted to the publication of the class of matter contained therein are admitted. *State v. McKee* (Conn.) 542

8. The contributory negligence of a person who goes upon a boat at a wharf, and goes to sleep in the cabin, knowing that contractors are blasting near by, is a question for the jury. *Smith v. Day* (C. C. App. 9th C.) 108

9. Whether or not a passenger was negligent in failing to look and listen for approaching trains before crossing a track between the place where he alighted from the train and the public highway is a question for the jury. *Cheasapeake & O. R. Co. v. King* (C. C. App. 6th C.) 102

Submission to jury.

10. The trial court is not bound, on request for a special verdict, to submit to the jury questions covering uncontroverted facts. *Gatzow v. Buening* (Wis.) 475

11. The question of the contributory negligence of plaintiff's intestate, killed by a railroad train, is for the court, where there is no contradiction in his evidence, and defendant, who submits no other evidence, demurs to that offered by plaintiff, thereby admitting its truth, and moves for a nonsuit. *Neal v. Carolina C. R. Co.* (N. C.) 684

12. When the evidence offered by plaintiff

to make out his cause of action to recover the value of a mill destroyed by sparks from defendant's locomotive creates a presumption of negligence on the part of defendant, the case should be submitted to the jury unless the rebutting evidence is so clear and circumstantial that no reasonable person could doubt its verity. *McCullen v. Chicago & N. W. R. Co.* (C. C. App. 8th C.) 642

13. It is for the jury to say whether or not the presumption of negligence raised against a railroad company by setting fire to adjacent property by sparks from a passing locomotive has been overcome by proof on the part of the company that the locomotive was properly equipped and handled. *McCullen v. Chicago & N. W. R. Co.* (C. C. App. 8th C.) 642

14. The question whether a mill was set on fire by sparks from a passing locomotive should be submitted to the jury where the evidence tends to show that the passing of the train and the starting of the fire were nearly related in point of time, that the fire caught on the outside of the ventilator slats, that there was no fire on the inside underneath the ventilator, that the direction of the wind would naturally carry sparks to the mill, that the locomotive was laboring on an up grade, and was observed only a short distance from the fire, to be emitting sparks which floated for some distance, that it was not impossible for sparks to have been carried to the mill, and that there was no other adequate cause for the fire. *McCullen v. Chicago & N. W. R. Co.* (C. C. App. 8th C.) 642

Directing verdict.

15. Directing a judgment for defendant, notwithstanding a verdict for plaintiff under an erroneous instruction of a presumption in his favor, on which he relied and therefore failed to prove a cause of action, is error, as a new trial should be ordered. *Jones v. Chicago, St. P. M. & O. R. Co.* (Minn.) 640

Instructions.

16. The refusal of instructions prepared by counsel, although they contain correct principles of law applicable to the case, is not erroneous if the charge of the court in its entirety fairly covers the legal propositions necessary to give instructions upon. *Denver & R. G. R. Co. v. Roller* (C. C. App. 9th C.) 77

17. An instruction in an action for a conspiracy, that damages are of three kinds, actual, compensatory, and exemplary, and which proceeds to distinguish between actual and compensatory damages, and to say that the jury must at least find for the actual damages, is erroneous, but the jury should be told that compensatory damages may be recovered, and then instructed as to the elements of such damages. *Gatzow v. Buening* (Wis.) 475

Verdict.

18. The denial of a special verdict, to which the moving party has an absolute right under Wis. Rev. Stat. § 2858, cannot 49 L. R. A.

be justified by the court's attempting to shift upon counsel the duty of preparing the form of the special verdict, and by counsel's failure to do so before the argument to the jury is commenced. *Gatzow v. Buening* (Wis.) 475

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TRUSTS.

See also **BILLS AND NOTES**, 6; **RELIGIOUS SOCIETIES**, 2.

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Trusts; *ex maleficio*; law of, as affecting right to revoke license. 497

USURY.

See also **EVIDENCE**, 13, 38.

1. A provision in a bond for a greater than the legal rate of interest after maturity, by way of a penalty to insure a prompt payment of the debt, does not render the bond usurious. *Ward v. Cornett* (Va.) 550

2. A deed of trust to secure payment, "with interest," of an extended bond which provided for usurious interest as a penalty for not paying it at maturity, will not be usurious, since, the legal interest being a penalty, the bond will only bear legal interest after maturity as before. *Ward v. Cornett* (Va.) 550

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Usury; in agreement for interest after maturity:—Lump sum, a penalty; where debtor can relieve himself; agreement for reduction for prompt payment; provision for interest only in case of default; legality of higher rate; statutory limitation; in case of sales; various constructions; express penalty; understanding that loan shall continue; notes held valid; equitable relief; other decisions. 550

VACCINATION.

Burden of Proof as to, see **EVIDENCE**, 4.

1. Authorizing county and municipal authorities to require compulsory vaccination is within the power of the legislature unless forbidden by the Constitution. *State v. Hay* (N. C.) 588

2. A statute permitting municipal authorities to make regulations "for the vaccination of its inhabitants under the direction of" the local board of health does not require the board of health to act in conjunction with the aldermen in passing the ordinance. *State v. Hay* (N. C.) 588

3. An ordinance requiring compulsory vaccination is not vitiated by failure to ex-

cept from its operation persons whose health is such that it would be unsafe for them to submit to vaccination. *State v. Hay* (N. C.) 588

4. Failure to comply with an ordinance requiring compulsory vaccination is not justified by one's own opinion, or that of his personal physician, that it would be dangerous for him to be vaccinated, or that he is sufficiently protected by former vaccination. *State v. Hay* (N. C.) 588

VEHICLES.

License on, see HIGHWAYS; INJUNCTION, 4.

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Liability on Note for Purchase Price, see BILLS AND NOTES, 8, 9.

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Vendor and purchaser; stipulation that vendee shall become a tenant. 435

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Determination of Election Contest by Legislature, see LEGISLATURE.
See also EVIDENCE, 11.

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Voters and elections; first and last days in computing time of elections. 244

Conclusiveness of decision on contest. 259

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Of Stipulation in Insurance Policy, see INSURANCE, 6.

WARRANTY.

See SALE, 2.

WATERS.

City's Agreement to Pay Water Company's Tax, see CONTRACTS, 13; MUNICIPAL CORPORATIONS, 89.

A water company is liable to a consumer for the loss of property by fire, if this is due to the failure to supply water sufficient for fire purposes, although the failure is due to a breaking of the pipes without any fault of the water company, when it has expressly contracted with him to supply water for fire purposes. *Middlesex Water Co. v. Knappmann Whiting Co.* (N. J. Err. & App.) 572

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Waters; liability of water company for failure to supply water at fire. 572

WILLS.

Removal to Federal Court of Probate Proceedings, see REMOVAL OF CAUSES.

A sailing yacht is not included in a bequest of "articles of personal use and ornament," in a clause which enumerates clothing, household furniture, pictures, books, etc. *Re Parry* (Pa.) 444

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Wills; probate of, as suit in law or equity. 63

WIRES.

See ELECTRICAL USES.

WITNESSES.

Privilege of, see CONTEMPT.

See also HABEAS CORPUS, 2.

1. A witness may be compelled to answer a question against his claim of privilege on the ground that his answer might tend to incriminate him, if the court decides that there is no tangible or substantial probability that any direct answer to the question would implicate him. *Ex parte Miskimins* (Wyo.) 831

2. A constitutional provision that no one shall be compelled to give incriminating evidence against himself will protect against the extortion of the evidence, although, if given, it could not be used in any prosecution against the witness. *Ex parte Miskimins* (Wyo.) 831

3. One charged with compounding a felony by refusing to testify against accused cannot, although the information against him has been dismissed, be compelled to give evidence to prove the commission of the felony, since that would be one link in establishing his guilt of compounding it. *Ex parte Miskimins* (Wyo.) 831

4. The question of the good faith of a witness in claiming privilege against giving self-incriminating testimony does not depend upon his attitude towards the prosecution, but upon his belief as to the effect of his answer. *Ex parte Miskimins* (Wyo.) 831

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Women; constitutionality of discrimination against, in police regulations. 111

WRIT AND PROCESS.

A managing agent in charge of the business office of a railroad company of another state for the purpose of soliciting business in transporting passengers and freight over its road situated in another state is a "managing or business agent," within the meaning of Cal. Code Civ. Proc. § 411, authorizing the service of summonses on such agents of foreign corporations. *Denver & R. G. R. Co. v. Roller* (C. C. App. 9th C.) 77

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Ex. C. H.





